

COK H3B08-64-P016-703

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VOL. 40

January, 1946

NO. 1

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## THE TWENTY-FOURTH YEAR OF THE WORLD COURT\*

By MANLEY O. HUDSON

The most significant event in the field of international judicial organization during the year 1945 was the adoption of the Statute of the International Court of Justice to replace the Statute of the Permanent Court of International Justice. The event marks at once an end and a beginning—closing a chapter of history which records an astonishing success, it opens a promising prospect for the continuance of the international administration of justice along precisely the same lines. Upon the termination of the Statute of 1920 the Permanent Court will technically cease to exist; but its place will be filled by a new Court so closely resembling the old one that the chain of continuity need not be broken and the accumulated experience need not be lost. If from a technical point of view it must be said that the Court of the future will be a new Court, from a practical point of view it is more accurate to say that the same Court will go on under a new name and with but slight modifications of its basic Statute.

### THE TWENTY-FOURTH YEAR OF THE PERMANENT COURT

The activity of the Permanent Court of International Justice extended from January 30, 1922, when its doors were first opened at The Hague, to the summer of 1940 when those doors were closed by a stern invader. During this period the Court may be said to have held forty-nine sessions,<sup>1</sup> in the course of which more than sixty international disputes were brought before it. Though a hiatus then ensued the events of 1940 did not bring an end to the existence of the Court. The general election of judges scheduled in 1939 could not be held, but under the provision in Article 13 of the Statute the judges remained in office pending the selection of their successors; and the officials of the Court continued to discharge their duties in offices temporarily located at Geneva. Through five difficult years during which no one could forecast the future, the Court was at hand for such service as might be demanded of it;<sup>2</sup> and as events have turned out the continued existence of the Court was a factor which possibly contributed to the shaping of plans for the future.<sup>3</sup>

\*This is the twenty-fourth in the writer's series of annual articles on the World Court, the publication of which was begun in this JOURNAL in 1923 (Vol. 17), at p. 15.

<sup>1</sup> As amended in 1936, Article 23 of the Statute provided that "the Court shall remain permanently in session," but the amendment effected little change in the preëxisting practice of sessions.

<sup>2</sup> In 1942 the Court was officially informed of negotiations relating to the possible submission of a dispute between the United States and the Netherlands to its Chamber for Summary Procedure; but the negotiations later proved abortive.

<sup>3</sup> In its first report for 1944 (Document C.27.M.27.194-X); the Supervisory Commission of the League of Nations observed: "It is a source of satisfaction to the Commission that the

Some changes occurred in the composition of the Court during the five years: Judge Rostworowski (Polish) died in 1940, Judge Nagaoka (Japanese) and Judge Urrutia (Colombian) resigned in 1942, and Judge Fromageot (French) resigned on June 7, 1945. Yet, at considerable sacrifice in some instances, eleven of the fifteen judges have remained in office and have thus helped to keep aloft the torch of justice in a distracted world.

At the close of its session held at The Hague from February 19 to 26, 1940, it was contemplated that the Court would meet again in May of that year. This proved to be impossible, and the judges were not convoked during the five succeeding years. Throughout the military occupation of The Hague Judge van Eysinga, assisted by a small staff, acted as custodian of the Court's premises and archives in the Peace Palace, and he successfully resisted all attempts made to interfere with them.<sup>4</sup> As a result the premises are now intact and the archives have been preserved for future use.

In view of the new situation resulting from the decisions taken by the United Nations Conference at San Francisco on June 26, 1945, the President summoned the judges to The Hague, and eight judges—President Guerrero, Vice-President Hurst, Judges van Eysinga, Negulesco, Cheng, Hudson, de Visscher, and Erich—attended a session there from October 26 to 31, 1945. The agenda of the meeting consisted chiefly of administrative questions and no judicial business was transacted. Moved by a desire to facilitate in every way possible the inauguration of the new Court, the judges present decided upon the administrative measures to be taken to prepare for an eventual transfer of archives, library, furniture, and other properties to the new Court. They also considered the possibility of a collective resignation at a moment which might prove to be opportune.

Two cases remained on the Court's docket when the session was held in 1945. In the case of the *Electricity Company of Sofia and Bulgaria*, the Belgian Government, the applicant, expressed a desire to discontinue the proceedings, and no objection having been advanced by the respondent, the Bulgarian Government, the President was empowered to order the discontinuance under paragraph 2 of Article 69 of the Rules. In the *Gerliczy Case* between Liechtenstein and Hungary, no step has been taken in the proceedings since the filing of Liechtenstein's application in 1939.

The 1945 budget of the Court, extending a credit of 471,226 Swiss francs, was partly alimanted; and a budget of 2,931,081 Swiss francs for 1946 has been approved subject to later developments.<sup>5</sup> The salaries of the judges

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Court has been maintained intact as an essential factor in the settlement of international disputes, and the Commission looks forward to a renewal of its activities as conditions return to normal."

<sup>4</sup> Archives of the Netherlands Ministry of Foreign Affairs were removed to Germany by the occupying authority.

<sup>5</sup> In its first report for 1944 (Document C.27.No.27.1944.X), the Supervisory Commission of the League of Nations observed: "As regards the Permanent Court of International Jus-

have not been paid for the years since 1940, and a settlement of the judges' claims for the arrears has been approved by the Supervisory Commission in connection with plans for liquidating the Court. Even after the liquidation is effected, pensions will continue to be due to the judges and the staff of the Registry, and provision will doubtless be made for an adequate alimentation of the special funds for meeting them in the future.

#### DRAFTING OF THE NEW STATUTE

The general lines to be followed in the drafting of the new Statute were forged in the conversations conducted at Dumbarton Oaks by representatives of the United States of America, the United Kingdom, the Union of Soviet Socialist Republics, and China from August 21 to October 7, 1944. The proposals resulting from those conversations contained the following specific suggestions (Chapter VII):

1. There should be an international court of justice which should constitute the principal judicial organ of the Organization.
2. The court should be constituted and should function in accordance with a statute which should be annexed to and be a part of the Charter of the Organization.
3. The statute of the court of international justice should be either (a) the Statute of the Permanent Court of International Justice, continued in force with such modifications as may be desirable or (b) a new statute in the preparation of which the Statute of the Permanent Court of International Justice should be used as a basis.
4. All members of the Organization should *ipso facto* be parties to the statute of the international court of justice.
5. Conditions under which states not members of the Organization may become parties to the statute of the international court of justice should be determined in each case by the General Assembly upon recommendation of the Security Council.

The proposals also envisaged (Chapter VIII, A, 6) a continuance of the advisory jurisdiction of the Court, in some degree, in the suggestion that

Justiciable disputes should normally be referred to the international court of justice. The Security Council should be empowered to refer to the court, for advice, legal questions connected with other disputes.

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tice, it is not an administrative organ with a staff comparable with that of the International Labour Office. There has been some criticism of the organic connection between the Court and the League of Nations in the past, and of the maintenance on the financial side of the connection hitherto existing between the Court and the central international authority. In the past, while the Court obtained its resources from contributions by Governments distributed through the League, it enjoyed autonomy in respect of expenditure. An important advantage of the system was that the Court avoided the administrative burden of collecting contributions and was able to avail itself of the services of the League Treasury in regard to such general financial matters as the custody of its balances, management of the Judges' Pension Fund and the co-ordination of matters of common interest to the Court and other international institutions."

An informal understanding was reached at Dumbarton Oaks that in advance of the projected United Nations Conference a committee of jurists would be convoked to prepare a draft of the statute of the future court.

Acting on behalf of itself and the three other Governments which had been represented at Dumbarton Oaks, the Government of the United States on March 24, 1945 issued invitations to the United Nations to send representatives to a preliminary meeting of jurists to be held in Washington, to prepare a draft of a statute for the international court of justice. Forty-four States accepted this invitation. Under the chairmanship of Green H. Hackworth (U.S.A.) and with Jules Basdevant (France) as Reporter, the Committee of Jurists met on April 9 and completed its work on April 20. The membership of the Committee included a judge and a former judge of the Permanent Court, present as representatives of their Governments—Judge de Visscher of Belgium, and Judge Wang Chung-hui of China; Mr. Jorstad, formerly Deputy-Registrar of the Permanent Court, was present at the Committee's meetings as the Norwegian representative. The Permanent Court of International Justice accepted an invitation to be represented unofficially at the meetings of the Committee, and Judge Hudson was designated as its representative.

At its first meeting the Committee of Jurists decided to take the Statute of the Permanent Court of International Justice as the basis of its work. Thereafter the discussions proceeded on a text submitted by the American representative. This proposed a revision of twenty-five of the sixty-eight articles, and the addition of an article on amendment; changes were suggested in eleven articles with a view to substituting the United Nations for the League of Nations; substantive changes were suggested in eleven articles; and slight modifications were suggested in three articles. For the most part the discussions were conducted in the English language, but the draft approved by the Committee of Jurists and the report thereon were in the Chinese, English, French, Russian and Spanish languages.

As explained by its Reporter, the Committee of Jurists "proceeded to a revision, article by article, of the Statute of the Permanent Court of International Justice. This revision consisted, on the one hand, in the effecting of certain adaptations of form rendered necessary by the substitution of The United Nations for the League of Nations; on the other hand, in the introduction of certain changes judged desirable and now possible." The Committee's draft safeguarded the arrangement and numbering of the articles as in the Statute of the Permanent Court, and it introduced a useful innovation in numbering the paragraphs of each article; these features, which were maintained in the later work at San Francisco, greatly facilitate ready reference to action taken under the old Statute, and they assure the utilization of past experience in applying the provisions of the new Statute.

On certain questions, it was deemed to be a more prudent course to avoid any attempt to prejudice the decisions which might later be taken by the

United Nations Conference, and the following topics were deferred by the Committee of Jurists: (1) the question whether the court of the future should be a new court or a continuance of the Court established in 1920; (2) the question as to the manner in which candidates should be nominated for the elections of judges; and (3) the question whether the optional feature of the jurisdiction conferred should be retained or replaced by a provision for compulsory jurisdiction. On the second and third questions, the Committee presented alternative drafts. It also redrafted the text of a new article on amendments as offered by the American representative, and it called attention to the importance of including in the Charter a provision assuring the execution of the Court's judgments.

Fifty States were represented at the United Nations Conference on International Organization, held at San Francisco from April 25 to June 26, 1945. This Conference entrusted the consideration of the draft prepared by the Washington Committee of Jurists to Committee 1 of Commission IV. On the recommendation of the Steering Committee, the Plenary Conference appointed Manuel C. Gallagher (Peru) to be Chairman of Committee 1, and Nasrat Al-Farsy (Iraq) to be its Reporter. The Permanent Court of International Justice accepted an invitation to be represented unofficially at the meetings of Committee 1, and President Guerrero and Judge Hudson assisted in its deliberations.<sup>6</sup>

In twenty-two meetings, from May 4 to June 14, Committee 1 prepared a draft of the articles which later became Articles 92 to 96 of the Charter, as well as a draft of the Statute of the International Court of Justice.

<sup>6</sup> On April 11, the Secretary of State of the United States directed the United States Consul in Geneva to inform the Registrar of the Permanent Court that the host Government suggested "that it would be helpful if the Court were to be represented during the current sessions of the Committee of Jurists meeting in Washington and at San Francisco during the forthcoming United Nations Conference"; he expressed the hope that the representatives of the Court would "hold themselves available in San Francisco for informal consultation," and stated that "arrangements would be made for these representatives to attend all public sessions of the Conference." The message reached the Registrar of the Court on April 13, after a representative of the Court had begun to attend the meetings of the Committee of Jurists in Washington; the invitation was promptly accepted by the President of the Court. Similar invitations to San Francisco were extended to the League of Nations, the International Labor Organization, the United Nations Interim Commission on Food and Agriculture, and the United Nations Relief and Rehabilitation Administration. 1 Documents of the United Nations Conference, p. 3; 5 same, pp. 189, 373.

At San Francisco a protracted discussion took place on the question of the participation of the representatives of the Court and of the other international bodies. The question of admitting the Court's representatives to meetings of Committee 1 of Commission IV was raised at its first meeting on May 4 and at its third meeting on May 8. Not until the latter date did the Steering Committee agree to leave the various committees of the Conference free to decide the question for themselves, and on May 5 Committee 1 took a decision to invite the Court's representatives to attend its meetings, but stipulated that they were to speak "only at the request of the Chairman." Their first attendance was on May 10, after the work of the Committee was somewhat advanced.

The Washington draft, taken as a basis of its work, was submitted by Committee 1 to a first reading, during the course of which opportunity was given for the presentation of amendments for later consideration. The Committee then proceeded to the adoption of the text of the Statute, article by article; only after the accomplishment of this task was well advanced did it arrive at proposals for texts to be included in the Charter. From time to time, sub-committees were charged with the consideration of particular topics.<sup>7</sup> After the texts proposed by Committee 1 had been adopted by Commission IV on June 15, they were submitted to some re-shaping at the hands of the Coördination Committee, with the aid of an Advisory Committee of Jurists.<sup>8</sup>

The final text of the new Statute was annexed to the Charter of the United Nations which was signed on June 26 and brought into force as a result of the deposits of ratifications by twenty-nine States on October 24, 1945.

### *The Decision to Create a New Court*

Basic to the work of the Committee of Jurists at Washington and the Conference at San Francisco was the problem raised in the Dumbarton Oaks proposal that

The statute of the court of international justice should be either (a) the Statute of the Permanent Court of International Justice, continued in force with such modifications as may be desirable or (b) a new statute in the preparation of which the Statute of the Permanent Court of International Justice should be used as a basis.

Yet the choice between these alternatives was one of the matters deferred at Washington, and no decision on it was taken at San Francisco until the work on the drafting of the Statute was already well advanced.

Of course the mere posing of the problem at Dumbarton Oaks created doubt as to the continued existence of the Permanent Court of International Justice, and the Proposals seemed to suggest in any event a change in the name of the future court. They referred in paragraph 1 to "an international

<sup>7</sup> Sub-Committee A reported on the question of old or new Court on May 22; Sub-Committees B and C reported on Articles 8-12 of the Statute on May 22 and May 25, respectively; Sub-Committee D reported on Article 36 of the Statute on May 31. 13 Documents of the Conference, pp. 524, 537, 549, 557.

<sup>8</sup> On June 25, 1945, the Steering Committee of the Conference reported: "The Statute of the International Court of Justice, which is to form an integral part of the Charter, was not formally considered by the Steering Committee since it had been thoroughly discussed by the United Nations Committee of Jurists, which met in Washington before this Conference, by Technical Committee 1 of Commission IV, by Commission IV, and by the Coördination Committee and the Advisory Committee of Jurists. The Steering Committee had before it on June 23 a statement of the drafting changes made in the Statute by the Coördination Committee and the Advisory Committee of Jurists. These changes were designed merely to clarify certain passages in the Statute as adopted by Commission IV and to bring the Statute as a whole into complete accord with the Charter." 1 Documents of the Conference, p. 629.



court of justice," and in paragraphs 4 and 5 to "the statute of the international court of justice"; on the other hand, they referred in paragraph 3 to "the statute of the court of international justice." However, a mere change of name would not have obviated the necessity of a choice between the old Statute and a new one. Nor was the choice entirely foreclosed by the proposals that in the future the court should be an organ of the Organization, and that all members of the Organization should *ipso facto* be parties to its statute. Even the proposal in paragraph 5 as to the determination of the conditions under which States not members of the Organization might become parties to the Statute, could have been reconciled with a continuance of the existing Court, provided it did not involve an exclusion of States already parties to the Statute of 1920.

It is important to underline the fact that in the approach to a decision on this question no dissatisfaction with the Permanent Court was voiced at any time, either at Washington or at San Francisco. Nor was any criticism expressed of its record in dealing with the cases brought before it. Quite the contrary was the case. The report made by Professor Basdevant on behalf of the Committee of Jurists referred to "the respect attaching to the name of The Permanent Court of International Justice"; it stated that "the Permanent Court of International Justice had functioned for twenty years to the satisfaction of the litigants," and that "if violence had suspended its activity, at least this institution had not failed in its task." The President of Commission IV, Caracciolo Parra-Pérez (Venezuela), referred at a public session on May 19 to the "great weight" of the decisions of the Permanent Court, to "the intellectual and moral capacity of its judges," and to "the respect which it has won in the world." Even more effusive was the report made by Sub-Committee A of Committee 1 on May 21, which referred to "the debt of the United Nations to the experience of the Permanent Court—not only in respect of constitution but also in matters of jurisdiction, organization and procedure," and which proposed that "the fullest use should be made of the valuable experience and achievements of the Permanent Court." The Reporter of Committee 1, Nasret Al-Farsy, stated that the Permanent Court's exercise of the jurisdiction conferred on it had "produced a general satisfaction throughout the world," and that Committee 1 "pays tribute to this remarkable achievement" which had led to the accumulation of a "rich experience."<sup>9</sup> In his report to the President after the signature of the Charter, the Chairman of the American delegation stated that "there was unanimous agreement that the Permanent Court of International Justice had rendered effective service and had made an excellent record."<sup>10</sup>

In line with this appreciation, a strong current of opinion both at Washington and at San Francisco supported the first of the Dumbarton Oaks

<sup>9</sup> 13 Documents of the Conference, p. 382. The report was also published in 31 American Bar Association Journal (1945), pp. 420-425.

<sup>10</sup> Department of State Publication No. 2349, p. 139.

alternatives, and favored the continuance in force with modifications of the Statute drawn up in 1920 and revised in 1936. This course was presented as affording the best way of assuring the advantage of continuity with the experience of the past, and of safeguarding the gains of a viable and successful international institution. It was urged, also, as a means of preserving the hundreds of international instruments already in force by which States had subjected themselves to the Court's jurisdiction.

Practical difficulties in adopting the first alternative presented themselves, however. In the first place, the existing Statute included no provision for the procedure to be followed in effecting a modification of its text; hence the normal procedure for introducing modifications would have required the assent of all the States parties. It is true that in times of turmoil in the past, multipartite international instruments have on some occasions been modified without the assent of all the parties;<sup>11</sup> but that procedure hardly commended itself in connection with the adoption of a basic instrument relating to the administration of international justice. Yet for various reasons it would have been extremely difficult to organize consultations with all of the States parties to the existing Statute. Many of the States parties were not represented at San Francisco,<sup>12</sup> and the States there represented did not maintain diplomatic relations with some of these States. Nor is the fact to be ignored that in some of the States parties to the existing Statute Governments were in power which were, to say the least, not altogether popular, and on the part of some of the delegates at San Francisco there was reluctance to consult with those Governments. In any event, consultation would have involved effort and time, as well as a risk of possible dissent. Moreover, consultation was not facilitated by the adoption of the Dumbarton Oaks proposal that the Statute should be made an integral part of the Charter; for this reason, the period of time which would have been required might have delayed the signing of the Charter, and conceivably the whole program for launching the Charter and the Organization might have been jeopardized.

A further complication resulted from the fact that the Protocol of Signature of December 16, 1920, to which the Statute was annexed, was open to signature and ratification only by Members of the League of Nations or States named in the Annex to the Covenant; nor was it open to accession by other States. A number of the States represented at San Francisco had not

<sup>11</sup> A notable example was the Convention on the Revision of the Berlin and Brussels Acts, signed at St. Germain, September 10, 1919. 1 Hudson, *International Legislation*, p. 343. Despite the very guarded language of this instrument, however, the procedure followed did not escape castigation by some of the Judges when the Convention was invoked before the Permanent Court of International Justice in the *Oscar Chinn Case* in 1934. 3 Hudson, *World Court Reports*, p. 416. For other cases of modification without unanimous consent, see Tobin, H. J., *Termination of Multi-partite Treaties*, New York, 1933, p. 206 and f.

<sup>12</sup> These included Albania, Austria, Bulgaria, Finland, Germany, Hungary, Ireland, Italy, Japan, Poland, Portugal, Roumania, Siam, Spain, Sweden, and Switzerland.

become parties to the Statute of the Permanent Court;<sup>13</sup> and until a modification of the text applicable should have been brought into force, some of them<sup>14</sup> could not become parties to that instrument. Such States were in a somewhat anomalous situation for participating in the modification of the 1920 Statute, without a frank avowal that the United Nations were taking over the existing Court.

Committee 1 referred the question of an old or a new Court to a sub-committee which on May 21 reported:

"After considering the reasons advanced for and against the two alternatives, the Subcommittee decided by a vote of seven to three to recommend that the court should be a new institution, believing that the consequences of the other solution would be more grave, from the point of view of international law and for practical reasons."

The adoption of this report by Committee 1 put effective seal on the decision that the Statute to be annexed to the Charter should be a new Statute, not continuing but replacing the Statute of 1920, and that technically the Court of the future should be a new Court. The Committee's consideration of the question was summed up by its Reporter in the following language:<sup>15</sup>

"The basic question which had to be resolved by the First Committee was whether the Permanent Court of International Justice should be continued as an organ of the new Organization, or whether a new Court should be established. This question was considered in all its aspects, both at meetings of the full Committee and at a number of meetings of a subcommittee. After balancing the advantages to be gained and the objections to be overcome in the adoption of either course, the First Committee decided to recommend the establishment of a new Court. This course commended itself to the First Committee as more in keeping with the provisions proposed for inclusion in the Charter, under which all members of the Organization will *ipso facto* be parties to the Statute and other states not members of the Organization may become parties to the Statute only on conditions to be laid down in each case by the General Assembly upon the recommendation of the Security Council. Some of the members of the First Committee regarded the maintenance of these provisions as essential to the acceptability of the Charter and the Statute by all members of the United Nations.

"Moreover, the creation of a new Court seems to be the simpler and at the same time the more expeditious course to be taken. If the Permanent Court were continued, modifications in its Statute would be required as a result of the discontinuance of the League of Nations. Only 32 of the 41 states now parties to that Statute are represented at

<sup>13</sup> The States in this category included the United States of America, Costa Rica, Ecuador, Egypt, Guatemala, Honduras, Iraq, Lebanon, Liberia, Mexico, Philippine Commonwealth, Saudi Arabia, Syria, the Union of Soviet Socialist Republics, Turkey, and others.

<sup>14</sup> For example, Lebanon, Philippine Commonwealth, Syria, and others. Nor is it clear that an ex-Member of the League of Nations could become a party to the Protocol of December 16, 1920.

<sup>15</sup> 13 Documents of the Conference, p. 383. As fifty-two States became parties to the Statute of the Permanent Court, the figures given in the edited Report are inexact.

the United Nations Conference in San Francisco, and the negotiations with the parties not thus represented which would be required for effecting modifications in the 1920 Statute would encounter difficulties and might be very protracted. Moreover, a large number of states are represented at the United Nations Conference which are not parties to the 1920 Statute, and as it is not open to all of them for accession, some of them could have no part in the negotiations entailed by the process of modification. On the whole, therefore, though the creation of a new Court will involve important problems, this course seems to the First Committee to create fewer difficulties than would the continuance of the Permanent Court of International Justice, and it may make possible the earlier functioning of the Court of the future."

The question then arose, though it was little discussed, as to the name of the new Court. It might have been possible to christen the new Court as the Permanent Court of International Justice;<sup>16</sup> if in some quarters that name had been commented upon—the word "Permanent" seemed to smack of unfulfilled prophecy, and the qualification of "Justice" as "International" was thought to be too limitative—the objections to it were not determining. A new Court seemed to require a distinguishing name, and the references in the Dumbarton Oaks Proposals were at hand to supply it. Hence it is the International Court of Justice which will replace the Permanent Court of International Justice.

These decisions may have as a consequence the sacrifice of some of the jurisdiction which had been conferred on the Permanent Court. Otherwise they do not involve a serious departure, however. The new Court will step into the shoes of the old—it will have the same seat (at The Hague); it will have the same number of judges, and the judges will be elected by the same general process;<sup>17</sup> no substantial change has been made in the jurisdiction conferred, and it will be exercised by the same successful procedure. Indeed, as the following explanations will indicate, but few changes of substance have been made in the Statute of 1920. It was therefore possible for the Reporter of Committee 1 to say:

"The creation of the new Court will not break the chain of continuity with the past. Not only will the Statute of the new Court be based upon the Statute of the old Court, but this fact will be expressly set down in the Charter. In general, the new Court will have the same organization as the old, and the provisions concerning its jurisdiction will follow very closely those in the old Statute. Many of the features of the old Statute were elaborated from ideas which had already been current during several decades, and its provisions with reference to procedure—which it is now proposed to retain—were to a large extent borrowed from the Hague Conventions on Pacific Settlement of 1899 and 1907. In a similar way, the 1945 Statute will garner what has

<sup>16</sup> At San Francisco the Cuban delegation submitted a draft of a statute of "a new Permanent Court of International Justice." 3 Documents of the Conference, p. 516.

<sup>17</sup> A new election of judges would have been held in any event—indeed it was six years overdue.

come down from the past. To make possible the use of precedents under the old Statute the same numbering of the articles has been followed in the new Statute.

"In a sense, therefore, the new Court may be looked upon as the successor to the old Court which is replaced. The succession will be explicitly contemplated in some of the provisions of the new Statute, notably in Article 36, paragraph 4, and Article 37. Hence, continuity in the progressive development of the judicial process will be amply safeguarded."

Nor is it to be thought that the new Court will be exclusively an organ of the United Nations. Both the Charter and the Statute negate that conception. The Charter (Article 93) includes a provision by which the way may be opened for States not members of the United Nations to become parties to the Statute; and the latter specifically envisages (Article 4) possible participation by such States in the elections of judges and (Article 69) in the adoption of amendments. Moreover, the Statute expressly provides (Article 35) that States not members of the United Nations may be permitted to have access to the Court; and they may be permitted to accept the Court's compulsory jurisdiction. Like the Court which it replaces, therefore, the new Court is conceived to be a World Court, serving the whole community of States.

#### *Court Provisions in the Charter*

While the Charter provides in Article 7 for the establishment of "an International Court of Justice" as one of the principal organs of the United Nations, the constitutional basis of the Court thus established is to be found in its Articles 92 to 96.

Article 92 carries out ideas enunciated in the Dumbarton Oaks Proposals. It first provides that "The International Court of Justice shall be the principal judicial organ of the United Nations." Materials available do not supply content for the characterization "principal judicial organ,"<sup>18</sup> but it would seem to leave open the way for the creation by the United Nations of other judicial organs. The further provision in the Article that the Court "shall function in accordance with the annexed Statute, which is based upon the Statute of the Permanent Court of International Justice and forms an integral part of the present Charter," simplifies the constitutional position of the Court within the United Nations Organization, and it supplies a legal basis for continuity between the old Court and the new. One consequence of making the Statute a part of the Charter may be that various provisions of the Charter must be taken into consideration in the interpretation of the Statute; e.g., Article 102 (2) of the Charter is clearly in this category, and reference will later be made to it.

<sup>18</sup> Proposal 12 of the *International Law of the Future* suggested that the Permanent Court of International Justice should be "the chief judicial organ of the Community of States." See this JOURNAL, Vol. 38 (1944), Supplement, p. 59.

The provision in Article 93, paragraph 1, that "All Members of the United Nations are *ipso facto* parties to the Statute of the International Court of Justice," states merely a consequence of the integral position of the Court in the new Organization. Paragraph 2 adds that "A state which is not a Member of the United Nations may become a party to the Statute of the International Court of Justice on conditions to be determined in each case by the General Assembly upon the recommendation of the Security Council." The substance of the provision had been forecast in the Dumbarton Oaks Proposals.

Article 94, drafted by Committee 1 at San Francisco, is in line with a suggestion made by the Washington Committee of Jurists concerning the execution of decisions.<sup>19</sup> Though it had been invoked on but one occasion,<sup>20</sup> the provision in paragraph 4 of Article 13 in the Covenant of the League of Nations<sup>21</sup> served as a useful precedent, but the actual text of Article 94 may be thought to go somewhat beyond it:

1. Each Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party.

2. If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment.

Article 95 provides that "Nothing in the present Charter shall prevent Members of the United Nations from entrusting the solution of their differences to other tribunals by virtue of agreements already in existence or which may be concluded in the future." This is an adaptation of the provision in Article 1 of the 1920 Statute that the Permanent Court "shall be in addition to the Court of Arbitration organized by the Conventions of The

<sup>19</sup> The Basdevant report (Jurist 61, revised, G/49) stated: "A Member of the Committee has called the attention of the latter to the importance which exact execution of the decisions of the Court has for the reign of law and the maintenance of peace, and he wondered whether the Statute ought not to contain a provision concerning the proper means for assuring this effect. The importance of this suggestion was not contested, but the remark was made that it was not the business of the Court itself to ensure the execution of its decisions, that the matter concerns rather the Security Council, and that Article 13, paragraph 4, of the Covenant had referred in this connection to the Council of the League of Nations. A provision of this nature is not consequently to appear in the Statute, but the attention of the San Francisco Conference is to be called to the great importance connected with formulating rules on this point in the Charter of The United Nations."

<sup>20</sup> In a dispute concerning the execution of an award in the *Rhodope Forests Case* in 1934. League of Nations, *Official Journal*, 1934, pp. 1432-1433, 1477.

<sup>21</sup> Article 13 of the Covenant as amended provides: "The Members of the League agree that they will carry out in full good faith any award or decision that may be rendered, and that they will not resort to war against a Member of the League which complies therewith. In the event of any failure to carry out such an award or decision, the Council shall propose what steps should be taken to give effect thereto."

Hague of 1899 and 1907, and to the special Tribunals of Arbitration to which States are always at liberty to submit their disputes for settlement."

Article 96 is a substantive amplification of the provision in Article 14 of the Covenant that "the Court may also give an advisory opinion upon any dispute or question referred to it by the Council or by the Assembly." The new text goes beyond the limited provision in Chapter VIII, A, 6, of the Dumbarton Oaks Proposals, which referred to possible requests by the Security Council only. Under the first paragraph of Article 96, "The General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question." Though the subject of a request is limited to "any legal question," it may possibly include a question as to "the existence of any fact which, if established, would constitute a breach of an international obligation." The text does not specifically deal with the problem, which has been much discussed in the past,<sup>22</sup> as to the nature of the vote required for the making of a request by the General Assembly or the Security Council.<sup>23</sup> As to the General Assembly, Article 18 of the Charter is applicable, and unless a decision to make a request should be added to the category of decisions "on important questions" to be taken by a two-thirds majority of the members present and voting, a majority vote would suffice. In the Security Council, Article 27 of the Charter sets the general requirements as to voting; the affirmative votes of seven members will be necessary for making a request, and unless the matter be classified as "procedural," the seven must include all permanent members. A request for an advisory opinion may be deemed by the Security Council, however, to be an "appropriate procedure" for dealing with certain disputes under Article 36 of the Charter, and in this event, under the provision in Article 27, a party to the dispute must abstain from voting.

Paragraph 2 of Article 96 contains an important innovation in providing that "Other organs of the United Nations and specialized agencies, which may at any time be so authorized by the General Assembly, may also request advisory opinions of the Court on legal questions arising within the scope of their activities." Proposed by the British delegation at San Francisco, this is in line with a continued insistence of the International Labor Organization.<sup>24</sup> As the provision limits the subject-matter of requests, it can hardly be contended that they might involve delicate matters which should require their screening by a political body such as the General Assembly or the

<sup>22</sup> On the history of this question, see Hudson, *Permanent Court of International Justice*, 1920-1942, pp. 488-494.

<sup>23</sup> In the *International Law of the Future*, it was proposed (No. 18) that an Executive Council should have power "by majority vote, to request an advisory opinion on any legal question" connected with a dispute.

<sup>24</sup> See the communication addressed by the Acting Director of the International Labor Office to the Secretary-General of the League of Nations on June 2, 1944: League of Nations Document, C.20.M.20.1944.V. See also 24 International Labor Office *Official Bulletin*, No. 2 (Dec. 1, 1944), pp. 194-196.

Security Council. A proposal that individual states or the states parties to a dispute be authorized to make requests for advisory opinions was not very seriously considered, either at Washington or at San Francisco.

#### ANALYSIS OF THE NEW STATUTE

Though only English and French versions constituted the text of the old Statute, the text of the new Statute consists of versions in Chinese, English, French, Russian and Spanish. As the five versions are "equally authentic" under Article 111 of the Charter,<sup>25</sup> each of them is to serve in the process of interpretation. Yet the historical fact that English and French were employed as the working languages at San Francisco, and the provision (in Article 39 of the Statute) that "the official languages of the Court shall be French and English," may be thought to justify a process of interpretation which proceeds, in the beginning at any rate, on the basis of the versions of these two languages.

The 1936 text of the Statute<sup>26</sup> contained sixty-eight articles. No change whatever, beyond such changes as the numbering of paragraphs, was made in thirteen of these articles; the changes made in fourteen articles were merely stylistic and effected no modification of the meaning;<sup>27</sup> the changes made in nine articles were either stylistic, or consequential in the sense that they resulted from the replacement of the League of Nations by the United Nations Organization. Some of the additional changes were made in one version only, and not a few of them were merely designed to produce a closer correspondence between the English and French versions. The changes of substantive import were therefore relatively few.

As the Statute of the Permanent Court is now well-known, and as there exists an abundant literature relating to it,<sup>28</sup> an attempt will be made in the following analysis to indicate how the new Statute departs from the old and why the departures were made in each case.<sup>29</sup> Those parts of the 1936 text

<sup>25</sup> Though Article 111 refers to the versions as "texts," it would seem clear that there is but a single text, of which each version forms only a part. Strictness of vocabulary on this point might serve to facilitate interpretation.

<sup>26</sup> The amendments to the 1920 text proposed in 1929 were brought into force in 1936. The 1936 text as reproduced here is taken from the *Publications of the Court*, Series D, No. 1 (3d ed.); slight variations appear in the fourth edition of that publication.

<sup>27</sup> In Mr. Stettinius' report to the President it is stated (p. 139) that "as a working rule" the Committee of Jurists "left well enough alone, making changes in the text under which the Court had operated for twenty-three years only where there was strong reason for doing so." Yet draftsmen called upon to review the work of other draftsmen are always tempted to paint the lily, and it is demanding too much to expect that they will never yield to the temptation. A thorough overhauling of the text of the Statute might have led to many more changes for the improvement of its linguistic elegance.

<sup>28</sup> See the bibliographies published in successive numbers of Series E of the *Publications of the Permanent Court*.

<sup>29</sup> See also Philip C. Jessup, "The International Court of Justice of the United Nations," 21 *Foreign Policy Reports*, No. 11 (August 15, 1945).



of the Permanent Court's Statute which find no place in the English and French versions of the new Statute are placed in brackets; and parts of the new text which find no place in the 1936 text of the Statute of the Permanent Court are underscored.

## Article 1

[A Permanent Court of International Justice is hereby established, in accordance with Article 14 of the Covenant of the League of Nations. This Court shall be in addition to the Court of Arbitration organized by the Conventions of The Hague of 1899 and 1907, and to the special Tribunals of Arbitration to which States are always at liberty to submit their disputes for settlement.]

The International Court of Justice established by the Charter of the United Nations as the principal judicial organ of the United Nations shall be constituted and shall function in accordance with the provisions of the present Statute.

## Article [premier] I

[Indépendamment de la Cour d'Arbitrage, organisée par les Conventions de La Haye de 1899 et 1907, et des Tribunaux spéciaux d'Arbitres, auxquels les États demeurent toujours libres de confier la solution de leurs différends, il est institué, conformément à l'article 14 du Pacte de la Société des Nations, une Cour permanente de Justice internationale.]

La Cour Internationale de Justice instituée par la Charte des Nations Unies comme organe judiciaire principal de l'Organisation sera constituée et fonctionnera conformément aux dispositions du présent Statut.

The new text of this Article, due to the decision to create a new Court, was based on proposals made by sub-Committee A of Committee 1. The reference to the Permanent Court of Arbitration was dropped, though such a reference was maintained in Articles 4 and 5; but the substance of the provision concerning the freedom of States to resort to other tribunals was maintained in another place (in Article 95 of the Charter).

Chapter I  
Organization of the CourtChapitre [premier] I  
Organisation de la Cour

Apart from the modifications in Articles 26 and 27 with reference to special Chambers, few significant changes were made in this Chapter.

## Article 2

The [Permanent] Court [of International Justice] shall be composed of a body of independent judges, elected regardless of their nationality from [amongst] among persons of high moral character, who possess the qualifications required in their respective countries for appointment to the highest judicial offices, or are jurisconsults of recognized competence in international law.

La Cour [permanente de Justice internationale] est un corps de magistrats indépendants, élus, sans égard à leur nationalité, parmi les personnes jouissant de la plus haute considération morale, et qui réunissent les conditions requises pour l'exercice, dans leurs pays respectifs, des plus hautes fonctions judiciaires, ou qui sont des jurisconsultes possédant une compétence notoire en matière de droit international.

The Washington Committee of Jurists proposed provisionally the deletion of the name of the Permanent Court, and this was necessarily accepted at San Francisco after the decision to re-christen the Court. Otherwise the original text is maintained as drafted in 1920.

## Article 3

1. The Court shall consist of fifteen members, no two of whom may be nationals of the same state.

2. A person who for the purposes of membership in the Court could be regarded as a national of more than one state shall be deemed to be a national of the one in which he ordinarily exercises civil and political rights.

1. La Cour se compose de quinze membres. Elle ne pourra comprendre plus d'un ressortissant du même Etat.

2. A cet égard celui qui pourrait être considéré comme le ressortissant de plus d'un Etat, sera censé être ressortissant de celui où il exerce habituellement ses droits civils et politiques.

There was little disposition either at Washington or San Francisco to reduce the number of judges, though the Inter-Allied Committee of Jurists had proposed a smaller number.<sup>30</sup> The addition in paragraph 1, drafted at Washington, was intended to give clarity to a principle which was implicit in the original Statute but was only adumbrated in paragraph 3 of Article 10. The new second paragraph, proposed by the Australian delegation at San Francisco, was designed as a solution of the question concerning the possible eligibility of a judge from a part of the British Commonwealth possessing British nationality, even though the bench should also include a British national from the United Kingdom;<sup>31</sup> if other cases of dual nationality are less likely to arise they nevertheless are not impossible.

## Article 4

1. The members of the Court shall be elected by the General Assembly and by the Security Council from a list of persons nominated by the national groups in the Permanent Court of Arbitration, in accordance with the following provisions.

2. In the case of Members of the [League of] United Nations not represented in the Permanent Court of Arbitration, [the lists of] candidates shall be [drawn up] nominated by national groups appointed for this purpose by their governments under the same conditions as those prescribed for members of the Permanent Court of Arbitration by Article 44 of the Convention of The Hague of 1907 for the pacific settlement of international disputes.

3. The conditions under which a [State] state which [has accepted] is a party to the present Statute [of the Court] but is not a

1. Les membres de la Cour sont élus par l'Assemblée Générale et par le Conseil de Sécurité sur une liste de personnes présentées par les groupes nationaux de la Cour Permanente d'Arbitrage, conformément aux dispositions suivantes.

2. En ce qui concerne les Membres [de la Société] des Nations Unies qui ne sont pas représentés à la Cour [permanente] Permanente d'Arbitrage, les [listes de] candidats seront [présentées] présentés par des groupes nationaux, désignés à cet effet par leurs gouvernements, dans les mêmes conditions que celles stipulées pour les membres de la Cour Permanente d'Arbitrage par l'article 44 de la Convention de La Haye de 1907 sur le règlement pacifique des conflits internationaux.

3. En l'absence d'accord spécial, l'Assemblée Générale, sur la [proposition] recommandation du Conseil de Sécurité, [réglera]

<sup>30</sup> The report of the Inter-Allied Committee of Jurists, published on February 10, 1944, was reprinted in this JOURNAL, Vol. 39 (1945), Supplement, pp. 1-42.

<sup>31</sup> On this question, see Hudson, *Permanent Court of International Justice*, 1920-1942, pp. 183, 367.

Member of the [League of] United Nations [,] may participate in electing the members of the Court shall, in the absence of a special agreement, be laid down by the General Assembly [on the proposal] upon the recommendation of the Security Council.

règlera les conditions auxquelles peut participer à l'élection des membres de la Cour un [État] État qui, tout en [ayant accepté le] étant partie au présent Statut [de la Cour], n'est pas Membre [de la Société] des Nations Unies.

The changes in this Article are either stylistic or consequential. The Dumbarton Oaks Proposals referred (Chapter V, B, 4) to the possible functions of the General Assembly in the elections of judges, without mentioning the Security Council; the participation of the latter, proposed at Washington, was agreed upon at San Francisco after the drafting of the new paragraph 2 of Article 10. A strong current of opinion at Washington opposed the continuance of the system of nominations of candidates by national groups, and would have conferred the power to nominate directly on the Governments; the Committee of Jurists therefore put forth alternative drafts of this Article. The opposition to the old system was weaker at San Francisco, however.

#### Article 5

1. At least three months before the date of the election, the Secretary-General of the [League of] United Nations shall address a written request to the members of the Permanent Court of Arbitration belonging to the [States] states [mentioned in the Annex to the Covenant or to the States which join the League subsequently,] which are parties to the present Statute, and to the [persons] members of the national groups appointed under [paragraph 2 of] Article 4, paragraph 2, inviting them to undertake, within a given time, by national groups, the nomination of persons in a position to accept the duties of a member of the Court.

2. No group may nominate more than four persons, not more than two of whom shall be of their own nationality. In no case [must] may the number of candidates nominated by a group be more than double the number of seats to be filled.

1. Trois mois au moins avant la date de l'élection, le Secrétaire [général] Général [de la Société des Nations Unies invite par écrit les membres de la Cour Permanente d'Arbitrage appartenant aux [États] États [mentionnés à l'annexe au Pacte ou entrés ultérieurement dans la Société des Nations] qui sont parties au présent Statut, ainsi que les [personnes] membres des groupes nationaux [désignées] désignés conformément [à l'alinéa] au paragraphe 2 de l'article 4, à procéder dans un délai déterminé, par groupes nationaux, à la présentation de personnes en situation de remplir les fonctions de membre de la Cour.

2. Chaque groupe ne peut, en aucun cas, présenter plus de quatre personnes[,], dont deux au plus de sa nationalité. En aucun cas, il ne peut être présenté un nombre de candidats plus élevé que le double des [places] sièges à [remplir] pourvoir.

The Committee of Jurists put forward an alternative draft of this Article, which provided for the nomination by each Government of a single candidate of its own nationality; this was stoutly opposed as tending to increase the political element in the selection of judges. The text adopted at San Francisco makes a substantive change in the original text of paragraph 1, in restricting the privilege of nominating candidates to national groups belonging to States parties to the Statute; under the original text, for example, nomina-

tions had been made by the American national group in the Permanent Court of Arbitration though the United States was not a party to the Statute. The text does not exclude the nomination of persons who are nationals of States not parties to the Statute.

#### Article 6

Before making these nominations, each national group is recommended to consult its [Highest] highest [Court] court of [Justice] justice, its [Legal] legal [Faculties] faculties and [Schools] schools of [Law] law, and its [National] national [Academies] academies and national sections of [International] international [Academies] academies devoted to the study of [Law] law.

Avant de procéder à cette désignation, il est recommandé à chaque groupe national de consulter la plus haute cour de justice, les facultés et écoles de droit, les académies nationales et les sections nationales d'académies internationales, vouées à l'étude du droit.

Apart from the merely stylistic changes in the English version, the original text is maintained as drafted in 1920.

#### Article 7

1. The Secretary-General [of the League of Nations] shall prepare a list in alphabetical order of all the persons thus nominated. Save as provided in Article 12, paragraph 2, these shall be the only persons eligible [for appointment].

2. The Secretary-General shall submit this list to the General Assembly and to the Security Council.

1. Le Secrétaire [général] Général [de la Société des Nations] dresse, par ordre alphabétique, une liste de toutes les personnes ainsi désignées[:]; seules ces personnes sont éligibles, sauf le cas prévu à l'article 12, paragraphe 2.

2. Le Secrétaire [général] Général communique cette liste à l'Assemblée Générale et au Conseil de Sécurité.

Apart from the stylistic or consequential changes, the original text is maintained as drafted in 1920.

#### Article 8

The General Assembly and the Security Council shall proceed independently of one another to elect the members of the Court.

L'Assemblée Générale et le Conseil de Sécurité procèdent indépendamment l'un de l'autre à l'élection des membres de la Cour.

Apart from the merely consequential changes, the text is maintained as revised in 1929.

#### Article 9

At every election, the electors shall bear in mind [that] not only that [should all] the persons [appointed as members of the Court] to be elected should individually possess the qualifications required, but also that in the [whole] body as a whole [also should represent] the representation of the main forms of civilization and of the principal legal systems of the world should be assured.

Dans toute élection, les électeurs auront en vue que les personnes appelées à faire partie de la Cour, non seulement réunissent individuellement les conditions requises, mais assurent dans l'ensemble la représentation des grandes formes de civilisation et des principaux systèmes juridiques du monde.

Apart from the merely stylistic changes in the English version, the original text is maintained as drafted in 1920.

#### Article 10

1. Those candidates who obtain an absolute majority of votes in the General Assembly and in the Security Council shall be considered as elected.

2. Any vote of the Security Council, whether for the election of judges or for the appointment of members of the conference envisaged in Article 12, shall be taken without any distinction between permanent and non-permanent members of the Security Council.

3. In the event of more than one national of the same [Member of the League being elected by] state obtaining an absolute majority of the votes [of] both of the General Assembly and of the Security Council, the eldest of these only shall be considered as elected.

1. Sont élus ceux qui ont réuni la majorité absolue des voix dans l'Assemblée Générale et dans le Conseil de Sécurité.

2. Le vote au Conseil de Sécurité, soit pour l'élection des juges, soit pour la nomination des membres de la commission visée à l'article 12 ci-après, ne comportera aucune distinction entre membres permanents et membres non-permanents du Conseil de Sécurité.

3. Au cas où le double scrutin de l'Assemblée Générale et du Conseil de Sécurité se porterait sur plus d'un ressortissant du même [Membre de la Société des Nations] Etat, le plus âgé est seul élu.

Only stylistic or consequential changes were made in the first and third paragraphs of this article. The insertion of the new paragraph 2 was designed to safeguard what was termed the "democratic" character of the election; it also facilitated agreement on the text of Article 4.

#### Article 11

If, after the first meeting held for the purpose of the election, one or more seats remain to be filled, a second and, if necessary, a third meeting shall take place.

Si, après la première séance d'élection, il reste encore des sièges à pourvoir, il est procédé, de la même manière, à une seconde et, s'il est nécessaire, à une troisième.

The original text is maintained as drafted in 1920.

#### Article 12

1. If, after the third meeting, one or more seats still remain unfilled, a joint conference consisting of six members, three appointed by the General Assembly and three by the Security Council, may be formed[,] at any time [.] at the request of either the General Assembly or the Security Council, for the purpose of choosing by the vote of an absolute majority one name for each seat still vacant, to submit to the General Assembly and the Security Council for their respective acceptance.

2. If the joint [Conference] conference is unanimously agreed upon any person who

1. Si, après la troisième séance d'élection, il reste encore des sièges à pourvoir, il peut être à tout moment formé sur la demande, soit de l'Assemblée Générale, soit du Conseil de Sécurité, une Commission médiatrice de six membres, nommés trois par l'Assemblée Générale, trois par le Conseil de Sécurité, en vue de choisir par un vote à la majorité absolue, pour chaque siège non pourvu, un nom à présenter à l'adoption séparée de l'Assemblée Générale et du Conseil de Sécurité.

2. [Peuvent être portées] La Commission médiatrice peut porter sur [cette] sa liste

fulfils the required conditions, he may be included in its list, even though he was not included in the list of nominations referred to in [Articles 4 and 5] Article 7.

3. If the joint conference is satisfied that it will not be successful in procuring an election, those members of the Court who have already been [appointed] elected shall, within a period to be fixed by the Security Council, proceed to fill the vacant seats by selection from [amongst] among those candidates who have obtained votes either in the General Assembly or in the Security Council.

4. In the event of an equality of votes [amongst] among the judges, the eldest judge shall have a casting vote.

[, à l'unanimité,] le nom de [toutes personnes] toute personne satisfaisant aux conditions requises et qui recueille l'unanimité de ses suffrages, [alors] lors même [qu'elles n'auraient] qu'il n'aurait pas figuré sur la liste de présentation visée [aux articles 4 et 5] à l'article 7.

3. Si la Commission médiatrice constate qu'elle ne peut réussir à assurer l'élection, les membres de la Cour déjà nommés pourvoient aux sièges vacants, dans un délai à fixer par le Conseil de Sécurité, en choisissant parmi les personnes qui ont obtenu des suffrages soit dans l'Assemblée Générale, soit dans le Conseil de Sécurité.

4. Si, parmi les juges, il y a partage égal des voix, la voix du juge le plus âgé l'emporte.

For the most part the changes are merely stylistic or consequential. The substantive change in paragraph 1, assuring the sufficiency of a majority vote in the choice of members of the joint conference, was due to a desire to escape the application of the provision in Article 27 of the Charter on voting in the Security Council.

#### Article 13

1. The members of the Court shall be elected for nine years[.] and [They] may be re-elected[.] ; provided, however, that of the judges elected at the first election, the terms of five judges shall expire at the end of three years and the terms of five more judges shall expire at the end of six years.

2. The judges whose terms are to expire at the end of the above-mentioned initial periods of three and six years shall be chosen by lot to be drawn by the Secretary-General immediately after the first election has been completed.

3. [They] The members of the Court shall continue to discharge their duties until their places have been filled. Though replaced, they shall finish any cases which they may have begun.

4. In the case of the resignation of a member of the Court, the resignation [will] shall be addressed to the President of the Court for transmission to the Secretary-General [of the League of Nations]. [ ] This last notification makes the place vacant.

1. Les membres de la Cour sont élus pour neuf ans[.] et [Ils] ils sont rééligibles[.] ; toutefois, en ce qui concerne les Juges nommés à la première élection de la Cour, les fonctions de cinq juges prendront fin au bout de trois ans, et celles de cinq autres juges prendront fin au bout de six ans.

2. Les juges dont les fonctions prendront fin au terme des périodes initiales de trois et six ans mentionnées ci-dessus seront désignés par tirage au sort effectué par le Secrétaire Général, immédiatement après qu'il aura été procédé à la première élection.

3. [Ils] Les membres de la Cour restent en fonction jusqu'à leur remplacement. Après ce remplacement, ils continuent de connaître des affaires dont ils sont déjà saisis.

4. En cas de démission d'un membre de la Cour, la démission sera adressée au Président de la Cour, pour être transmise au Secrétaire [général] Général [de la Société des Nations]. [ ] Cette dernière notification emporte vacance de siège.

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No disposition was manifested to vary the nine-year terms of the judges, but the modifications of paragraph 1 and the insertion of the new paragraph 2 stagger the terms by abolishing their simultaneous expirations. The change had been frequently proposed, and the Reporter of Committee 1 characterized it as assuring "a periodical reinvigoration of the bench." An alternative proposal made by the American delegate at Washington would have sought this result by providing in Article 15 that judges elected to fill vacancies should hold office for a full term of nine years; this would have accomplished the result desired, though it would have introduced a greater irregularity in the dates of elections.

Article 14

Vacancies [which may occur] shall be filled by the same method as that laid down for the first election, subject to the following provision: the Secretary-General [of the League of Nations] shall, within one month of the occurrence of the vacancy, proceed to issue the invitations provided for in Article 5, and the date of the election shall be fixed by the Security Council [at its next session].

Il est pourvu aux sièges devenus vacants selon la méthode suivie pour la première élection, sous réserve de la disposition ci-après: dans le mois qui suivra la vacance, le Secrétaire [général] Général [de la Société des Nations] [procèdera] procèdera à l'invitation prescrite par l'article 5, et la date d'élection sera fixée par le Conseil de Sécurité [dans sa première session].

The changes in this Article are chiefly stylistic and consequential. The concluding phrase in the original text, drafted in 1929 to assure promptness in filling vacancies, became unnecessary in view of the provision in Article 28 of the Charter that "the Security Council shall be so organized as to be able to function continuously." It is hardly to be supposed, however, that the Security Council will ignore the necessity for a prompt filling of vacancies.<sup>32</sup>

Article 15

A member of the Court elected to replace a member whose [period] term of [appointment] office has not expired [will] shall hold [the appointment] office for the remainder of his predecessor's term.

Le membre de la Cour élu en remplacement d'un membre dont le mandat n'est pas expiré achève le terme du mandat de son prédécesseur.

Apart from the merely stylistic changes in the English version, the text is maintained as revised in 1929.

Article 16

1. [The members] No member of the Court may [not] exercise any political or administrative function, [nor] or engage in any other occupation of a professional nature.

1. Les membres de la Cour ne peuvent exercer aucune fonction politique ou administrative, ni se livrer à aucune autre occupation de caractère professionnel.

2. Any doubt on this point [is] shall be settled by the decision of the Court.

2. En cas de doute, la Cour décide.

<sup>32</sup> But see Philip C. Jessup, in 21 *Foreign Policy Reports*, Number 11, p. 164.

Apart from the merely stylistic changes in the English version, the text is maintained as revised in 1929.

#### Article 17

1. No member of the Court may act as agent, counsel, or advocate in any case.

2. No member may participate in the decision of any case in which he has previously taken [an active] part as agent, counsel, or advocate for one of the [contesting] parties, or as a member of a national or international [Court] court, or of a commission of enquiry, or in any other capacity.

3. Any doubt on this point [is] shall be settled by the decision of the Court.

1. Les membres de la Cour ne peuvent exercer les fonctions d'agent, de conseil ou d'avocat dans aucune affaire.

2. Ils ne peuvent participer au règlement d'aucune affaire dans laquelle ils sont antérieurement intervenus comme agents, conseils ou avocats de l'une des parties, membres d'un tribunal national ou international, d'une commission d'enquête, ou à tout autre titre.

3. En cas de doute, la Cour décide.

Apart from the chiefly stylistic changes in the English version, the text is maintained as revised in 1929.

#### Article 18

1. [A] No member of the Court [cannot] can be dismissed unless, in the unanimous opinion of the other members, he has ceased to fulfil the required conditions.

2. Formal notification thereof shall be made to the Secretary-General [of the League of Nations,] by the Registrar.

3. This notification makes the place vacant.

1. Les membres de la Cour ne peuvent être relevés de leurs fonctions que si, au jugement unanime des autres membres, ils ont cessé de répondre aux conditions requises.

2. Le Secrétaire [général] Général [de la Société des Nations] en est officiellement informé par le Greffier.

3. Cette communication emporte vacance de siège.

Apart from the merely stylistic and consequential changes, the original text is maintained as drafted in 1920.

#### Article 19

The members of the Court, when engaged on the business of the Court, shall enjoy diplomatic privileges and immunities.

Les membres de la Cour jouissent, dans l'exercice de leurs fonctions, des privilèges et immunités diplomatiques.

The maintenance of this text as it was drafted in 1920, despite the narrower provision in Article 105 of the Charter with reference to officials of the Organization, emphasizes the desire of the Conference at San Francisco to assure to the judges a privileged position while engaged in the performance of their duties.

#### Article 20

Every member of the Court shall, before taking up his duties, make a solemn declaration in open [Court] court that he will exercise his powers impartially and conscientiously.

Tout membre de la Cour doit, avant d'entrer en fonction, en séance publique, prendre [engagement] l'engagement solennel d'exercer ses attributions en pleine impartialité et en toute conscience.



Apart from the merely stylistic changes, the original text is maintained as drafted in 1920.

#### Article 21

1. The Court shall elect its President and Vice-President for three years; they may be re-elected.

2. [It] The Court shall appoint its Registrar and may provide for the appointment of such other officers as may be necessary.

[The duties of Registrar of the Court shall not be deemed incompatible with those of Secretary-General of the Permanent Court of Arbitration.]

1. La Cour [élit] nomme, pour trois ans, son Président et son Vice-Président; ils sont rééligibles.

2. Elle ~~nomme~~ son Greffier et peut pourvoir à la nomination de tels autres fonctionnaires qui seraient nécessaires.

[La fonction de Greffier de la Cour n'est pas incompatible avec celle de Secrétaire général de la Cour permanente d'Arbitrage.]

The addition in paragraph 2 of this Article, proposed at Washington, was due to a French suggestion that the Court might need a Secretary-General in addition to a Registrar. The text is sufficiently flexible to enable the Court to appoint or to delegate the power to appoint other officers. Article 17 of the 1936 Rules covered the appointment by the Court of officials of the Registry other than the Deputy-Registrar, on proposals submitted by the Registrar; hence the addition in paragraph 2 was hardly needed.

The deletion of the concluding paragraph of the original text, proposed at Washington because the Registrar of the Permanent Court had never been called upon to assume the duties of the Secretary-General of the Permanent Court of Arbitration, is difficult to justify. In view of the references to the Permanent Court of Arbitration in Articles 4 and 5 of the new Statute, the continuance of the institution created by the Hague Conventions of 1899 and 1907 is clearly envisaged; it would effect a saving of energy and expense to confer on the Registrar the duties, also, of the Secretary-General. This result may be discouraged, though it is not excluded, by the fact of the deletion.

#### Article 22

1. The seat of the Court shall be established at The Hague. This, however, shall not prevent the Court from sitting and exercising its functions elsewhere whenever the Court considers it desirable.

2. The President and the Registrar shall reside at the seat of the Court.

1. Le siège de la Cour est fixé à La Haye. La Cour peut toutefois siéger et exercer ses fonctions ailleurs lorsqu'elle le juge désirable.

2. Le Président et le Greffier résident au siège de la Cour.

The addition of the new sentence in paragraph 1 of this Article, proposed at Washington, was due to a desire to emphasize the world character of the Court and the possibility of its meeting in different parts of the world. Even without the addition the Court could doubtless have exercised its functions elsewhere than at its seat. The Cuban delegation at San Francisco proposed that the Court should "consist of two Chambers," one of which should "ordinarily function" at The Hague, and the other at Habana.<sup>33</sup>

<sup>33</sup> 3 Documents of the Conference p. 516.

## Article 23

1. The Court shall remain permanently in session, except during the judicial vacations, the dates and duration of which shall be fixed by the Court.

2. Members of the Court [whose homes are situated at more than five days' normal journey from The Hague shall be] are entitled [ , apart from the judicial vacations, ] to [six months'] periodic leave, [every three years, not including the time spent in travelling] the dates and duration of which shall be fixed by the Court, having in mind the distance between The Hague and the home of each judge.

3. Members of the Court shall be bound, unless they are on [regular] leave or prevented from attending by illness or other serious [reason] reasons duly explained to the President, to hold themselves permanently at the disposal of the Court.

1. La Cour reste toujours en fonction, excepté pendant les vacances judiciaires, dont les périodes et la durée sont fixées par la Cour.

2. Les membres de la Cour [dont les foyers se trouvent à plus de cinq jours de voyage normal de La Haye auront droit, indépendamment des vacances judiciaires, à un congé de six mois, non compris la durée des voyages, tous les trois ans] ont droit à des congés périodiques dont la date et la durée seront fixées par la Cour, en tenant compte de la distance qui sépare La Haye de leurs foyers.

3. Les membres de la Cour sont tenus, à moins de congé [régulier], d'empêchement pour cause de maladie ou autre motif grave dûment justifié auprès du Président, d'être à tout moment à la disposition de la Cour.

The first paragraph of this Article is maintained as revised in 1929, though it may be doubted whether the change then effected requiring the Court to be in permanent session has been fruitful of much result. The modification of paragraph 2 is a substantial improvement of the text, for it leaves to the Court itself the power to fix and modify the details of the periodic leave.

## Article 24

1. If, for some special reason, a member of the Court considers that he should not take part in the decision of a particular case, he shall so inform the President.

2. If the President considers that for some special reason one of the members of the Court should not sit [on] in a particular case, he shall give him notice accordingly.

3. If in any such case the member of the Court and the President disagree, the matter shall be settled by the decision of the Court.

1. Si, pour une raison spéciale, l'un des membres de la Cour estime devoir ne pas participer au jugement d'une affaire déterminée, il en fait part au Président.

2. Si le Président estime qu'un des membres de la Cour ne doit pas, pour une raison spéciale, siéger dans une affaire déterminée, il en avertit celui-ci.

3. Si, en pareils cas, le membre de la Cour et le Président sont en désaccord, la Cour décide.

Apart from the slight change in the English version, the original text is maintained as drafted in 1920.

## Article 25

1. The full Court shall sit except when it is expressly provided otherwise in the present Statute.

2. Subject to the condition that the number of judges available to constitute the

1. Sauf exception expressément prévue par le présent Statut, la Cour exerce ses attributions en séance plénière.

2. Sous la condition que le nombre des juges disponibles pour constituer la Cour ne

Court is not thereby reduced below eleven, the Rules of the Court may provide for allowing one or more judges, according to circumstances and in rotation, to be dispensed from sitting.

3. [Provided always that a] A quorum of nine judges shall suffice to constitute the Court.

soit pas réduit à moins de onze, le Règlement de la Cour pourra prévoir que, selon les circonstances et à tour de rôle, un ou plusieurs juges pourront être dispensés de siéger.

3. [Toutefois, le] Le quorum de neuf est suffisant pour constituer la Cour.

Apart from the merely stylistic changes, the text is maintained as revised in 1929.

#### Article 26

[Labour cases, particularly cases referred to in Part XIII (Labour) of the Treaty of Versailles and the corresponding portions of the other treaties of peace, shall be heard and determined by the Court under the following conditions:

[The Court will appoint every three years a special Chamber of five judges, selected so far as possible with due regard to the provisions of Article 9. In addition, two judges shall be selected for the purpose of replacing a judge who finds it impossible to sit. If the parties so demand, cases will be heard and determined by this Chamber. In the absence of any such demand, the full Court will sit. In both cases, the judges will be assisted by four technical assessors sitting with them, but without the right to vote, and chosen with a view to ensuring a just representation of the competing interests.

[The technical assessors shall be chosen for each particular case in accordance with rules of procedure under Article 30 from a list of "Assessors for Labour Cases" composed of two persons nominated by each Member of the League of Nations and an equivalent number nominated by the Governing Body of the Labour Office. The Governing Body will nominate, as to one-half, representatives of the workers, and, as to one-half, representatives of employers from the list referred to in Article 412 of the Treaty of Versailles and the corresponding articles of the other treaties of peace.

[Recourse may always be had to the summary procedure provided for in Article 29, in the cases referred to in the first paragraph of the present Article, if the parties so request.

[Pour les affaires concernant le travail, et spécialement pour les affaires visées dans la Partie XIII (Travail) du Traité de Versailles et les parties correspondantes des autres traités de paix, la Cour statuera dans les conditions ci-après:

[La Cour constituera pour chaque période de trois années une Chambre spéciale composée de cinq juges désignés en tenant compte, autant que possible, des prescriptions de l'article 9. Deux juges seront, en outre, désignés pour remplacer celui des juges qui se trouverait dans l'impossibilité de siéger. Sur la demande des parties, cette Chambre statuera. A défaut de cette demande, la Cour siégera en séance plénière. Dans les deux cas, les juges sont assistés de quatre assessseurs techniques siégeant à leurs côtés avec voix consultative et assurant une juste représentation des intérêts en cause.

[Les assessseurs techniques sont choisis dans chaque cas spécial d'après les règles de procédure visées à l'article 30, sur une liste d' "Assesseurs pour litiges de travail", composée de noms présentés à raison de deux par chaque Membre de la Société des Nations et d'un nombre égal présenté par le Conseil d'administration du Bureau international du Travail. Le Conseil désignera par moitié des représentants des travailleurs et par moitié des représentants des patrons pris sur la liste prévue à l'article 412 du Traité de Versailles et aux articles correspondants des autres traités de paix.

[Le recours à la procédure sommaire visée à l'article 29 reste toujours ouvert dans les affaires visées à l'alinéa premier du présent article, si les parties le demandent.

[In Labour cases, the International Office shall be at liberty to furnish the Court with all relevant information, and for this purpose the Director of that Office shall receive copies of all the written proceedings.]

1. The Court may from time to time form one or more chambers, composed of three or more judges as the Court may determine, for dealing with particular categories of cases; for example, labor cases and cases relating to transit and communications.

2. The Court may at any time form a chamber for dealing with a particular case. The number of judges to constitute such a chamber shall be determined by the Court with the approval of the parties.

3. Cases shall be heard and determined by the chambers provided for in this Article if the parties so request.

[Dans les affaires concernant le travail, le Bureau international aura la faculté de fournir à la Cour tous les renseignements nécessaires et, à cet effet, le Directeur de ce Bureau recevra communication de toutes les pièces de procédure présentées par écrit.]

1. La Cour peut, à toute époque, constituer une ou plusieurs chambres composées de trois juges au moins selon ce qu'elle décidera, pour connaître de catégories déterminées d'affaires, par exemple d'affaires de travail et d'affaires concernant le transit et les communications.

2. La Cour peut, à toute époque, constituer une chambre pour connaître d'une affaire déterminée. Le nombre des juges de cette chambre sera fixé par la Cour avec l'assentiment des parties.

3. Les chambres prévues au présent article statueront, si les parties le demandent.

As the Permanent Court's special chambers for labor cases and transit and communications cases had never been activated, the Washington Committee of Jurists adopted an American proposal that they be eliminated and that the Court be given a general power to create chambers as needed. The first paragraph of the new text envisages standing chambers, available for dealing with special categories of cases; such chambers might be regional. The second paragraph would enable the Court to create a chamber for a particular case; the desirability of this provision was indicated in 1928 when, as the Court lacked a quorum, the agent of the French Government in the *Serbian Loans Case* suggested that the judges available sit as an arbitral tribunal to hear the case.<sup>24</sup>

#### Article 27

[Cases relating to transit and communications, particularly cases referred to in Part XII (Ports, Waterways and Railways) of the Treaty of Versailles and the corresponding portions of the other treaties of peace, shall be heard and determined by the Court under the following conditions:

[The Court will appoint every three years a special Chamber of five judges, selected so far as possible with due regard to the provisions of Article 9. In addition, two judges shall be selected for the purpose of replacing a judge who finds it impossible to sit. If the parties so demand, cases will be heard and

[Pour les affaires concernant le transit et les communications, et spécialement pour les affaires visées dans la Partie XII (Ports, Voies d'eau, Voies ferrées) du Traité de Versailles et les parties correspondantes des autres traités de paix, la Cour statuera dans les conditions ci-après:

[La Cour constituera, pour chaque période de trois années, une Chambre spéciale composée de cinq juges désignés en tenant compte autant que possible des prescriptions de l'article 9. Deux juges seront, en outre, désignés pour remplacer celui des juges qui se trouverait dans l'impossibilité de siéger.

<sup>24</sup> See Hudson, *Permanent Court of International Justice*, 1920-1942, p. 337 note.

determined by this Chamber. In the absence of any such demand, the full Court will sit. When desired by the parties or decided by the Court, the judges will be assisted by four technical assessors sitting with them, but without the right to vote.

[The technical assessors shall be chosen for each particular case in accordance with rules of procedure under Article 30 from a list of "Assessors for Transit and Communications Cases" composed of two persons nominated by each Member of the League of Nations.

[Recourse may always be had to the summary procedure provided for in Article 29, in the cases referred to in the first paragraph of the present Article, if the parties so request.]

A judgment given by any of the chambers provided for in Articles 26 and 29 shall be considered as rendered by the Court.

Sur la demande des parties, cette Chambre statuera. A défaut de cette demande, la Cour siégera en séance plénière. Si les parties le désirent, ou si la Cour le décide, les juges seront assistés de quatre assesseurs techniques siégeant à leurs côtés avec voix consultative.

[Les assesseurs techniques seront choisis dans chaque cas spécial d'après les règles de procédure visées à l'article 30, sur une liste d' "Assesseurs pour litiges de transit et de communications," composée de noms présentés à raison de deux par chaque Membre de la Société des Nations.

[Le recours à la procédure sommaire visée à l'article 29 reste toujours ouvert dans les affaires visées à l'alinéa premier du présent article, si les parties le demandent.]

Tout arrêt rendu par l'une des chambres prévues aux articles 26 et 29 sera considéré comme rendu par la Cour.

The new text of this Article, proposed by the American member of the Committee of Jurists at Washington, takes over the substance of a provision in Article 73 of the 1936 Rules of the Permanent Court.

#### Article 28

The [special] chambers provided for in Articles 26 and [27] 29 may, with the consent of the parties [to the dispute], sit and exercise their functions elsewhere than at The Hague.

Les chambres [spéciales] prévues aux articles 26 et [27] 29 peuvent, avec le consentement des parties [en cause], siéger et exercer leurs fonctions ailleurs qu'à La Haye.

The changes in this Article are in part stylistic but it was necessary to adapt the text to the new provisions in Article 26 and it is now extended to apply to the Chamber for Summary Procedure.

#### Article 29

With a view to the speedy despatch of business, the Court shall form annually a [Chamber] chamber composed of five judges [who] which, at the request of the [contesting] parties, may hear and determine cases by summary procedure. In addition, two judges shall be selected for the purpose of replacing [a judge] judges who [finds] find it impossible to sit.

En vue de la prompt expédition des affaires, la Cour compose annuellement une [Chambre] chambre de cinq juges, appelés à statuer en procédure sommaire lorsque les parties le demandent. Deux juges seront, en outre, désignés [ ] pour remplacer celui des juges qui se trouverait dans l'impossibilité de siéger.

Apart from the merely stylistic changes in the English version, the text is maintained as revised in 1929.

## Article 30

1. The Court shall frame rules for [regulating] carrying out its [procedure] functions. In particular, it shall lay down rules [for] of [summary] procedure.

2. The Rules of the Court may provide for assessors to sit with the Court or with any of its chambers, without the right to vote.

1. La Cour détermine par un règlement le mode suivant lequel elle exerce ses attributions. Elle règle notamment [la] sa procédure [sommaire].

2. Le Règlement de la Cour peut prévoir des assesseurs siégeant à la Cour ou dans ses chambres, sans droit de vote.

The changes in the first part of the first paragraph of the English version of this Article bring it into correspondence with the original French version. The new second paragraph is an adaptation and an extension of provisions for assessors previously included in Articles 26 and 27, though those provisions had never been applied.<sup>35</sup> As it fails to carry over any intimation as to the manner in which assessors shall be selected, it leaves a *lacuna* in the new Statute to be filled by Rules of Court. Though provisions for assessors have been popular in recent international instruments, there have been few, if any, cases in which assessors have been called upon to function.

## Article 31

1. Judges of the nationality of each of the [contesting] parties shall retain their right to sit in the case before the Court.

2. If the Court includes upon the Bench a judge of the nationality of one of the parties, [the] any other party may choose a person to sit as judge. Such person shall be chosen preferably from among those persons who have been nominated as candidates as provided in Articles 4 and 5.

3. If the Court includes upon the Bench no judge of the nationality of the [contesting] parties, each of these parties may proceed to [select] choose a judge as provided in [the preceding] paragraph 2 of this Article.

4. The [present provision] provisions of this Article shall apply to the case of Articles 26 [, 27] and 29. In such cases, the President shall request one or, if necessary, two of the members of the Court forming the [Chamber] chamber to give place to the members of the Court of the nationality of the parties concerned, and, failing such, or if they are unable to be present, to the judges specially [appointed] chosen by the parties.

5. Should there be several parties in the same interest, they shall, for the purpose of

1. Les juges de la nationalité de chacune des parties [en cause] conservent le droit de siéger dans l'affaire dont la Cour est saisie.

2. Si la Cour compte sur le siège un juge de la nationalité d'une des parties, [l'autre] toute autre partie peut désigner une personne de son choix pour siéger en qualité de juge. Celle-ci devra être prise de préférence parmi les personnes qui ont été l'objet d'une présentation en conformité des articles 4 et 5.

3. Si la Cour ne compte sur le siège aucun juge de la nationalité des parties, chacune de ces parties peut procéder à la désignation d'un juge de la même manière qu'au paragraphe précédent.

4. [La] Le [présente] présent [disposition] article s'applique dans le cas des articles 26 [, 27] et 29. En pareils cas, le Président priera un, ou, s'il y a lieu, deux des membres de la Cour composant la [Chambre] chambre, de céder leur place aux membres de la Cour de la nationalité des parties intéressées et, à défaut ou en cas d'empêchement, aux juges spécialement désignés par les parties.

5. Lorsque plusieurs parties font cause commune, elles ne comptent, pour l'applica-

<sup>35</sup> See Hudson, *Permanent Court of International Justice, 1920-1942*, pp. 348-349.

the preceding provisions, be reckoned as one party only. Any doubt upon this point [is] shall be settled by the decision of the Court.

6. Judges [selected] chosen as laid down in paragraphs 2, 3, and 4 of this Article shall fulfil the conditions required by Articles 2, 17 (paragraph 2), 20, and 24 of [this] the present Statute. They shall take part in the decision on terms of complete equality with their colleagues.

Despite some criticism of the provisions for judges *ad hoc*, no disposition to change this system was evident, either at Washington or at San Francisco. Apart from the stylistic changes, the text is maintained as revised in 1929.

#### Article 32

1. [The] Each [members] member of the Court shall receive an annual salary.

2. The President shall receive a special annual allowance.

3. The Vice-President shall receive a special allowance for every day on which he acts as President.

4. The judges [appointed] chosen under Article 31, other than members of the Court, shall receive [an indemnity] compensation for each day on which they [sit] exercise their functions.

5. These salaries, allowances, and [indemnities] compensation shall be fixed by the General Assembly [of the League of Nations on the proposal of the Council]. They may not be decreased during the term of office.

6. The salary of the Registrar shall be fixed by the General Assembly on the proposal of the Court.

7. Regulations made by the General Assembly shall fix the conditions under which [retiring] retirement pensions may be given to members of the Court and to the Registrar, and the conditions under which members of the Court and the Registrar shall have their [travelling] traveling expenses refunded.

8. The above salaries, [indemnities and] allowances, and compensation shall be free of all taxation.

tion des dispositions qui [précèdent] précèdent, que pour une seule. En cas de doute, la Cour décide.

6. Les juges désignés, comme il est dit aux paragraphes 2, 3 et 4 du présent article, doivent satisfaire aux prescriptions des articles 2 [;], 17, [alinéa] paragraphe 2 [;], 20 et 24 du présent Statut. Ils participent à la décision dans des conditions de complète égalité avec leurs collègues.

1. Les membres de la Cour reçoivent un traitement annuel.

2. Le Président reçoit une allocation annuelle spéciale.

3. Le Vice-Président reçoit une allocation spéciale pour chaque jour où il remplit les fonctions de [président] Président.

4. Les juges désignés par application de l'article 31, autres que les membres de la Cour, reçoivent une indemnité pour chaque jour où ils exercent leurs fonctions.

5. Ces traitements, allocations et indemnités sont fixés par l'Assemblée Générale [de la Société des Nations sur la proposition du Conseil]. Ils ne peuvent être diminués pendant la durée des fonctions.

6. Le traitement du Greffier est fixé par l'Assemblée Générale sur la proposition de la Cour.

7. Un règlement adopté par l'Assemblée Générale fixe les conditions dans lesquelles [les] des pensions sont allouées aux membres de la Cour et au Greffier, ainsi que les conditions dans lesquelles les membres de la Cour et le Greffier reçoivent le remboursement de leurs frais de voyage.

8. Les traitements, [indemnités et] allocations et indemnités sont exempts de tout impôt.

Apart from the chiefly stylistic and consequential changes, the text is maintained as revised in 1929. Paragraph 5 was amended to take account of the General Assembly's exclusive control of finances.



## Article 33

The expenses of the Court shall be borne by the [League of] United Nations [,] in such a manner as shall be decided by the General Assembly [upon the proposal of the Council].

Les frais de la Cour sont supportés par [la Société des] Nations Unies de la manière que l'Assemblée Générale décide [sur la proposition du Conseil].

The changes in this Article are chiefly consequential; the omission of the concluding phrase is in line with the provisions in Article 17 of the Charter which invest the General Assembly exclusively with power to deal with financial questions.

Chapter II  
Competence of the Court

Chapitre II  
Compétence de la Cour

Though fundamental changes have not been made in this Chapter, somewhat more liberal account has been taken of the position of international organizations *vis-à-vis* the Court.

## Article 34

1. Only [States] states [or Members of the League of Nations can] may be parties in cases before the Court.

2. The Court, subject to and in conformity with its Rules, may request of public international organizations information relevant to cases before it, and shall receive such information presented by such organizations on their own initiative.

3. Whenever the construction of the constituent instrument of a public international organization or of an international convention adopted thereunder is in question in a case before the Court, the Registrar shall so notify the public international organization concerned and shall communicate to it copies of all the written proceedings.

1. Seuls les [États] Etats [ou les Membres de la Société des Nations] ont qualité pour se présenter devant la Cour.

2. La Cour, dans les conditions prescrites par son Règlement, pourra demander aux organisations internationales publiques des renseignements relatifs aux affaires portées devant elle, et recevra également les dits renseignements qui lui seraient présentés par ces organisations de leur propre initiative.

3. Lorsque l'interprétation de l'acte constitutif d'une organisation internationale publique ou celle d'une convention internationale adoptée en vertu de cet acte est mise en question dans une affaire soumise à la Cour, le Greffier en avise cette organisation et lui communique toute la procédure écrite.

When the original text of the first paragraph of this Article was drafted in 1920, it was customary to refer to both States and Members of the League of Nations because of doubt as to the condition of some of the latter, particularly of the British Dominions; at San Francisco the term *states* was given a broader application, and all the signatories of the Charter are (in Article 3) characterized as such. There was some disposition at Washington to permit public international organizations to appear as parties before the Court; a suggestion to this end had been advanced by the International Labor Office in 1944.<sup>35</sup>

<sup>35</sup> League of Nations Document, C.20.M.20.1944.V.



The new second paragraph is an enlargement of a provision in the final paragraph of Article 26 of the original Statute which applied only to the International Labor Office. The new third paragraph, proposed by the British delegation at San Francisco, is in line with insistence of the International Labor Office that its *locus standi* under the original Article 26 be in some degree maintained.

#### Article 35

1. The Court shall be open to the [Members of the League and also to States] states [mentioned in the Annex to the Covenant] parties to the present Statute.

2. The conditions under which the Court shall be open to other [States] states shall, subject to the special provisions contained in treaties in force, be laid down by the Security Council, but in no case shall such [provisions] conditions place the parties in a position of inequality before the Court.

3. When a [State] state which is not a Member of the [League of] United Nations is a party to a [dispute] case, the Court shall fix the amount which that party is to contribute towards the expenses of the Court. This provision shall not apply if such [State] state is bearing a share of the expenses of the Court.

1. La Cour est ouverte aux [Membres de la Société des Nations, ainsi qu'aux États mentionnés à l'annexe au Pacte] États parties au présent Statut.

2. Les conditions auxquelles elle est ouverte aux autres [États] États sont, sous réserve des dispositions particulières des traités en vigueur, réglées par le Conseil de Sécurité, et, dans tous les cas, sans qu'il puisse en résulter pour les parties aucune inégalité devant la Cour.

3. Lorsqu'un [État] État, qui n'est pas Membre [de la Société] des Nations Unies, est partie en cause, la Cour fixera la contribution aux frais de la Cour que cette partie devra supporter. Toutefois, cette disposition ne s'appliquera pas, si cet [État] État participe aux dépenses de la Cour.

Apart from the merely stylistic or consequential changes, the text is maintained as revised in 1929.

#### Article 36

1. The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force.

2. The [Members of the League of Nations and the States] states [mentioned in the Annex to the Covenant] parties to the present Statute may [, either when signing or ratifying the Protocol to which the present Statute is adjoined, or at a later moment,] at any time declare that they recognize as compulsory *ipso facto* and without special agreement, in relation to any other [Member or State] state accepting the same obligation, the jurisdiction of the Court in all [or any of the classes of] legal disputes concerning:

1. La compétence de la Cour s'étend à toutes les affaires que les parties lui soumettront, ainsi qu'à tous les cas spécialement prévus dans la Charte des Nations Unies ou dans les traités et conventions en vigueur.

2. Les [Membres de la Société et États] États [mentionnés à l'annexe au Pacte] parties au présent Statut, pourront, [soit lors de la signature ou de la ratification du Protocole, auquel le présent Acte est joint, soit ultérieurement] à n'importe quel moment, déclarer reconnaître [dès à présent] comme obligatoire [, de plein droit et sans convention spéciale, [vis-à-vis] à l'égard de tout autre [Membre ou État] État acceptant la même obligation, la juridiction de la Cour sur [toutes ou quelques-unes des catégories de] tous les différends d'ordre juridique ayant pour objet:

[(a)] a. the interpretation of a treaty;  
 [(b)] b. any question of international law;

[(c)] c. the existence of any fact which, if established, would constitute a breach of an international obligation;

[(d)] d. the nature or extent of the reparation to be made for the breach of an international obligation.

3. The [declaration] declarations referred to above may be made unconditionally or on condition of reciprocity on the part of several or certain [Members or States] states, or for a certain time.

4. Such declarations shall be deposited with the Secretary-General of the United Nations, who shall transmit copies thereof to the parties to the Statute and to the Registrar of the Court.

5. Declarations made under Article 36 of the Statute of the Permanent Court of International Justice and which are still in force shall be deemed, as between the parties to the present Statute, to be acceptances of the compulsory jurisdiction of the International Court of Justice for the period which they still have to run and in accordance with their terms.

6. In the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court.

The addition in the first paragraph of this Article was suggested at Washington, before the text of the Charter had been drafted; considering the actual text of the Charter, the addition is of doubtful effect, but it might become useful if the Charter were amended to confer some jurisdiction on the Court.

The text of paragraph 2, which had been debated at length at Geneva in 1920, led also to protracted debates at Washington and at San Francisco.<sup>37</sup> At both places, a majority of the delegations desired to see compulsory jurisdiction conferred on the Court; appeal was made to the extensive progress achieved under the optional provisions since 1920, and it was taken to indicate that the time had arrived for an advance. Yet some delegations—notably those of the United States and the Soviet Union—stated that their Governments might find it difficult or impossible to accept a provision for

a[)], l'interprétation d'un traité;  
 b[)], tout point de droit international;

c[)], la réalité de tout fait qui, s'il était établi, constituerait la violation d'un engagement international;

d[)], la nature ou l'étendue de la réparation due pour la rupture d'un engagement international.

3. [La] Les [déclaration] déclarations ci-dessus visées [pourra] pourront être [faite] faites purement et simplement ou sous condition de réciprocité de la part de plusieurs ou de certains [Membres ou États] États, ou pour un délai déterminé.

4. Ces déclarations seront remises au Secrétaire Général des Nations Unies qui en transmettra copie aux parties au présent Statut ainsi qu'au Greffier de la Cour.

5. Les déclarations faites en application de l'article 36 du Statut de la Cour Permanente de Justice Internationale pour une durée qui n'est pas encore expirée seront considérées, dans les rapports entre parties au présent Statut, comme comportant acceptation de la juridiction obligatoire de la Cour Internationale de Justice pour la durée restant à courir d'après ces déclarations et conformément à leurs termes.

6. En cas de contestation sur le point de savoir si la Cour est compétente, la Cour décide.

<sup>37</sup> For an analysis of these debates, see Lawrence Preuss, "The International Court and the Problem of Compulsory Jurisdiction," in 13 *Department of State Bulletin*, No. 327 (September 30, 1945), pp. 471-478.

compulsory jurisdiction in the Statute, and that the fate of the Charter to which the Statute was to be annexed might thus be placed in jeopardy. In the hope of obtaining general agreement the New Zealand delegation proposed a provision for compulsory jurisdiction which would not apply to certain categories of cases; it also proposed an exhaustive list of permitted reservations, along the lines adopted in the Geneva General Act of 1928. The Canadian delegation proposed the inclusion in paragraph 2 of a non-exhaustive list of permitted reservations. The matter was referred by Committee 1 to its sub-Committee D, which took the first of the alternatives advanced at Washington as the basis of its work, and which on May 31 reported by 6 votes to 3 in favor of the maintenance of paragraph 2 in its present form, with a deletion of the words "or any of the classes of." This deletion was said to be "favorable to the jurisdiction of the Court, since it eliminates the distinctions which the present text seems to make"; yet the forty-six States which had made declarations under Article 36 had seldom taken account of the possibility of excluding any of the enumerated classes.<sup>38</sup> When a vote was first taken in Committee 1 on the maintenance of the optional provision, the result, 26 votes to 16, failed to achieve the required majority of two-thirds; later, by 31 votes to 14, Committee 1 decided to maintain the optional as opposed to an obligatory provision, but the delegations of Australia, China, New Zealand and Turkey declared that "they voted in favor only to prevent a stalemate." The delegations of Bolivia, Costa Rica, Cuba, Ecuador, Egypt, El Salvador, Greece, Guatemala, Iran, Liberia, Mexico, Panama, Paraguay, and Uruguay maintained their opposition to the result.<sup>39</sup>

A question may be raised as to the effect of the provision in paragraph 7 of Article 2 of the Charter that nothing in the Charter "shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter." This can hardly be taken to be an exclusion from declarations to be made under Article 36 of the Statute of "questions which by international law fall exclusively" within the national jurisdiction;<sup>40</sup> that exclusion may be thought to follow from the enumerations in Article 36 itself, though it is to be noted that some of the declarations in the past have repeated it.

The changes in paragraph 3 are merely stylistic. Sub-Committee D of Committee 1 pointed out that Article 36 "has consistently been interpreted in the past as allowing states accepting the jurisdiction of the Court to sub-

<sup>38</sup> See Hudson, *Permanent Court of International Justice, 1920-1942*, p. 467.

<sup>39</sup> It is notable that all of these States are, or have been, Members of the League of Nations. Costa Rica, Ecuador, Egypt, Guatemala, Liberia, and Mexico had not become parties to the Statute of the Permanent Court, but Bolivia, Cuba, El Salvador, Greece, Iran, Panama, Paraguay, and Uruguay had made declarations under Article 36 accepting the compulsory jurisdiction of the Permanent Court.

<sup>40</sup> See 1 Documents of the Conference, p. 615.

ject their declarations to reservations," and it "considered such interpretation as henceforth established."<sup>41</sup>

The insertion of a new paragraph 4 entered into a detail of housekeeping, but in view of the uncertainties which have arisen it may prove to be useful.

The new paragraph 5 was inserted with the purpose of preserving some of the jurisdiction of the Permanent Court for the new Court. For the States which had deposited ratifications on October 24, 1945, the date on which the Statute entered into force, the provision must operate as of that date. At that time, declarations made by the following States under Article 36 were in force, and "as between the parties to the Statute" the provision applies to them: Argentina, Brazil, Denmark, Dominican Republic, Great Britain, Haiti, Iran, Luxemburg, New Zealand, Nicaragua, and El Salvador. The provision will similarly apply from the dates of their deposits of ratifications, to declarations made by Australia, Bolivia, Canada, Colombia, India, Netherlands, Norway, Panama, South Africa, and Uruguay.<sup>42</sup> On the other hand, declarations made by the following States under Article 36, which were also in force on October 24, 1945, will not be covered by the provision unless these States become parties to the new Statute: Bulgaria, Finland, Ireland, Portugal, Siam, Sweden, and Switzerland. The San Francisco Conference also recommended that Members of the United Nations Organization "declare as soon as possible their acceptance of the obligatory jurisdiction" of the Court.<sup>43</sup>

#### Article 37

[When] Whenever a treaty or convention in force provides for [the] reference of a matter to a tribunal to [be] have been instituted by the League of Nations, or to the Permanent Court of International Justice, the [Court will be such tribunal] matter shall, as between the parties to the present Statute, be referred to the International Court of Justice.

Lorsqu'un traité ou une convention en vigueur [vise] prévoit le renvoi à une juridiction [à établir par] que devait instituer la Société des Nations ou à la Cour Permanente de Justice Internationale, la Cour Internationale de Justice constituera cette juridiction entre les parties au présent Statut.

The changes in this Article were designed to preserve some of the jurisdiction of the Permanent Court for the new Court. Many scores of treaties have been concluded conferring jurisdiction on the Permanent Court. To the extent that the parties to such treaties are parties to the new Statute the provision will effectively transfer this jurisdiction to the new Court; to

<sup>41</sup> On the practice in the past see Hudson, *Permanent Court of International Justice*, 1920-1942, pp. 467-472.

<sup>42</sup> On December 27, 1945, ratifications of the Charter had been deposited by all of these States.

<sup>43</sup> 1 Documents of the Conference, p. 627.

the extent that the parties to such treaties are not parties to the new Statute a transfer is not effected without further action or negotiations.<sup>44</sup> Hence, some of the provisions for the Permanent Court's jurisdiction may lapse.

#### Article 38

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

[1] a. [International] international conventions, whether general or particular, establishing rules expressly recognized by the contesting [States] states;

[2] b. [International] international custom, as evidence of a general practice accepted as law;

[3] c. [The] the general principles of law recognized by civilized nations;

[4] d. [Subject] subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

2. This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto.

1. La Cour, dont la mission est de régler conformément au droit international les différends qui lui sont soumis, applique:

[1] a. [Les] les conventions internationales, soit générales, soit spéciales, établissant des règles expressément reconnues par les [États] Etats en litige;

[2] b. La la coutume internationale comme preuve d'une pratique générale acceptée comme étant le droit;

[3] c. [Les] les principes généraux de droit reconnus par les nations civilisées;

[4] d. [Sous] sous réserve de la disposition de l'article 59, les décisions judiciaires et la doctrine des publicistes les plus qualifiés des différentes nations, comme moyen auxiliaire de détermination des règles de droit.

2. La présente disposition ne porte pas atteinte à la faculté pour la Cour, si les parties sont d'accord, de statuer *ex aequo et bono*.

The change in the introductory sentence in paragraph 1 of this Article was proposed by the Chilean delegation at San Francisco to complete the original text. No doubt had ever been expressed on this point; indeed, the Permanent Court had without challenge often referred to itself as an "organ of international law," or as possessing a mandate to apply international law.<sup>45</sup> The stylistic changes in the sub-paragraphs of paragraph 1 are of little importance. Yet it may be thought that sub-paragraph 1 has been materially modified by the provision in paragraph 2 of Article 102 of the Charter that an unregistered treaty or international agreement entered into by a Member of the United Nations after the Charter's coming into force may not be invoked "before any organ of the United Nations"; possibly in practice the consequence of this provision may easily be escaped, however, by the registration at any time of the instrument intended to be invoked. There was some disposition at San Francisco to insist upon the successive application of the sources enumerated but the practice of the Permanent Court in this connection was deemed to be satisfactory.

<sup>44</sup> Some question may arise where States in both categories are parties to certain instruments, e.g., the Constitution of the International Labor Organization.

<sup>45</sup> See Hudson, *Permanent Court of International Justice, 1920-1942*, pp. 603-605.

Paragraph 2 is maintained as it was drafted in 1920, though commentators are by no means in accord as to its meaning.<sup>46</sup>

Chapter III  
Procedure

Chapitre III  
Procédure

Many of the provisions in Chapter III were originally modelled on historical precedents, and as the Permanent Court's procedure never led to any dissatisfaction, there was little disposition to modify these provisions, either in 1929 or in 1945.

Article 39

1. The official languages of the Court shall be French and English. If the parties agree that the case shall be conducted in French, the judgment [will] shall be delivered in French. If the parties agree that the case shall be conducted in English, the judgment [will] shall be delivered in English.

2. In the absence of an agreement as to which language shall be employed, each party may, in the pleadings, use the language which it prefers; the decision of the Court [will] shall be given in French and English. In this case the Court [will] shall at the same time determine which of the two texts shall be considered as authoritative.

3. The Court [may] shall, at the request of any party, authorize a language other than French or English to be used by that party.

1. Les langues officielles de la Cour sont le français et l'anglais. Si les parties sont d'accord pour que toute la procédure ait lieu en français, le jugement sera prononcé en cette langue. Si les parties sont d'accord pour que toute la procédure ait lieu en anglais, le jugement sera prononcé en cette langue.

2. A défaut d'un accord fixant la langue dont il sera fait usage, les parties pourront employer pour les plaidoiries celle des deux langues qu'elles [préférent] préfereront, et l'arrêt de la Cour sera rendu en français et en anglais. En ce cas, la Cour désignera en même temps celui des deux textes qui fera foi.

3. La Cour [pourra], à la demande de toute partie, [autoriser] autorisera l'emploi par cette partie d'une langue autre que le français ou l'anglais.

The changes in paragraphs 1 and 2 of this Article are merely stylistic. A substantive change in paragraph 3 makes the previously permissive provision mandatory.

Article 40

1. Cases are brought before the Court, as the case may be, either by the notification of the special agreement or by a written application addressed to the Registrar. In either case the subject of the dispute and the [contesting] parties [must] shall be indicated.

2. The Registrar shall forthwith communicate the application to all concerned.

1. Les affaires sont portées devant la Cour, selon le cas, soit par notification du compromis, soit par une requête, adressées au [Greffe] Greffier; dans les deux cas, l'objet du différend et les parties [en cause] doivent être indiqués.

2. Le [Greffe] Greffier donne immédiatement communication de la requête à tous intéressés.

<sup>46</sup> In the *Meuse Case*, Series A/B, No. 70, the Permanent Court applied a principle of equity without any agreement between the parties. Yet before the Senate Committee on Foreign Relations, Mr. Hackworth interpreted the provision to mean that "the Court may apply the principles of equity in any case where the parties to the case agree to have those principles applied." Hearings on the Charter, p. 340.

3. He shall also notify the Members of the [League of] United Nations through the Secretary-General, and also any other [States] states entitled to appear before the Court.

3. Il en informe également les Membres [de la Société] des Nations Unies par l'entremise du Secrétaire [général] Général, ainsi que les autres [États] États admis à ester en justice devant la Cour.

Apart from the merely stylistic or consequential changes, the text is maintained as revised in 1929.

#### Article 41

1. The Court shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to [reserve] preserve the respective rights of either party.

2. Pending the final decision, notice of the measures suggested shall forthwith be given to the parties and to the Security Council.

1. La Cour a le pouvoir d'indiquer, si elle estime que les circonstances l'exigent, quelles mesures conservatoires du droit de chacun doivent être prises à titre provisoire.

2. En attendant l'arrêt définitif, l'indication de ces mesures est immédiatement notifiée aux parties et au Conseil de Sécurité.

The change of "reserve" to "preserve" in the English version of the first paragraph of this Article corrects a typographical error made in 1920.<sup>47</sup> Only stylistic and consequential changes are made in the second paragraph.

#### Article 42

1. The parties shall be represented by agents.

2. They may have the assistance of counsel or advocates before the Court.

3. The agents, counsel, and advocates of parties before the Court shall enjoy the privileges and immunities necessary to the independent exercise of their duties.

1. Les parties sont représentées par des agents.

2. Elles peuvent se faire assister devant la Cour par des conseils ou des avocats.

3. Les agents, conseils et avocats des parties devant la Cour jouiront des privilèges et immunités nécessaires à l'exercice indépendant de leurs fonctions.

The addition of the new third paragraph of this Article was inspired by the experience of the Permanent Court. In 1939, the Bulgarian agent in the case of the *Electricity Company of Sofia and Bulgaria* informed the Court that owing to the necessity of crossing belligerent countries to reach The Hague and the consequent risks to personal safety, the Bulgarian Government had forbidden the departure of its agent and of the Bulgarian judge *ad hoc*; in 1940 the Court rejected the contention that the facts alleged constituted a situation of *force majeure* with the consequences drawn.<sup>48</sup>

#### Article 43

1. The procedure shall consist of two parts: written and oral.

2. The written proceedings shall consist of the communication to the [judges] Court

1. La procédure a deux phases: l'une écrite, l'autre orale.

2. La procédure écrite comprend la communication à juge et à partie des mémoires,

<sup>47</sup> See Hudson, *Permanent Court of International Justice, 1920-1942*, p. 199, note 84.

<sup>48</sup> Series A/B, No. 80.

and to the parties of [Cases, Counter-Cases] memorials, counter-memorials and, if necessary, [Replies] replies; also all papers and documents in support.

3. These communications shall be made through the Registrar, in the order and within the time fixed by the Court.

4. A certified copy of every document produced by one party shall be communicated to the other party.

5. The oral proceedings shall consist of the hearing by the Court of witnesses, experts, agents, counsel, and advocates.

des contre-mémoires, et [,] éventuellement, des répliques, ainsi que de toute pièce et document à l'appui.

3. La communication se fait par l'entremise du [Greffier] Greffier dans l'ordre et les délais déterminés par la Cour.

4. Toute pièce produite par l'une des parties doit être communiquée à l'autre en copie certifiée conforme.

5. La procédure orale consiste dans l'audition par la Cour des témoins, experts, agents, conseils et avocats.

The first change in paragraph 2 of the English version of this Article reconciles its meaning with that of the French version. The substitution of "memorials" for "cases," and of "counter-memorials" for "counter-cases," also brings the English version into harmony with the French; that substitution had been made by the Permanent Court itself in Article 41 and other Articles of its 1936 Rules.

#### Article 44

1. For the service of all notices upon persons other than the agents, counsel, and advocates, the Court shall apply direct to the government of the [State] state upon whose territory the notice has to be served.

2. The same provision shall apply whenever steps are to be taken to procure evidence on the spot.

1. Pour toute notification à faire à d'autres personnes que les agents, conseils et avocats, la Cour s'adresse directement au gouvernement de [l'État] l'Etat sur le territoire duquel la notification doit produire effet.

2. Il en est de même s'il s'agit de faire procéder sur place à l'établissement de tous moyens de preuve.

Apart from the slight stylistic changes, the original text is maintained as drafted in 1920.

#### Article 45

The hearing shall be under the control of the President or, if he is unable to preside, of the Vice-President; if neither is able to preside, the senior judge present shall preside.

Les débats sont dirigés par le Président et, à défaut de celui-ci, par le Vice-Président; en cas d'empêchement, par le plus ancien des juges présents.

The change in the English version of this Article brings it into correspondence with the French version, which is maintained as drafted in 1920 with only commas added.

#### Article 46

The hearing in Court shall be public, unless the Court shall decide otherwise, or unless the parties demand that the public be not admitted.

L'audience est publique, à moins qu'il n'en soit autrement décidé par la Cour ou que les deux parties ne demandent que le public ne soit pas admis.

The original text is maintained as drafted in 1920.



## Article 47

1. Minutes shall be made at each hearing [,] and signed by the Registrar and the President.

2. These minutes alone shall be [the only] authentic [record].

1. Il est tenu de chaque audience un procès-verbal signé par le Greffier et le Président.

2. Ce procès-verbal a seul caractère authentique.

Apart from the stylistic changes in the English version of this Article, the original text is maintained as drafted in 1920.

## Article 48

The Court shall make orders for the conduct of the case, shall decide the form and time in which each party must conclude its arguments, and make all arrangements connected with the taking of evidence.

La Cour rend des ordonnances pour la direction du procès, la détermination des formes et délais dans lesquels chaque partie doit finalement conclure; elle prend toutes les mesures que comporte l'administration des preuves.

The original text is maintained as drafted in 1920.

## Article 49

The Court may, even before the hearing begins, call upon the agents to produce any document [,] or to supply any explanations. Formal note shall be taken of any refusal.

La Cour peut, même avant tout débat, demander aux agents de produire tout document et de fournir toutes explications. En cas de refus, elle en prend acte.

The original text is maintained as drafted in 1920.

## Article 50

The Court may, at any time, entrust any individual, body, bureau, commission, or other organization that it may select, with the task of carrying out an enquiry or giving an expert opinion.

A tout moment, la Cour peut confier une enquête ou une expertise à toute personne, corps, bureau, commission ou organe de son choix.

The original text is maintained as drafted in 1920.

## Article 51

During the hearing any relevant questions are to be put to the witnesses and experts under the conditions laid down by the Court in the rules of procedure referred to in Article 30.

Au cours des débats, toutes questions utiles sont posées aux témoins et experts dans les conditions que fixera la Cour dans le règlement visé à l'article 30.

The original text is maintained as drafted in 1920.

## Article 52

After the Court has received the proofs and evidence within the time specified for the purpose, it may refuse to accept any further oral or written evidence that one party may desire to present unless the other side consents.

Après avoir reçu les preuves et témoignages dans les délais déterminés par elle, la Cour peut écarter toutes dépositions ou documents nouveaux qu'une des parties voudrait lui présenter sans l'assentiment de l'autre.

The original text is maintained as drafted in 1920.

## Article 53

1. Whenever one of the parties [shall] does not appear before the Court, or [shall fail] fails to defend [his] its case, the other party may call upon the Court to decide in [favour] favor of [his] its claim.

2. The Court must, before doing so, satisfy itself, not only that it has jurisdiction in accordance with Articles 36 and 37, but also that the claim is well founded in fact and law.

1. Lorsqu'une des parties ne se présente pas, ou s'abstient de faire valoir ses moyens, l'autre partie peut demander à la Cour de lui adju<sup>ger</sup> ses conclusions.

2. La Cour, avant d'y faire droit, doit s'assurer non seulement qu'elle a compétence aux termes des articles 36 et 37, mais que les conclusions sont fondées en fait et en droit.

Apart from the merely stylistic changes in the English version of the first paragraph, the original text is maintained as drafted in 1920.

## Article 54

1. When, subject to the control of the Court, the agents, [advocates and] counsel, and advocates have completed their presentation of the case, the President shall declare the hearing closed.

2. The Court shall withdraw to consider the judgment.

3. The deliberations of the Court shall take place in private and remain secret.

1. Quand les agents, [avocats et] conseils et avocats ont fait valoir, sous le contrôle de la Cour, tous les moyens qu'ils jugent utiles, le Président prononce la clôture des débats.

2. La Cour se retire en Chambre du Conseil pour délibérer.

3. Les délibérations de la Cour sont et restent secrètes.

Apart from the merely stylistic changes in the first paragraph, the original text is maintained as drafted in 1920.

## Article 55

1. All questions shall be decided by a majority of the judges present [at the hearing].

2. In the event of an equality of votes, the President or [his deputy] the judge who acts in his place shall have a casting vote.

1. Les décisions de la Cour sont prises à la majorité des juges présents.

2. En cas de partage [de] des voix, la voix du Président ou de celui qui le remplace est prépondérante.

The changes in the English version of this Article bring it into correspondence with the French version, which is maintained as drafted in 1920.

## Article 56

1. The judgment shall state the reasons on which it is based.

2. It shall contain the names of the judges who have taken part in the decision.

1. L'arrêt est motivé.

2. Il mentionne les noms des juges qui y ont pris part.

The original text is maintained as drafted in 1920.

## Article 57

If the judgment does not represent in whole or in part the unanimous opinion of the judges, any [dissenting judges] judge [are] shall be entitled to deliver a separate opinion.

Si l'arrêt n'exprime pas en tout ou en partie l'opinion unanime des juges, [les dissidents] tout juge [ont] aura le droit d'y joindre l'exposé de [leur] son opinion individuelle.

The slight change brings the text of this Article into conformity with the practice of the Permanent Court.

#### Article 58

The judgment shall be signed by the President and by the Registrar. It shall be read in open [Court] court, due notice having been given to the agents.

L'arrêt est signé par le Président et par le Greffier. Il est lu en séance publique, les agents dûment prévenus.

The original text is maintained as drafted in 1920.

#### Article 59

The decision of the Court has no binding force except between the parties and in respect of that particular case.

La décision de la Cour n'est obligatoire que pour les parties en litige et dans le cas qui a été décidé.

The original text is maintained as drafted in 1920.

#### Article 60

The judgment is final and without appeal. In the event of dispute as to the meaning or scope of the judgment, the Court shall construe it upon the request of any party.

L'arrêt est définitif et sans recours. En cas de contestation sur le sens et la portée de l'arrêt, il appartient à la Cour de l'interpréter, à la demande de toute partie.

The original text is maintained as drafted in 1920.

#### Article 61

1. An application for revision of a judgment [can] may be made only when it is based upon the discovery of some fact of such a nature as to be a decisive factor, which fact was, when the judgment was given, unknown to the Court and also to the party claiming revision, always provided that such ignorance was not due to negligence.

2. The proceedings for revision [will] shall be opened by a judgment of the Court expressly recording the existence of the new fact, recognizing that it has such a character as to lay the case open to revision, and declaring the application admissible on this ground.

3. The Court may require previous compliance with the terms of the judgment before it admits proceedings in revision.

4. The application for revision must be made at latest within six months of the discovery of the new fact.

5. No application for revision may be made after the lapse of ten years from the date of the [sentence] judgment.

1. La révision de l'arrêt ne peut être éventuellement demandée à la Cour [qu'à] qu'en raison de la découverte d'un fait de nature à exercer une influence décisive et qui, avant le prononcé de l'arrêt, était inconnu de la Cour et de la partie qui demande la révision, sans qu'il y ait, de sa part, faute à l'ignorer.

2. La procédure de révision s'ouvre par un arrêt de la Cour constatant expressément l'existence du fait nouveau, lui reconnaissant les caractères qui donnent ouverture à la révision, et déclarant de ce chef la demande recevable.

3. La Cour peut subordonner l'ouverture de la procédure en révision à l'exécution préalable de l'arrêt.

4. La demande en révision devra être formée au plus tard dans le délai de six mois après la découverte du fait nouveau.

5. Aucune demande de révision ne pourra être formée après l'expiration d'un délai de dix ans à dater de l'arrêt.

Apart from the merely stylistic changes, the original text is maintained as drafted in 1920.

## Article 62

1. Should a [State] state consider that it has an interest of a legal nature which may be affected by the decision in the case, it may submit a request to the Court to be permitted to intervene [as a third party].

2. It [will] shall be for the Court to decide upon this request.

1. Lorsqu'un [État] Etat estime que, dans un différend, un intérêt d'ordre juridique est pour lui en cause, il peut adresser à la Cour une requête, à fin d'intervention.

2. La Cour décide.

The deletion of the concluding phrase in the English version of paragraph 1 of this Article brings it into correspondence with the French version.

## Article 63

1. Whenever the construction of a convention to which [States] states other than those concerned in the case are parties is in question, the Registrar shall notify all such [States] states forthwith.

2. Every [State] state so notified has the right to intervene in the proceedings [;] but if it uses this right, the construction given by the judgment will be equally binding upon it.

1. Lorsqu'il s'agit de l'interprétation d'une convention à laquelle ont participé d'autres [États] Etats que les parties en litige, le [Greffe] Greffier les avertit sans délai.

2. Chacun d'eux a le droit d'intervenir au procès, et s'il exerce cette faculté, l'interprétation contenue dans la sentence est également obligatoire à son égard.

Apart from merely stylistic changes, the original text is maintained as drafted in 1920.

## Article 64

Unless otherwise decided by the Court, each party shall bear its own costs.

S'il n'en est autrement décidé par la Cour, chaque partie supporte ses frais de procédure.

The original text is maintained as drafted in 1920.

#### Chapter IV Advisory Opinions

#### Chapitre IV Avis consultatifs

The principal changes in this Chapter were designed to effectuate the provisions included in the Charter, and to systematize the text. Though Article 14 of the Covenant of the League of Nations provided for the advisory opinions of the Permanent Court, the 1920 text of the Statute failed to mention them; the amendments drafted in 1929 and brought into force in 1936 were largely confined to the incorporation of procedural provisions from the Court's Rules. With few changes the texts which were drafted in 1929 are now maintained in the new Statute.

## Article 65

1. The Court may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request.

1. La Cour peut donner un avis consultatif sur toute question juridique, à la demande de tout organe ou institution qui aura été autorisé par la Charte des Nations Unies ou conformément à ses dispositions, à demander cet avis.

2. Questions upon which the advisory opinion of the Court is asked shall be laid before the Court by means of a written request, signed either by the President of the Assembly or the President of the Council of the League of Nations, or by the Secretary-General of the League under instructions from the Assembly or the Council.] [ ]

[The request shall contain] containing an exact statement of the question upon which an opinion is required, and [shall be] accompanied by all documents likely to throw light upon the question.

The new first paragraph of this Article was drafted at San Francisco to take account of the provisions inserted in Article 96 of the Charter. The second paragraph combines the essential parts in the two paragraphs drafted in 1929, omitting only the details as to the signature of requests.

#### Article 66

1. The Registrar shall forthwith give notice of the request for an advisory opinion to [the Members of the League of Nations, through the Secretary-General of the League, and to any States] all states entitled to appear before the Court.

2. The Registrar shall also, by means of a special and direct communication, notify any [Member of the League or State] state [admitted] entitled to appear before the Court or international organization considered by the Court, ([ ] or, should it not be sitting, by the President[ ]), as likely to be able to furnish information on the question, that the Court will be prepared to receive, within a [time-limit] time limit to be fixed by the President, written statements, or to hear, at a public sitting to be held for the purpose, oral statements relating to the question.

3. Should any [Member or] such [State] state [referred to in the first paragraph] entitled to appear before the Court have failed to receive the special communication [specified above] referred to in paragraph 2 of this Article, such [Member or State] state may express a desire to submit a written statement[,] or to be heard; and the Court will decide.

[2] 4. [Members,] States[,] and organizations having presented written or oral state-

2. Les questions sur lesquelles l'avis consultatif de la Cour est demandé sont exposées à la Cour par une requête écrite [, signée soit par le président de l'Assemblée ou par le président du Conseil de la Société des Nations, soit par le Secrétaire général de la Société agissant en vertu d'instructions de l'Assemblée ou du Conseil.] [ ]

[La requête] qui formule, en termes précis, la question sur laquelle l'avis de la Cour est demandé. Il y est joint tout document pouvant servir à élucider la question.

1. Le Greffier notifie immédiatement la requête demandant l'avis consultatif [aux Membres de la Société des Nations par l'entremise du Secrétaire général de la Société, ainsi qu'aux États] à tous les États admis à exercer en justice devant la Cour.

2. En outre, [à tout Membre de la Société,] à tout [État] État admis à ester devant la Cour et à toute organisation internationale jugée, par la Cour ou par le Président si elle ne siège pas, susceptibles de fournir des renseignements sur la question, le Greffier fait connaître, par communication spéciale et directe, que la Cour est disposée à recevoir des exposés écrits dans un délai à fixer par le Président, ou à entendre des exposés oraux au cours d'une audience publique tenue à cet effet.

3. Si un [des Membres de la Société ou des États mentionnés au premier alinéa du présent paragraphe] de ces États, n'ayant pas été l'objet de la communication spéciale [ci-dessus] visée au paragraphe 2 du présent article, exprime le désir de soumettre un exposé écrit ou d'être entendu, la Cour statue.

[2] 4. Les [Membres, États] États ou organisations qui ont présenté des exposés

ments or both shall be [admitted] permitted to comment on the statements made by other [Members, States,] states or organizations in the form, to the extent, and within the [time-limits] time limits which the Court, or, should it not be sitting, the President, shall decide in each particular case. Accordingly, the Registrar shall in due time communicate any such written statements to [Members, States,] states and organizations having submitted similar statements.

écrits ou oraux sont admis à discuter les exposés faits par d'autres [Membres, États] États et organisations dans les formes, mesures et délais fixés, dans chaque cas d'espèce, par la Cour[,] ou, si elle ne siège pas, par le Président. A cet effet, le Greffier communique, en temps voulu, les exposés écrits aux [Membres, États] États ou organisations qui en ont eux-mêmes [présentés] présenté.

The changes in this Article are merely stylistic. The new text preserves an expression to which it has been difficult to give precise meaning in the past—"States entitled to appear before the Court."<sup>49</sup>

#### Article 67

The Court shall deliver its advisory opinions in open [Court] court, notice having been given to the Secretary-General [of the League of Nations] and to the representatives of Members of the [League] United Nations, or other [States] states and of international organizations immediately concerned.

La Cour prononcera ses avis consultatifs en audience publique. le Secrétaire [général] Général [de la Société des Nations] et les représentants des Membres [de la Société] des Nations Unies, des autres [États] États et des organisations internationales directement intéressés étant prévenus.

Apart from the merely stylistic and consequential changes, the text is maintained as drafted in 1929.

#### Article 68

In the exercise of its advisory functions[,] the Court shall further be guided by the provisions of the present Statute which apply in contentious cases to the extent to which it recognizes them to be applicable.

Dans l'exercice de ses attributions consultatives, la Cour s'inspirera en outre des dispositions du présent Statut qui s'appliquent en matière contentieuse, dans la mesure où elle les reconnaîtra applicables.

Apart from the slight stylistic changes, the text is maintained as drafted in 1929.

#### Chapter V Amendment

#### Chapitre V Amendements

This chapter, which is entirely new, supplies a lacuna in the original Statute. Though both the Covenant of the League of Nations and the Constitution of the International Labor Organization contained provisions for their amendment by something less than the unanimous action of the parties, the matter was not discussed by the draftsmen of 1920 and the original Statute did not deal with amendment. Nor was any provision on the subject drafted in 1929. As a consequence, an amendment of the Statute was deemed to require the consent of all the parties; the amendments

<sup>49</sup> See Hudson, *Permanent Court of International Justice*, 1920-1942, pp. 392-394.

proposed on September 14, 1929 did not enter into force until February 1, 1936.

#### Article 69

Amendments to the present Statute shall be effected by the same procedure as is provided by the Charter of the United Nations for amendments to that Charter, subject however to any provisions which the General Assembly upon recommendation of the Security Council may adopt concerning the participation of states which are parties to the present Statute but are not Members of the United Nations.

Les amendements au présent Statut seront effectués par le même procédure que celle prévue pour les amendements à la Charte des Nations Unies, sous réserve des dispositions qu'adopterait l'Assemblée Générale, sur la recommandation du Conseil de Sécurité, pour régler la participation à cette procédure des Etats qui, tout en ayant accepté le présent Statut de la Cour, ne sont pas Membres des Nations Unies.

Acting on an American suggestion, the Committee of Jurists at Washington proposed the following draft for this article, with intention to conform to a provision in the Dumbarton Oaks proposals, and subject to later reconsideration:

Amendments to the present Statute shall come into force for all parties to the Statute when they have been adopted by a vote of two-thirds of the members of the General Assembly and ratified in accordance with their respective constitutional processes by the Members of The United Nations having permanent membership on the Security Council and by a majority of the other parties to the Statute.

The text adopted at San Francisco was intended to take full account of the fact that the Statute was to be annexed to the Charter, and hence it refers generally to the latter's provisions (in Articles 108 and 109) for its amendment. Yet against some opposition a desire prevailed to make some provision for the possible participation of States which, though not parties to the Charter, might be parties to the Statute;<sup>60</sup> and the latter part of the text was adapted from the provision in paragraph 3 of Article 4 of the Statute concerning the participation of non-Member States in the elections of judges.

#### Article 70

The Court shall have power to propose such amendments to the present Statute as it may deem necessary, through written communications to the Secretary-General, for consideration in conformity with the provisions of Article 69.

La Cour pourra proposer les amendements qu'elle jugera nécessaire d'apporter au présent Statut, par la voie de communications écrites adressées au Secrétaire Général, aux fins d'examen conformément aux dispositions de l'article 69.

This text, based upon a proposal by the Peruvian delegation, gives to the Court a possible initiative for proposing the amendments which its experience may show to be needed.

<sup>60</sup> When the United States proposed to become a party to the Statute of the Permanent Court in 1926, it stipulated that the Statute should not be amended without its consent.

## POSSIBILITY OF DENUNCIATION OF THE NEW STATUTE

No provision for denunciation was included in the Statute of the Permanent Court, or in the Protocol of Signature to which it was annexed; and at no time did any State attempt to denounce either instrument.<sup>51</sup> The possibility of a denunciation of the Statute was alluded to on various occasions,<sup>52</sup> but at no time was it authoritatively confirmed. However, the special Protocol of 1929 concerning its adherence to the Protocol of 1920 would have conferred on the United States a special privilege to "withdraw its adherence" at any time, and it would have created for each of the other States parties a reciprocal privilege to "withdraw its acceptance of the special conditions attached by the United States to its adherence"; though the special Protocol of 1929 failed to enter into force, its provisions would seem to cast doubt on the existence of a general possibility of denouncing the Statute.

Withdrawal from the League of Nations by a State party to the Statute was not tantamount to a denunciation of the latter.<sup>53</sup> Some of the States which withdrew indicated at the time their willingness to continue to be parties to the Statute; even without such an indication, however, it was the invariable practice to regard withdrawing States as continuing to be parties to the Statute, and some such States participated in elections of judges and contributed for meeting the Court's expenses after their withdrawal.

A different situation obtains with reference to the new Court. The new Statute like the old contains no provision for denunciation. Yet as it "forms an integral part" of the Charter, it shares the fate of the latter. While the Charter contains no provision for withdrawal, the San Francisco Conference gave a clear sanction to the possibility of withdrawal without any previous notice—the Covenant of the League of Nations prescribed two-years' advance notice. The following statement emanating from Committee I/2,<sup>54</sup> approved on June 23 by Commission I<sup>55</sup> and on June 25 by the Conference itself,<sup>56</sup> must be regarded as an authoritative contemporary expression of the views of the draftsmen of the Charter, and as such it effectively assures to each State a possibility of withdrawal from membership in the United Nations Organization:

The Committee adopts the view that the Charter should not make express provision either to permit or to prohibit withdrawal from the Organization. The Committee deems that the highest duty of the nations which will become Members is to continue their coöperation

<sup>51</sup> When in 1938 Paraguay attempted to denounce its 1933 declaration under Article 36 of the Statute, accepting the Court's jurisdiction without limit of time, reservations as to the legal effect of such action were made by eleven States.

<sup>52</sup> See Hudson, *Permanent Court of International Justice, 1920-1942*, p. 128.

<sup>53</sup> Same, pp. 129, 217-218.

<sup>54</sup> Document 1074, I/2/76.

<sup>55</sup> Document 1187, I/13.

<sup>56</sup> 1 Documents of the Conference, pp. 616-620. Cf., U. S. Senate Hearings on the Charter, pp. 232, 236, 324.



within the Organization, for the preservation of international peace and security. If, however, a Member because of exceptional circumstances feels constrained to withdraw, and leave the burden of maintaining international peace and security on the other Members, it is not the purpose of the Organization to compel that member to continue its cooperation in the Organization.

It is obvious, however, that withdrawal or some other forms of dissolution of the Organization would become inevitable if, deceiving the hopes of humanity, the Organization was revealed to be unable to maintain peace or could do so only at the expense of law and justice.

Nor would it be the purpose of the Organization to compel a Member to remain in the Organization if its rights and obligations as such were changed by Charter amendment in which it has not concurred and which it finds itself unable to accept, or if an amendment duly accepted by the necessary majority in the Assembly or in a general conference fails to secure the ratification necessary to bring such amendment into effect.

It is for these considerations that the Committee has decided to abstain from recommending insertion in the Charter of a formal clause specifically forbidding or permitting withdrawal.

By withdrawing from membership in the United Nations Organization, a state would cease to be a party to the Charter and to the Statute which forms a part of it. In other words, withdrawal from the Organization would be tantamount to denunciation of both the Charter and the Statute. The possibility of denouncing the whole of the Charter does not necessarily include a possibility of denouncing a part of it, however, and doubtless a state Member cannot denounce the Statute without withdrawing from the Organization. The withdrawing state might be permitted again to "become," or possibly permitted to continue, a party to the Statute, but this would be subject to the conditions provided for in paragraph 2 of Article 93 of the Charter. A state expelled from the Organization, under Article 6 of the Charter, would of course cease to be a party to the Statute. It is not so clear that a state which, though not a party to the Charter, is a party to the Statute has the privilege of denouncing the Statute; of course that privilege could expressly be given to it at the time the conditions are fixed upon which it becomes a party.

Perhaps the whole question is of little importance, in view of the fact that the new Statute, like the old, imposes such slight obligations on the states which are parties to it.

#### PLANS FOR THE INAUGURATION OF THE NEW COURT

It is encouraging that within four months after the close of the San Francisco Conference the new Statute was brought into force. On October 24, 1945, ratifications of the Charter had been deposited by twenty-nine of the signatories; other ratifications have since been deposited, and on December 27, 1945, the Charter was in force for all of the 51 signatories.

It was contemplated at San Francisco that the members of the United Nations Organization should proceed promptly to the organization of the International Court of Justice, and to this end the Interim Arrangements signed on June 26 provided, in paragraph 4 (e), that the Preparatory Commission should "issue invitations for the nominations of candidates for the International Court of Justice in accordance with the provisions of the Statute." Contained in a contemporaneous instrument signed by all the signatories to the Charter, this had the effect of investing in the Preparatory Commission, for the purposes of the first election of judges, the duty imposed on the Secretary-General of the United Nations by Article 5 of the Statute.<sup>57</sup> It was also provided that "the functions and powers of the Commission, when the Commission is not in session, shall be exercised by an Executive Committee."

On September 7, 1945, the Executive Committee meeting in London directed the Executive Secretary of the Preparatory Commission, Mr. Gladwyn Jebb, to "take immediate steps for the issuing of the invitations" referred to in Article 5 of the Statute, and to "take all necessary action thereafter required under Article 7 of the Statute."<sup>58</sup> By a communication addressed to the Ministers of Foreign Affairs of all the United Nations on September 12, 1945, the Executive Secretary sought to ascertain the composition of the national groups, suggested the necessary appointments to complete such groups, and enclosed the invitations to make nominations to be transmitted to the members of the groups; it was also stated that the three-months' period referred to in Article 5 (1) of the Statute was taken to run from September 15, 1945.<sup>59</sup> The invitations stated that the nominations should be communicated to the Executive Secretary by December 15, but the date was later extended to January 10, 1946. The practice of the League of Nations will doubtless be continued, however, so as to include in the list prescribed by Article 7 of the Statute the names of candidates nominated after the expiration of the "given time" referred to in Article 5.

It has been contemplated for some time that the election of the judges would take place during the meeting of the first General Assembly. A first part of that meeting was originally scheduled for December, 1944, but it proved to be impossible for the General Assembly to convene before January, 1946. In some quarters a desire obtains for longer interval between the time when the nominations are made and the time when the election is held to permit more careful consideration of candidates' qualifications. In any event the prospect warrants an anticipation that an election will be held in time to enable the new Court to meet before the summer of 1946.

When the successful candidates are notified of their election and asked to

<sup>57</sup> A disposition to question this conclusion was manifested in certain quarters in London.

<sup>58</sup> The Executive Committee later recommended to the Preparatory Commission that this action be approved, and approval was voted by the latter body.

<sup>59</sup> Telegraphic summaries of the communications were also despatched on September 12.

accept, it will be necessary for them to know what salaries will be paid to them. Hence the General Assembly must have taken a decision on the salaries, allowances and compensation referred to in Article 32 of the Statute. To this end, acting on a proposal by the Executive Committee, the Preparatory Commission has recommended that the "real value" of the salaries of the judges should be "not less than that of those of the judges of the Permanent Court of International Justice during the period 1936-1939." In that period the judges were paid annual salaries of 45,000 florins.

In anticipation of the organization of the new Court, some steps have already been taken to integrate its position in the international organization of the future. The Constitution of the Food and Agriculture Organization of the United Nations, opened to signature at Quebec on October 16, 1945, provides (Article 17) for the reference of disputes as to the interpretation of the Constitution and of any international convention adopted under it "to an appropriate international court or arbitral tribunal in the manner prescribed by rules to be adopted by the Conference." On November 1, 1945, the Conference at Quebec formulated rules providing that the conventions adopted should bind the states to refer any question or dispute concerning them to the International Court of Justice or an arbitral tribunal, and envisaging the normal reference of questions or disputes concerning the interpretation of the Constitution to the Court for advisory opinion and the normal reference of questions or disputes concerning conventions to the Court for determination.

The Constitution of the Educational, Scientific, and Cultural Organization of the United Nations, opened to signature at London on November 16, 1945, provides (Article 14) that any question or dispute concerning its interpretation "shall be referred for determination to the International Court of Justice or to an arbitral tribunal as the General Conference may determine under its rules of procedure."<sup>60</sup>

#### PLANS FOR THE LIQUIDATION OF THE PERMANENT COURT

Advancement of the plans for the inauguration of the new Court emphasizes the necessity of providing for the termination of the Permanent Court. Since the Statute of the latter has not been abrogated it continues in force. Indeed, since October 24, 1945, both the Statute of the Permanent Court and the Statute of the new Court are in force. Though it is obvious that it cannot continue to function, the Permanent Court continues to exist; on paper the International Court of Justice also exists. This situation was foreseen by Sub-committee A of Committee IV/1 at San Francisco, which in its report of May 22 stated:

The creation, for the purposes of the new Organization and as between the members of the United Nations, of a new court will not of itself in

<sup>60</sup> 13 *Department of State Bulletin*, No. 334 (Nov. 18, 1945), p. 806.

any way affect the old Court, nor put an end to the existence of the latter. Since, however, it is impossible to contemplate the existence of two World Courts, each with their seat at The Hague, etc., it is clear that at the earliest possible moment steps will have to be taken to bring the old Court to an end, and make adequate provisions for pensioning its judges and officials in so far as these are not elected or transferred to the new court. Provision will also have to be made for continuing to pay the pensions already accrued to former judges and officials of the old Court. It would not be possible in this report to go into all the details of this matter or to suggest the means of dealing with it. But it is one which will require to be dealt with by whatever means are considered to be suitable, e.g., by the United Nations entering into negotiations with the appropriate bodies for this purpose.

Plans are under way for an early meeting of the Assembly of the League of Nations to consider this situation, and exploratory investigations have been undertaken by the League of Nations Supervisory Commission.<sup>61</sup> It is contemplated that the United Nations will acquire all of the properties of the League of Nations, and some of the properties used by the Court may be included. Also under contemplation is some formal action to terminate the Permanent Court's Statute. Acting on the recommendation of the Executive Committee, the Preparatory Commission adopted a resolution along the following lines:

*The Preparatory Commission of the United Nations,*

*Having been informed* by certain of its members, which are also members of the League of Nations, that it is their intention to move at the forthcoming session of the Assembly of the League of Nations a resolution for the purpose of effecting the dissolution of the Permanent Court of International Justice;

*Having been informed* of the intention of the Powers concerned to require, under the terms of the peace treaties made with them or in some other appropriate form, the assent of those states parties to the Protocol of Signature of the Statute of the Permanent Court, which have been or still are at war with certain of the Members of the United Nations, to any measures taken to bring the Permanent Court to an end; and

*Recording* by the present resolution the assent to the dissolution of the Court of those members of the Preparatory Commission, which are parties to the Protocol of Signature, whether members of the League of Nations or not;

*Declares* that it would welcome the taking by the League of Nations of appropriate steps for the purpose of dissolving the Permanent Court. The resolution of the Assembly of the League of Nations is contemplated along the following lines:

*The Assembly of the League of Nations,*

*Considering* that by Article 92 of the Charter of the United Nations provision is made for an International Court of Justice which shall be the principal judicial organ of the United Nations and shall be open

<sup>61</sup> League of Nations Document C.103.M.103.1945.

to states not Members of the United Nations on terms to be determined by the United Nations;

*Considering* that the establishment of this Court and the impending dissolution of the League of Nations render it desirable that measures for the formal dissolution of the Permanent Court of International Justice be taken in as simple and expeditious a manner as is possible;

*Considering* that by a resolution of . . . . . the Preparatory Commission of the United Nations has declared that it would welcome the taking of appropriate steps by the League of Nations for the purpose of dissolving the Permanent Court, and that the above mentioned resolution of the Preparatory Commission is stated to record the assent to the dissolution of the Permanent Court of all the Members of the United Nations which are parties to the Protocol of Signature of the Statute of the Permanent Court, whether members of the League of Nations or not; and, further,

*Considering* that the Assembly has been informed that, under the terms of the peace treaties to be made with them or in some other appropriate form, those states parties to the Protocol of Signature but not members of the League, which have been or still are at war with certain of the Members of the United Nations, have been or will be required to assent to any measures taken to bring the Permanent Court to an end;

*Resolves* that the Permanent Court of International Justice shall be deemed to be dissolved and shall cease to exist on . . . . ., without prejudice to such subsequent measures as may be necessary for the complete liquidation of its affairs.

The adoption of the proposed resolution by the Assembly of the League of Nations would serve, for practical purposes at any rate, to terminate the old Statute; and doubtless parties to the Statute which are no longer Members of the League of Nations may in some way lend their concurrence in this result.

## APPENDIX

### STATES' POSITIONS WITH REFERENCE TO THE COURT STATUTES

#### I. Parties to the Statutes of 1920 and 1945<sup>1</sup>

Argentine Republic	Denmark
Australia	Dominican Republic
Belgium	El Salvador
Bolivia	Ethiopia
Brazil	France
Canada	Greece
Chile	Haiti
China	India
Colombia	Iran
Cuba	Luxembourg
Czechoslovakia	Netherlands

<sup>1</sup> In the League of Nations *Official Journal*, Special Supplement No. 193, published in 1944, neither the Argentine Republic nor Nicaragua is listed as a party to the Statute of 1920, however.

New Zealand	Poland
Nicaragua	South Africa
Norway	United Kingdom
Panama	Uruguay
Paraguay	Venezuela
Peru	Yugoslavia

34 States

II. Parties to the 1945 Statute only <sup>2</sup>

Byelorussian Soviet Socialist Republic	*Liberia
*Costa Rica	Mexico
Ecuador	Philippine Commonwealth
*Egypt	Saudi Arabia
*Guatemala	Syria
Honduras	*Turkey
*Iraq	Ukrainian Soviet Socialist Republic
Lebanon	Union of Soviet Socialist Republics
	*United States of America

17 States

III. Parties to the 1920 Statute only <sup>3</sup>

Albania	Japan
Austria	Portugal
Bulgaria	Rumania
Finland	Siam
Germany	Spain
Hungary	Sweden
Ireland	Switzerland
Italy	

15 States

## IV. Parties to Neither Statute

Afghanistan	Nepal
Iceland	San Marino
Liechtenstein	Yemen
Monaco	

7 States

<sup>2</sup> The asterisks indicate that no ratification of the 1920 Statute was deposited, though the State became a signatory to the 1920 Protocol.

<sup>3</sup> Estonia, Latvia and Lithuania also became parties to the 1920 Statute.

## RESOURCES OF THE CONTINENTAL SHELF

By EDWIN BORCHARD

*Of the Board of Editors*

On September 28, 1945, the President of the United States issued two important proclamations and executive orders relating to the national exploitation of the resources of the continental shelf and the national regulation of contiguous fisheries.<sup>1</sup> The claims therein made on behalf of the United States have important international repercussions. They also have an impact on the Constitutional question as to who, as between state and nation, controls these resources within and outside the three-mile limit.

It appears that the stimulus for the proclamations and executive orders came from the Department of the Interior. They are based upon the avowed economic interest of the United States in discovering new sources of petroleum and other minerals located on or under the continental shelf, but outside the three-mile limit. Secretary Ickes, noting the dwindling of our oil resources, believes that the continental shelf may replenish those reserves. In an interview he is quoted as saying: "The continental shelf may well be the site of our last totally unexplored great domestic source of petroleum."<sup>1a</sup> While such resources have not yet been discovered, geologists inform us that they are likely to be, and that science has progressed to a point making their exploitation already possible. To insure their conservation and prudent utilization, the proclamation asserts that jurisdiction in the riparian state must be recognized, since the effectiveness of measures to conserve the resources is contingent upon coöperation and protection from the shore. It is asserted that since the continental shelf may be regarded as an extension of the land, since the resources frequently form the seaward extension of a pool or deposit lying within the territory, and since self-protection compels the coastal nation to keep watch over activities occurring off its shores in exploitation of these resources, the resources themselves on and under the continental shelf up to a water depth of 600 feet, are claimed as within the jurisdiction and control of the United States under the authority of the Secretary of the Interior, pending the enactment of legislation in the matter by Congress. Where that shelf extends to another state or is shared by an adjacent state, the boundary shall be determined by the United States and the state concerned. There is no intention to interfere with the rights of navigation in the waters over the shelf.

<sup>1</sup> Department of State, *Bulletin*, Sept. 30, 1945, pp. 484-487; reprinted below, Supplement, p. 45. The President of Mexico issued a proclamation somewhat similar in effect on Oct. 31, 1945: *The New York Times*, October 31, 1945, and *El Tiempo* (Monterrey), November 9, 1945, p. 4.

<sup>1a</sup> *The New York Times*, November 4, 1945.

The executive order expressly reserves the Constitutional question, to be settled by legislation or judicial decree, as to who, between state and nation, owns or controls the subsoil and sea bed of the continental shelf within or outside the three-mile limit. As will be apparent, the Constitutional question is of current importance, since the Attorney General began, in June, 1945, a suit against the Pacific Western Oil Corporation holding a lease from the State of California to exploit the continental shelf for petroleum within the three-mile limit.<sup>2</sup> It is his contention that this lease or license is grantable only by the Federal Government. That suit has been discontinued,<sup>3</sup> and the Attorney General is now filing a petition in the United States Supreme Court<sup>4</sup> for permission to file an original suit against the State of California and a group of defendants. In the meantime, the federal House of Representatives, on September 20, 1945,<sup>5</sup> passed a resolution renouncing the "right, title, interest, claim or demand" of the Federal Government in the soil under the marginal or navigable waters, inland or boundary, called tidelands or submerged lands,<sup>6</sup> in accordance with the decisions of numerous State and federal courts.<sup>7</sup>

On the same day, September 28, 1945, the President by proclamation and executive order gave a somewhat radical solution to the much-agitated question of the power of the Federal Government to control the taking of the Bristol Bay salmon on the high seas by any other nationals or subject to any other regulations than those of the United States. The theory justifying assertion of federal control appears to be the alleged inadequacy of present arrangements for the protection and perpetuation of the fishing resources contiguous to American coasts—the Japanese are said to have established their fishing apparatus on the high seas and depleted the run of salmon back to Bristol Bay. The importance of conserving the industry and bringing about international coöperation in its preservation, the importance of the industry as a source of livelihood and food to the coastal population, the

<sup>2</sup> Same, May 30, 1945, and June 26, 1945.

<sup>3</sup> Same, June 26, 1945; 14 *U. S. Law Week* (Oct. 23, 1945), p. 2248.

<sup>4</sup> Above, note 3.

<sup>5</sup> H. J. Res. 225, 79th Cong., 1st Sess. This was introduced in the Senate September 24th and referred to the Senate Judiciary Committee for consideration. See also S. J. Res. 48, 79th Cong., 1st Sess. It is designed to "quiet the titles of the respective States . . . to lands beneath tidewaters and . . . navigable waters within the boundaries of such States . . ."

<sup>6</sup> The word "tidelands" is used, ambiguously, in two senses: (1) to describe the marginal or territorial sea extending for three marine miles or to the state boundary from low-water mark; (2) to describe the lands covered and uncovered by the ebb and flow of the tides. Beside the tidelands and submerged lands out to the three-mile limit or the state boundary in coastal states, the lands renounced include all lands beneath inland navigable lakes and rivers and the beds of the Great Lakes to the International Boundary. See brief, "The Facts About the Legislation Quieting State Titles to Lands Beneath Tidal and Navigable Waters," a statement prepared by Robert W. Kenny, Attorney General of California, and William W. Clary, Special Assistant Attorney General of California, 42 pp., at p. 4.

<sup>7</sup> Below, pp. 64-66.



progressive intensification of fishing methods which threaten depletion of the fisheries, the special rights and equities of the coastal state which in this case has established a legitimate interest in the industry, and the fact that American nationals alone developed and maintained the industry—all these considerations, according to the proclamation, justify the United States in preserving the industry by establishing conservation zones and thus regulating the exercise of fishing. If another country participated in the development of the industry now or hereafter, its power to regulate jointly with the United States would be acknowledged. And if foreign countries developed a fishery along their shores similar conservation zones on their part would be recognized. Apparently the fishing claim is not limited by the continental shelf or by an off-shore depth of 600 feet or 100 fathoms. Whereas the fishery claim outside the three-mile limit had been confined to bays and other controllable bodies of water (the claim to the Bering Sea fisheries because the seals came to the Pribilof Islands to spawn having been defeated), the present claim marks an innovation in international law. It remains to be seen whether the assertion of American jurisdiction will receive the acquiescence of foreign powers and what will be the subsequent fate of the assertion.

The extensive claims of the United States just announced give rise to certain apprehensions. Since they seek a mining and fishing monopoly in places heretofore regarded as *res nullius*, they evidence not a growing internationalism but a well-defined nationalism. Since the United States claims these rights for itself, it cannot object to similar or possibly greater encroachment on the high seas by other nations. Again, while conservation of natural resources is a legitimate ground for protection, the line between national jurisdiction and international regulation by treaty had heretofore been drawn closer inshore. The division between conservation and unwanted competition is not always easy to draw. While the mining claim professes to leave untouched the historic right of navigation, it is not certain that mining can be so conducted.<sup>8</sup> It is observed that the argument used without effect in the fur-seal arbitration—but not supported by the facts—and rejected by the United States in the Russian-Commander Island seal arbitration,<sup>9</sup> is now revived with greater support in the facts in the President's fisheries proclamation.<sup>10</sup>

<sup>8</sup> The State Department a few years ago refused to license an American citizen desiring to build a platform or artificial island in the Gulf of Mexico, but suggested that he could proceed at his own risk if foreign countries did not object. Manuscript letter of Department of State, September 10, 1918, Hackworth, *Digest of International Law*, Vol. II, p. 679. The present proclamation seems to modify this view as to resources of the soil and subsoil on the continental shelf.

<sup>9</sup> "Whatever may be justly regarded as the produce of human art, industry and self-denial must be assigned to those who make these exertions as their merited reward." *Fur Seal Arbitration*, IX, p. 50; L. Larry Leonard, *International Regulation of Fisheries*, Washington, 1944, p. 70.

<sup>10</sup> The proclamation on fisheries of September 28, 1945, reads: "Where such activities have been or shall hereafter be developed and maintained by its nationals alone, the United States

## II

In view of the agitation in Congress and in the courts on the Constitutional question as to Federal or State ownership of the subsoil petroleum resources, it may be of interest to discuss this question in some detail. All the claims involve a preliminary discussion of the international law governing the subject as a foundation for the respective Constitutional claims of State or nation.<sup>11</sup>

As is well known, there is no agreed rule of international law as to the width of the marginal sea beyond tide waters or low-water mark from the coast.<sup>12</sup> The marginal sea itself, whatever its width, is a compromise between the ancient expansive claims of certain countries to a wide control of portions of the sea and the more modern demands for a free sea. Bynkershoek in 1702 and Galiani in 1782 proposed and lent support to the principle that the criterion of jurisdiction was the extent of physical control from the land, which in Bynkershoek's time was measured by the shot of a cannon from the shore. This later became arbitrarily identified in England and some other countries with a marine league, at which it became ostensibly fixed in spite of the increase in the range of cannon.

The justification for a marginal sea and sovereignty over it was, first, the necessity for protecting the adjacent land; second, the necessity for exercising some control over ships passing through; and third, the economic needs of the riparian population. The prestige of Great Britain gave considerable currency to the one league or three-mile rule, as it was called, and while this rule received support for certain purposes from the United States when this country became an independent nation, it never was accepted in northern or southern Europe, or for that matter, in Russia. As late as 1930 at the Hague Conference on Codification, one of many efforts public and private to achieve unanimity on this highly controversial subject, thirteen states, including the Scandinavian and Mediterranean, denied the international

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regards it as proper to establish explicitly bounded conservation zones in which fishing activities shall be subject to the regulation and control of the United States." Department of State, *Bulletin*, September 30, 1945, p. 486. Lord Russell in the Fur-Seal Arbitration contrasted the claim over seals with the claim over sedentary fish. Leonard, p. 79. Hitherto, national claims for the protection of fisheries beyond the three-miles limit seem to have met with opposition from foreign states. Leonard, p. 171.

<sup>11</sup> Leonard, pp. 146 and ff.

<sup>12</sup> Any detailed study of the claims of various national states and the extent of recognition of those claims by other states is unnecessary to this article. A survey of the subject will be found in Henry S. Fraser, "The Extent and Delimitation of Territorial Waters," in 11 *Cornell L. Quar.* (1926) 455; H. G. Crocker, *Extent of the Marginal Sea*, Washington, 1919, p. 633; the comment to Article 2 of the Draft Convention prepared under the auspices of the Harvard Law School in anticipation of the Codification Conference of 1930 at which agreement proved impossible to achieve; Leonard, pp. 166 and ff.; T. W. Fulton, *The Sovereignty of the Sea*, New York, 1911, p. 376; Stefan A. Riesenfeld, *Protection of Coastal Fisheries under International Law*, Washington, 1942, in which the practice of each country is outlined. Fulton, p. 697, discusses the inadequacy of the three-mile limit.

validity of the three-mile rule and insisted either on their four, six, or twelve-mile rule, respectively, or on a rule which would vary for different purposes, namely, control of fisheries, innocent passage, revenue protection, and neutrality,<sup>13</sup> or on a zone of jurisdiction contiguous to the territorial marginal sea.<sup>14</sup> Certain it is that the nations were unable to agree on any rule and that it is safe to say that international law prescribes no established width of the marginal belt.

The most that can be said is that three miles is a minimum. Professor Bingham insists<sup>15</sup> that no decision of any tribunal, not even the Bering Sea Arbitral Award,<sup>16</sup> has established the three-mile rule, outmoded, he concludes, as a rule of international law. In ten of the sixteen so-called liquor treaties concluded by the United States between 1924 and 1930 there was included a clause reading: "The High contracting parties respectively retain their rights and claims without prejudice by reason of this agreement with respect to the extent of their territorial jurisdiction."<sup>17</sup>

Even Great Britain, supposed to be, by reason of its economic interest in foreign fishing through the trawler trade, the firmest adherent of the three-mile rule, manages to make numerous exceptions to the rule in English waters. These are concerned mainly with the exclusion of foreign fishing in the broad bays around the British Isles<sup>18</sup> and in the claim to control either as King's property or occupied territory the natural resources in the bed under the sea both within and outside the three-mile limit.

As a matter of common law, as well as under the more restricted régime of the modern rule, Great Britain, says Sir Cecil Hurst, lays claim to the coal mines under the sea of England, to the pearl fisheries around Ceylon, to the oyster beds around Ireland (when Ireland was an integral part of Great Britain), and other natural resources of the submarine soil. We may quote Sir Cecil on both theory and practice in these matters.<sup>19</sup>

<sup>13</sup> See the discussion approving varying zones for different purposes, "Protective Jurisdiction over Marginal Waters," by Philip Marshall Brown and others, 17 *Proceedings of the American Society of International Law* (1923), p. 15. See also E. Borchard, in 6 same (1912), p. 141; (1923) 23 *Columbia L. Rev.* 472; also, 11 *Cornell L. Quar.* 455 at 461; (1936) 21 same 651.

<sup>14</sup> Proposed by Mr. Gidel for the French delegation at the conference of 1930 and still supported by the French. See de Lapradelle as quoted in Riesenfeld, work cited, p. 66. Extended jurisdiction for sanitary, customs, police, or neutrality control, is exercised by various states, by statute or treaty.

<sup>15</sup> *Report on the International Law of Pacific Coastal Fisheries* (1938).

<sup>16</sup> *Fur Seal Arbitration*, Vol. I, p. 54; Leonard, p. 80.

<sup>17</sup> Countries which insisted on the inclusion of this clause were Belgium, Chile, Denmark, France, Greece, Italy, Norway, Poland, Spain and Sweden. The three-mile rule was included in the treaties with Cuba, Germany, Great Britain, Japan, the Netherlands and Panama.

<sup>18</sup> See the account of the Moray Firth controversy with Norway in Bingham, work cited, at p. 50. But see Leonard, pp. 48-55.

<sup>19</sup> Sir Cecil Hurst, "Whose is the bed of the sea? Sedentary Fisheries Outside the Three-Mile Limit," *British Yearbook of International Law*, 1923-1924, pp. 34 and ff., at pp. 40-43.

. . . Vattel's statement . . . "Who can doubt that the pearl fisheries of Bahrein and Ceylon may lawfully become property?" ceases to cause any difficulty to even the stoutest upholders of the principle that the limits of the territorial belt are not more than three miles if it is realised that the exclusive right to the pearls to be obtained from the banks flowed from the ownership of the bed of the sea where the banks were situated, and not from any claim to maritime jurisdiction over the waters. Wherever it can be shown that particular oyster beds, pearl banks, chank fisheries, sponge fisheries or whatever may be the particular form of sedentary fishery in question outside the three-mile limit have always been kept in occupation by the Sovereign of the adjacent land, ownership of the soil of the bed of the sea where the fishery was situated may be presumed, and the exclusive right to the produce to be obtained from these fisheries may be based on their being a produce of the soil. Ownership of the soil by the Sovereign of the country under such circumstances must carry with it the right to legislate for the soil so owned and for the protection of the wealth to be derived from it, and no doubt need be felt as to the binding force of the various enactments which have been issued for the protection of these sedentary fisheries outside the three-mile limit.

. . .

The above are instances where the State interested formed part of the British Empire. The same principle must of necessity apply also to sedentary fisheries on banks claimed by foreign Governments. The Bey of Tunis has, for instance, claimed the exclusive right to the sponges on a bank outside the three-mile limit off the coast of Tunis by the continuous and unquestioned enjoyment of the fructus of these banks. Such enjoyment would constitute a title to the bank which foreign States would no doubt recognise and would oblige their nationals to recognise. Similarly, Mexico is said to have legislated for regulating pearl fisheries off the Mexican coast though outside the three-mile limit.

Jessup in his work on territorial waters <sup>20</sup> remarks:

Vattel . . . asserted that the resources near the shore may be taken advantage of by the littoral state and subjected to its ownership, apparently without regard to the limit of cannon range. . . . Littoral sovereigns have claimed the beds from time immemorial as their exclusive property.

Finally, we may adduce the testimony of the authoritative Fulton: <sup>21</sup>

. . . Cases in point are the pearl-fisheries on the banks in the Gulf of Manar, Ceylon, which extend from six to twenty-one miles from the coast, and are subject to a colonial Act of 1811. . . . These pearl-fisheries are very valuable, and have been treated from time immemorial

<sup>20</sup> P. C. Jessup, *The Law of Territorial Waters and Maritime Jurisdiction*, New York, 1927, p. 14.

<sup>21</sup> Fulton, pp. 697-698. Oppenheim supports on five grounds, notably occupation, the national claim to extraterritorial resources on or under the bed of the contiguous sea, provided there is no impairment of navigation. Oppenheim, *International Law*, 5th ed. by Lauterpacht, London, 1937, Secs. 287, b and c.

by the successive rulers of the island as subjects of property and jurisdiction; and the laws referred to apply also to foreigners. Another case is the pearl-fisheries in Australia. In Western Australia certain Acts are applied far beyond the three-mile limit, though apparently only against British subjects, [The Western Australian Pearl and Bêche-de-mer Fishery (Extra-Territorial) Act, 1889] and a similar Act, of 1888, applied in Queensland to extra-territorial waters west of Torres Strait. The pearl-fisheries of Mexico and Columbia are also subject to regulation beyond the ordinary three-mile limit. Examples of extra-territorial jurisdiction over beds of the common edible oyster are to be found in the British conventions with France in 1839 and 1867, by which the Bay of Granville was reserved to France (see p. 512), and in the last of these conventions (Article ix) a close-time was provided in the English Channel; and likewise in the proceedings concerning the Arklow and Wexford banks, off the Irish coast (see p. 621). Coral-beds in the Mediterranean, off the coasts of Algeria, Sardinia, and Sicily, are in a similar way regulated by Italian and French laws beyond the ordinary three-mile limit.

As is apparent, foreign countries near whose coasts were located natural valuable resources, found no difficulty, whatever their views as to the marginal sea, and met with no foreign objection, in putting to their own use these resources.<sup>22</sup> Writers do not discuss the doubtful question of title to the waters above the soil, where riparian rights are limited only by the well-known qualifications attached to the marginal sea. Here there is both *imperium* and *dominium*. But beyond, a separation of soil and surface was made by custom, practice and authority. The soil and subsoil wealth within reach of the shore was uniformly claimed by the riparian state and where resources were discovered, the rights of ownership exercised. Only when it concerned the great fishing banks far out in the open sea and the supply of free-swimming fish was in danger of depletion by modern fishing methods, did international convention among the interested powers recognize the necessity for joint regulation.<sup>23</sup>

But as to contiguous subsoil minerals under the sea and as to the sedentary resources attached to the bottom of the sea both statute and decision have claimed and foreign countries have recognized the propriety of riparian control, if not ownership.<sup>24</sup> The *Columbia Law Review*, in a study on the

<sup>22</sup> Sir John Fischer Williams and G. Grafton Wilson in their report to the Institute of International Law, 1935, on the exploitation of the resources of the sea, as reprinted in Bingham, p. 62.

<sup>23</sup> North Sea Fisheries Convention of May 6, 1882, Leonard, p. 35; Bering Sea Fur Seal Convention of July 7, 1911, same, p. 55; J. Tomasevich, *International Agreements on Conservation of Marine Resources*, Stanford, 1943, p. 107; *Manchester v. Massachusetts*, 139 U.S. 240 (1891); Letter of Department of State, 1926, League of Nations Document C.196.M.70.1927.V p. 160. See also A. P. Daggett, "The Regulation of Maritime Fisheries by Treaty," this JOURNAL, Vol. 28 (1934), pp. 693, 702. The author also discusses regulation of fisheries by treaty within territorial waters. The various halibut treaties of the North Pacific are discussed by Tomasevich, by Leonard p. 110, and by Daggett p. 715.

<sup>24</sup> See P. C. Jessup, *Exploitation des richesses de la mer*, in *Recueil des Cours de l'Académie de Dr. Int.*, Vol. IV (1929). League of Nations, Pub. C.351(b).M.145(b).1930V.

Advocating an extension of its territorial waters to twelve or fifteen miles (for fishing pur-

subject<sup>24a</sup>, lists judicial and legislative instances which have supported the littoral states' jurisdiction or control of submarine petroleum,<sup>25</sup> gold,<sup>26</sup> and coal<sup>27</sup> and such sedentary fisheries as oysters,<sup>23</sup> pearls,<sup>29</sup> and chanks.<sup>30</sup> Whether this jurisdiction or control be claimed as public property, under the sovereign right over the marginal sea in international law and the common law, or because the continental shelf is a continuation of the littoral state, or as a property right in the controllable soil and subsoil without any claim to surface waters, or that foreign rights in the subsoil beyond the three-mile limit would give rise to trouble, the fact is that the local claim has often been asserted and acquiesced in, especially where a specific resource was in question. Property by prescription would alone have sustained the right to a resource already exploited. Assertion of jurisdiction and acquiescence therein—without entering upon the abstruse question of title—must explain the coastal states' jurisdiction over unexploited resources in the continental shelf.

In this connection it may be interesting to recall the proposal in 1927 of José León Suarez, the well-known Argentine jurist, *rapporteur* of the subcommittee of the Committee of Experts on the topic of exploitation of the resources of the sea—a topic which did not get on the agenda of the 1930 conference—that the marginal sea must vary from place to place, as in the case of bays, and that the only natural limit for the marginal sea is the continental shelf itself. Suarez stated: "There is no stable, permanent and convenient solution except to adopt the rule of the continental shelf with some

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poses) and, we may add, for oil exploration of the submarine soil, the Portuguese Permanent Commission on International Maritime Law states: "Then each state would have its continental shelf included in its own territorial waters and would consequently be able in that area to adopt such rules as it might hold to be most desirable for the preservation of the species." They add, "Riparian states are alone able to exercise active, constant, and efficient economic control over their coastal zone." Bingham, p. 57.

<sup>24a</sup> Comment in 39 *Col. L. Rev.*, pp. 317-326, at 319.

<sup>25</sup> See *Oklahoma v. Texas*, 258 U. S. 574 (1922); *Gulf Refining Co. v. Grace*, 165 La. 979 (1928); *Ernst v. Savidge*, 110 Wash. 81 (1920); *Carr v. Kingstury*, 111 Cal. App. 165 (1931), cert. denied: 284 U. S. 641 (1931).

<sup>26</sup> See *Alaska Gold Recovery Co. v. Northern M. & T. Co.*, 7 Alaska 386 (1926); 31 Statutes 321 (1900), 48 U.S.C.A., Sec. 64 (1930); Senate Bill 3493, 75th Cong., 3rd Sess., introduced by delegate Dimond.

<sup>27</sup> *Attorney General v. Chambers* (1864), 4 de G. M. and G. 205; *Lord Advocate v. Wemyss* (1900), A. C. 48; *Attorney General v. Hammer* (1908), 6 W. R. 304; Hurst, as cited, pp. 49-50; and 21 and 22 Vict. c. 119 (1858).

<sup>28</sup> *Lewis Bluepoint Oyster Co. v. Briggs*, 229 U. S. 82 (1912); *State v. Taylor*, 3 Dutcher 117 (N. J. 1858); *Daniels v. Homer*, 139 N. C. 219 (1905); *McCready v. Virginia*, 94 U. S. 391 (1876); *State v. Van Vlack*, 101 Wash. 503 (1918).

<sup>29</sup> Western Australian Pearl . . . Fishery . . . Act of 1883. Orders in Council, Ceylon Regulation No. 3, 1811, for the protection of H. M. pearl banks.

<sup>30</sup> Orders in Council of Ceylon, Regulation No. 18 (1890). See *Annakumar Pillai v. Muthupayal* (1903), 27 Indian L. Rep. (Madras Series), 551. We might include sponges and other vegetables or minerals. See the Skiriotes case, below, and Leonard, at p. 145.

modifications according to circumstances." He justified his proposal by the necessity of adapting international law to the needs of maritime industries. It is, of course, true that the 1702 rule as to marginal seas and its arbitrary identification with three miles or one marine league antedated by centuries the modern discovery of and accessibility of sedentary resources and modern methods of extracting and utilizing them. In 1702 surface fishing, needed for sustenance, was practically the only marine industry known.<sup>31</sup> Dissatisfaction with the restrictions of the three-mile rule is observable on every hand.<sup>32</sup> When, then, exception is made for the extra-territorial control of natural resources controllable under the principle of protection of the land there seems no reason to question the practice.

Logically, there is no apparent reason why the United States should adhere indefinitely to the three-mile rule.<sup>33</sup> It is believed that it handicaps rather than benefits the United States. It cannot be that the United States is committed permanently to the three-mile limit, for there is no rule of international law on the subject, although it might be said to embody the American doctrine. The only economic motive the United States could have for the three-mile rule would be that American fishermen desire to fish in British waters up to the three-mile line and are unprotected by treaty. This I do not think to be so, although the fishing industry might be consulted. The Newfoundland fisheries and the North Atlantic and Pacific fisheries, the only important ones in which American citizens are engaged in British waters, are regulated by the treaty following the Hague award of 1910 or special treaty. They are not, therefore, controlled by any general rule.

It is suggested that the limit be extended officially by legislation to six miles.<sup>34</sup> Within that limit the United States would enjoy both *imperium* and *dominium*. If the United States wishes to insist upon its legal rights it would exclude foreign fishermen up to six miles out. It would seem that the United States is free to adopt any rule that suits its interests best, and it is doubted whether foreigners could or would raise serious complaint. This does not of course touch American rights existing outside the six-mile limit, nor the special rights claimed for American citizens under the circumstances outlined in the proclamation and executive order under discussion.

In the reply of the United States to the League of Nations questionnaire of 1929, in anticipation of the Hague Codification Conference of 1930, the United States supported the three-mile rule with numerous exceptions.<sup>35</sup>

<sup>31</sup> Riesenfeld, p. 76.

<sup>32</sup> Riesenfeld and Bingham, as cited; Fulton, p. 697. The extension of jurisdiction for the enforcement of Hovering Acts and for purposes of preserving health, the revenue, exercising police jurisdiction, etc., is not here discussed.

<sup>33</sup> Thomas Baty, "The Three Mile Limit," in this JOURNAL, Vol. 22 (1928), p. 503.

<sup>34</sup> Secretary Olney in 1896 expressed a willingness in concurrence with other countries to admit a six-mile marginal sea. Moore, *Digest of International Law*, Vol. I, p. 733; Leonard, p. 167. There is much academic encouragement of the suggestion. Leonard, p. 166.

<sup>35</sup> League of Nations document C.74M.39.(1929).V, pp. 129-130.

From the time when Jefferson in 1793 provisionally fixed the limit of marginal sea for the enforcement of neutrality at three miles, the United States has preserved its liberty of action to make larger claims whenever it saw fit.<sup>36</sup> Mr. Gordon Ireland in his valuable article in the *Louisiana Law Review*<sup>37</sup> states that the United States in 1939 had under consideration a proposal to suggest a general twelve-mile limit for the marginal sea.

In the important case of *Croft v. Dunpoy*,<sup>38</sup> a Canadian vessel was seized eleven and a half miles off the coast of Nova Scotia and taken into port. Under the statute, claimed by the respondent to be illegal because it authorized seizures outside territorial waters up to twelve miles from the coast, the Privy Council, sustaining the seizure, said that "it has long been recognized that for certain purposes, notably those of police, revenue, public health and fisheries, a state may enact laws affecting the seas surrounding its coasts to a distance seaward which exceeds the ordinary limits of its territory."

It becomes of interest to examine the theories on which the extension of littoral jurisdiction over sedentary resources on or under the continental shelf beyond the marginal sea can be justified. The pearl fisheries of Bahrein and Ceylon which extend out many miles beyond the three-mile limit, have been justified as an extension of the land to the shallow banks, on long historical usage (prescription), on physical occupation, and on the fact that Palk's Bay, if not the Gulf of Manaar, which divides India from Ceylon, constitute a part of the British dominions.

Acquiring property or jurisdiction in the resources of the continental shelf has been analogized to acquiring property in unoccupied islands or swimming fish or any other *res nullius*, by assertion of jurisdiction and acquiescence therein or occupation. This is how Holland is acquiring the filled land in what was formerly the Zuyder Zee, and it justifies the claim of Louisiana to the resources of the contiguous continental shelf.<sup>39</sup> Difficulty could only arise if the claim of title or jurisdiction were opposed by a foreign physical possession unauthorized by the coastal state.

In an opinion which the writer ventured to give in 1939, he sustained the power of Great Britain and Venezuela to extend their jurisdiction by treaty to explore for oil in the Gulf of Paria lying between Venezuela and Trinidad, located mainly on a shallow bank 70 miles long by 35 miles wide with openings for navigation at either end extending to ten and six miles respectively.<sup>40</sup> The claim of the littoral state may be justified on (1) the theory of sover-

<sup>36</sup> Riesenfeld, p. 251. The *Alabama* and the *Kecrsarge* without United States objection were escorted by a French vessel to a distance of seven miles in the English Channel before they began their engagement.

<sup>37</sup> Gordon Ireland, "Marginal Seas Around the States," in 2 *Louisiana L. Rev.* (1939), pp. 252, 436, at p. 265, note 73.

<sup>38</sup> (1933) A. C. 156.

<sup>39</sup> (1940) 19 *Nebraska L. Bull.* 467.

<sup>40</sup> It has been announced that the two countries have reached an agreement on the subject. See Message of the President of Venezuela to the Congress, April 19, 1941, and simultaneous statement published the same day in Caracas and London.



eignty over the shallow soil and subsoil as an extension of the land; (2) the theory of *terra nullius*, supported by Oppenheim and Fenn, implying the acquisition of property by effective occupation (leaving open the question how that is to be effected and leaving foreign fishing and navigation rights unimpaired); and (3) the theory that all or part of the Gulf of Paria is so shallow that the two states are justified in claiming it for themselves as national waters including the subsoil underneath, subject to the surface rights of third persons. To these may be added the grounds advanced in the President's proclamation—that the resources frequently form part of a pool or deposit lying within the territory and that protection of the resources and self-protection require the coöperation and policing of the authorities on the shore. Any or all these claims would involve the method by which sovereignty or property is often acquired in international law; namely, an assertion of jurisdiction and acquiescence therein, as in the case of the wide bays which by this method became territorial.

More difficult to defend is the national claim to high sea fisheries at unlimited distances from the shore depending upon the homing habits of the fish in question.<sup>41</sup> Were it not for the Fur Seal arbitration, in which a closely analogous claim to national jurisdiction was defeated, one would be better prepared to support the legal validity of the American claim. Grounds for distinguishing it from the claim of jurisdiction over the fur seals lies in the fact that nearly \$100,000,000 has been invested in the industry, that sea canneries furnish unfair competition to shore canneries, that the Japanese would share in an industry they have done nothing to develop, that the Japanese Government allegedly recognized the equity of the American claim by refusing licenses to its fishermen to fish for salmon, that failure of shore control—the industry seems to oppose treaty control—invites improper methods of foreign fishing in contrast to the statutory regulation of fishing by American nationals, and that intensive methods would deplete the fishery and kill the industry. Not least weighty of the practical arguments is that attempted national control of the sea fishery impaired the rights of British, Russian, and Japanese, and possibly other fishermen—not to speak of American—whereas the only foreigners who appear to have displayed any interest in the Alaskan salmon fishing are the Japanese, the nationals of a decisively defeated nation. The arguments for international regulation of the fishery seem to have been neglected.<sup>42</sup>

<sup>41</sup> The history and development of the Alaskan salmon fishery, which doubtless gave rise to the President's claim, is given in Leonard, pp. 121-140, 153-163.

<sup>42</sup> Leonard summarizes as follows (pp. 175-176) his objection to a national or treaty regulation of high sea fisheries:

This conclusion is based upon the following: (1) *An extension of territorial waters or the establishment of a principle of protective jurisdiction for fisheries* (a) would grant a monopoly to the riparian states but would not require the adoption of conservation measures by these states; (b) would not protect species of sea products which migrate on the high seas; (c) would require bilateral or multilateral supplementary conservation agreements

## III

Assuming that it has been established that as a matter of international law the littoral state may properly claim in ownership or jurisdiction the natural resources of the subsoil in the continental shelf beyond the marginal zone, whatever its width, and even assuming that the United States would not exercise its privilege of claiming more than three miles of marginal sea, the question still remains whether in American Constitutional law the state or the nation can legally make this assertion. The President leaves open this question.

Practice and practical considerations must be the determining guides. As the *Columbia Law Review* states,<sup>43</sup> it is now settled that the marginal sea is an integral part of the neighboring State and its counties<sup>44</sup> like any other territory, subject to the right of innocent passage and the rights over commerce and navigation exercised or reserved by federal and foreign ships. The Supreme Court has said that "within what are generally recognized as the territorial limits of the state by the law of nations, a State may define its boundaries on the sea and the boundary of its counties."<sup>45</sup> That the Navy has to protect both the shore and the marginal sea is irrelevant.

An attempt has recently been made to reclaim the marginal sea for the

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for fisheries which cannot be considered within the exclusive jurisdiction of one state; (d) would require economic adjustments within states where strong fishery groups depend upon the catch off foreign shores (this considerably weakens the possibility of securing agreements for the extension of jurisdiction); (e) would result, unless the limits were unusually wide, or varied from coast to coast, in fisheries off some coasts being beyond the protection of riparian states. (2) *Bilateral and multilateral agreements* (a) would protect only the specific fisheries for which these arrangements were concluded; (b) would leave non-signatory states free to fish unregulated, thereby nullifying the conservation arrangements; (c) are usually concluded only after fisheries have become depleted or controversy has arisen.

He proposes a project for an international organization and regulation; at p. 177.

<sup>43</sup> (1939) 39 *Columbia L. Rev.* 317 at 320.

<sup>44</sup> *The Ann*, 1 Fed. Cases 926 (1812); *Cunard S. S. Co. v. Mellon*, 262 U. S. 100 (1923); *Mohler v. Transportation Co.*, 25 N. Y. 352 (1866); *Lipscomb v. Kaloroukas*, 101 Fla. 1130 (1931); *Queen v. Cunningham* (1859), Bell's Criminal Cases 72. Draft Convention, article 1, League of Nations document C.351(b).M.145(b).1930.V.

<sup>45</sup> *Manchester v. Massachusetts*, 139 U. S. 240, 264 (1891). Cases which sustain the title of the state to the submerged land under public waters whether navigable rivers, inland seas, tidelands or marginal seas are *Martin v. Lessee of Waldell*, 16 Pet. 566, 416 (1842); *Shively v. Bowlby*, 152 U. S. 1, 14 (1893); *Pollard v. Hagar*, 3 How. 212, 230 (1845); *McCready v. Virginia*, 94 U. S. 391, 394 (1876); *Borax Consolidated Ltd. v. City of Los Angeles*, 296 U. S. 10, 16 (1935); *Weber v. Harbor Commissioners*, 18 Wall. 57 (1873); *Port of Seattle v. Oregon and W. R. R. Co.*, 255 U. S. 56, 63 (1921); *Louisiana v. Mississippi*, 202 U. S. 1, 52 (1906) (Maritime belt . . . under the sway of the riparian state); *Humboldt Lumber Manufacturers Assoc. v. Christopherson*, 73 Fed. 239, 244 (1896); *United States v. Ashton*, 170 Fed. 509, 513 (1909); *Dunham v. Lamphere*, 2 Gray 268 (Mass. 1855); *United States v. Bevans*, 3 Wheat. 336 (1818); *Philadelphia Co. v. Stimson*, 223 U. S. 605, 632 (1912); *Greenleaf . . . Lumber Co. v. Garrison*, 237 U. S. 251, 262 (1915); *United States v. Newark Meadows Imp. Co.*, 173 Fed. 426, 429 (1909) ("One marine league from low-water mark . . . the region annexed is as much a portion of its territory as any other part of its territory").

Federal Government. In the 75th Congress, Senator Nye introduced a joint resolution <sup>46</sup> providing that the Federal Government claimed the marginal sea and all its resources for the United States and authorizing the Attorney General to bring proceedings to expel its existing occupants under state law as trespassers. While the joint resolution passed the Senate it did not pass the House. House hearings were held upon the Nye Resolution in 1938 and upon the subsequent resolution of Representative Hobbs,<sup>47</sup> which made an exception for all existing vested rights. These vested interests had already grown to such an extent that the opposition to the passage of either the Nye or Hobbs Resolution (and thirteen others) was so great as to defeat the resolutions and strengthen the accepted view that the marginal sea belongs to the states.

Since 1940 the House has alone taken action to renounce the federal claim. Senate action has been announced as imminent. Mention has been made of the Attorney General's effort in the Supreme Court to sustain the federal claim.<sup>48</sup>

It is sometimes asserted that there are only a few decisions in which the facts involved a determination of the proprietorship of the coastal zone between low water mark and the three-mile limit.<sup>49</sup> It is true that only a few cases deal with the coastal zone and that most of the cases deal with marginal waters bordering rivers or inland seas.<sup>50</sup> But this is far from admitting that

<sup>46</sup> S. J. Res. 208, 75th Cong., 3rd Sess., Hearings of House Judiciary Committee on S. J. Res. 208, Feb. 23, 1938, "Titles to Submerged Oil Lands," Serial 16, p. 10 et seq.

<sup>47</sup> Submerged Oil Lands, Hearings before sub-committee no. 4 of the House Judiciary Committee, 76th Cong., 1st Sess., on H. J. Res. 176 and 181, March 22 and 23, 1939, Serial 2, pp. 290.

<sup>48</sup> Above, p. 54.

<sup>49</sup> Ex-Representative Blanton, representing some California residents, told the House Judiciary Committee in 1938 that the tideland and submerged land were public lands, that based on the distinction between sovereignty and property California had never owned the public lands of the state, that the states organized from territories or territories received by treaty cession were different from the original states and Texas, which had reserved its coastal waters, that *Shively v. Bowlby* and the many cases supporting it were *dicta* only and that the Federal Government really owned the land under tidewater and marginal sea. Hearings cited above, note 46. The Navy took then but not now a somewhat similar position. California and most witnesses disputed this view. See resolutions of legislature, cited in Gordon Ireland, p. 252. Representative Hobbs of the committee thought nobody owned the submerged lands.

On the question of "title," which it is believed is adequately made certain by the cases quoted in note 45, we may briefly quote from Professor Ireland, p. 268, as follows:

Only a few opinions, indeed, come out boldly and say, beyond the probable requirements of the particular case at hand, that title to the soil under these waters is in the state, but such is the implication of all the cases; and clarity in viewing the past and certainty in judging the future would be highly served by receiving and adopting such rules as a general principle necessarily to be deduced from the precedents.

Professor Ireland differs radically with Mr. Blanton as respects Californian law and history: p. 274.

<sup>50</sup> The cases involving tidelands along the coast are *Pillard's Lessee*, above, note 45 (Mo-

the rule as to the coastal zone tidelands is mere *dictum*. The courts uniformly insist that all the tidelands, whether on the coast or in rivers, are the property of the adjacent State, so that the tideland rule is a general principle needing only specific application. This it is believed is quite different from calling it *dictum*, since it is, as observed, a general principle needing only specific application. Since the general principle is uniformly followed, and has no exception so far as we are aware, it is safe to say that it is thoroughly established that all the tidelands whether on the coast or on rivers are the property of the adjacent state. All tidelands, meaning waters and submarine land up to the three-mile limit counting from low water mark, are included in this general rule.

#### IV

The remaining question involves the jurisdiction to grant licenses for exploration in the subsoil beyond the three-mile limit. Here analogy, practice, and practical considerations all point to the propriety of vesting this jurisdiction in the littoral State. If the State has primary jurisdiction in the marginal sea, it would seem that it should also have jurisdiction over a contiguous zone on the continental shelf for the purpose of controlling the exploitation of its submarine resources. Possibly no greater claim, such as ownership of the waters or the swimming fish in the zone, is justified or necessary, as Louisiana undertook to assert in 1938. But it is not readily conceivable that another sovereign, the Federal Government, should lay claim to a contiguous zone, thus inserting a strange belt and its own licensees, for all or some special purposes, between a State and its free access to the open sea.

Looking first at State and federal practice we find the following evidence: of the twenty-two coastal states in the United States three classes may be distinguished: first, those which were the original thirteen colonies; second, Texas; and third, the States admitted from territories or cessions acquired by the United States. The first group were independent countries or States and never surrendered to the Federal Government their boundary on the open sea or their common law jurisdiction over the marginal seas or sub-

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ble Bay); *Smith v. Maryland*, 18 How. 71, 74 (1855) (Chesapeake Bay); *Mumford v. Wardwell*, 6 Wall. 423, 435 (1867) (California); *Weber v. Commissioners*, above, note 45 (California); *Manchester v. Massachusetts*, above, note 45 (Buzzard's Bay); *Knight v. United States Land Assoc.*, 142 U. S. 161, 183, 201 (1891) (San Francisco Bay); *United States v. Mission Rock Co.*, 189 U. S. 391, 404 (1903); *Port of Seattle and Borax cases*, above, note 45; *United States v. O'Donnell* (1938), 303 U. S. 501, 519 (San Francisco Bay); and many other cases, federal and State.

A useful list of the cases relating to salt water and the tidelands, the Great Lakes, the navigable rivers and interior lakes, as well as State cases and the opinions of law writers, will be found in the appendix to the memorandum of law in support of joint resolutions quieting titles of the respective states to lands beneath navigable waters within the boundaries of such states. S. J. Res. 48, H. J. Res. 118, 79th Cong., 1st Sess. So far as can be found, there is no decision *contra*.

marine resources beyond.<sup>51</sup> These they still retained when acquiring statehood. Texas claimed ownership or jurisdiction over three leagues, or about ten and a half miles of marginal sea and still retained that jurisdiction after admission as a State in 1845.<sup>52</sup> The new States carved out of federal territory or acquired received such jurisdiction over the marginal sea as the Federal Government had theretofore held in trust for the eventual state, which was to be on a common footing with the other States.<sup>53</sup>

All the States, whatever their origin, can legitimately lay claim to the common law right to exercise sovereignty over the marginal sea subject to such federal rights as may be exercised, claimed or reserved by or to the Federal Government in the Constitution, and common law jurisdiction to control their natural submarine resources on the continental shelf beyond the marginal sea. How far this shelf claim extends, whether or not beyond the point where the depth reaches 100 fathoms, as some geologists assert, we need not finally determine. It seems from an announcement published simultaneously with the proclamation that the United States claim is limited to the place where the continental shelf reaches a depth of 100 fathoms or 600 feet. Perhaps "area controllable from the shore" suffices. Certainly it would be timid not to lay claim to such resources and not to contest a foreign objection should any be raised.

Practical considerations point to the same conclusion. It would hardly seem feasible or desirable for a foreign sovereign or its licensee to erect its wells on the continental shelf in the front yard, so to speak, of the neighboring state. Contesting control with competing licensees of the littoral State, it would seem difficult to maintain peace under such conditions. Reference has already been made to the awkward results which would follow an attempt by the Federal Government to inject a belt of its own or federal jurisdiction over Submarine resources in a zone between the marginal sea of a State and the open ocean. Nor did the Constitution contemplate that aside from the federal district it would retain federal territory for its own account.<sup>54</sup>

Examining the conduct of the States we find a series of provisions in state constitutions and statutes in which several States, e.g., Alabama, Florida, Georgia, Mississippi, Texas and Louisiana, lay claim to a maritime boundary of three leagues, six leagues or more.<sup>55</sup> The claim in Alaskan waters is properly federal, since Alaska is a territory.

<sup>51</sup> See (1938) 13 *Tulane L. Rev.* 253.

<sup>52</sup> See Art. V of the Treaty of Guadalupe Hidalgo, 1848 (1 Malloy 1107, 1109), making three leagues the marginal belt as between Mexico and the United States, and Secretary Buchanan's answer to the British protest in which Buchanan denied that his stipulation was intended to question British rights under the law of nations. 1 Moore, *Digest*, 730; Crocker, p. 649; Jessup, p. 52.

<sup>53</sup> Ireland, p. 274, differing from ex-Representative Blanton, above, note 49.

<sup>54</sup> *Weber v. State Harbor Commissioners*, 18 Wall. 57, 85 (U. S. 1873); *Shively v. Bowlby*, 152 U. S. 1, 49 (1894).

<sup>55</sup> There is doubtless some difference between a claim to a maritime boundary of certain

Even if we deny States the power to determine their own boundaries by asserting this to be a federal function, it does not follow that States are not free to determine rights in the marginal zone they fix or in the soil thereunder.<sup>56</sup> It may be added that the right to exercise riparian jurisdiction over submarine resources must extend to the adjacent zone limited by reasonable extent, a zone readily defined by a continental shelf. A more troublesome question is likely to be found in the federal claim to explore the resources of the continental shelf, possibly by submarine, and in the conflict arising between a reported Louisiana license and the federal claim to the whole continental shelf.

In the recent case of *Skiriotes v. United States*,<sup>57</sup> the petitioner was convicted of wrongfully taking sponges at a point six miles off the coast of Florida under a criminal statute of Florida prohibiting such taking of sponges within three leagues of the west coast of Florida from the Gulf of Mexico. The State court applied this statute literally.<sup>58</sup> The United States Supreme Court was more ambiguous, sustaining the conviction merely on the ground that as a citizen of Florida—a fact not in the record—he was bound by the Florida law.<sup>59</sup> This had been previously held in Florida with respect to citizens of the respective States.<sup>60</sup> The Supreme Court did not discuss the question of boundaries. If the State cannot protect and regulate the extraction of the resource, when beyond three miles, whether these be called territorial or extra-territorial waters, the result would be that no authority can protect it or regulate its extraction beyond the three-mile limit, since the Federal Government has not legislated.

Recently, Louisiana has by statute<sup>61</sup> claimed a jurisdiction on the shallow coastal shelf of eight leagues beyond the three-mile limit or twenty-seven miles in all, in "sovereignty" and full and complete ownership of the waters of the Gulf of Mexico "including all lands that are covered by the waters of

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extent and the claim to ownership of all the islands within a certain distance from the coast. E.g., Georgia, Code Annotated, Title 15, claims a boundary of three miles from low-water mark in the Atlantic Ocean, yet all the islands within twenty marine leagues of the coast. The latter claim is not unimportant. See Louisiana, 2 Stat. 701 (1812) (3 leagues); Alabama, 3 Stat. 489 (6 leagues); Mississippi, 3 Stat. 472 (1817) (6 leagues); Florida, 15 Stat. 73, Const. 1868, art. 1 (3 leagues); Louisiana, Gen. Stat. 1938, no. 55 (9 leagues). Texas and states ceded by Mexico, *supra* note 52 (3 leagues).

<sup>56</sup> Ireland, pp. 252, 283.

<sup>57</sup> 313 U. S. 69 (1941).

<sup>58</sup> 144 Fla. 220 (1940). The zone, according to Section 8087 Compiled Laws of Florida (3 leagues of the west coast of Florida) was characterized as "within the territorial waters of the state of Florida."

<sup>59</sup> See *Pope v. Blanton*, 10 F. Supp. 18 (D. C. Fla. 1935). If, as the court says, prescription for over 50 years founds a title to the sponges and, *a fortiori*, their regulation, there seems little reason to distinguish between citizens bound by the law and non-citizens who presumably are not. The case is discussed in (1936) 21 *Cornell L. Quar.* 651.

<sup>60</sup> *Lipscomb v. Gialourakis*, 101 Fla. 1130; *Lipscomb v. Kaloroukas*, 101 Fla. 1137 (1931).

<sup>61</sup> General Stats. 1938, no. 55; (1939) 39 *Columbia L. Rev.* 317; (1938) 13 *Tulane L. Rev.* 253; (1940) 19 *Nebraska L. Bull.* 267; Ireland, p. 252.

the said Gulf . . . within the boundaries of Louisiana," as fixed in the statute, subject to certain federal rights to regulate commerce and exercise admiralty jurisdiction. A license accordingly is said to have been granted to a private operator. Since no oil has yet been discovered in the zone, it is understood, the claim has given rise to no issues and the question remains whether the claim, if exercised, will raise any national or international issue. Louisiana cannot invoke a prescriptive right of property in the resources, arising out of long occupation, as in the Ceylon pearl banks, nor as a successor of France, which made no such claim, nor a claim resting on the title to adjacent islands. Louisiana applied literally the principle of coastal protection of a contiguous shallow shelf<sup>62</sup> measured by a modern cannon-shot—presumably a federal protection—and asserted her special rights in adjacent petroleum. The claim of Louisiana has given rise to a controversial literature, some supporting her claim of title, others challenging it. Perhaps the State would have been well advised not to claim sovereignty or ownership in a moving body of water or to seek to extend State boundaries,<sup>63</sup> but to confine its claim to one of jurisdiction over the submarine natural resources of an adjacent continental shelf, a claim not likely to be denied. The two are separate and distinct. By note of November 22, 1937, followed by the presidential proclamation of September, 1945, the United States has claimed with respect to Japan a monopoly of the Alaska Bristol Bay salmon fishing as embodied in the Copeland and Dimond bills of 1937 and 1938.<sup>64</sup>

Examining the federal action on this question we find a contradictory record. We discover numerous claims to the three-mile limit advanced by various secretaries of State for and against the United States. These were not, however, made with reference to sedentary fisheries or petroleum exploration. The United States in six liquor treaties and in the Bering Sea Arbitration admitted the three-mile limit of territorial jurisdiction. Yet it has also claimed wider limits for other purposes, as is evident in the letter to the Committee for the Codification of the Law of Territorial Waters in 1929.<sup>65</sup> Reference has already been made to the past and present claim of an extended jurisdiction over the Alaska salmon fisheries whose migration be-

<sup>62</sup> Portugal made such a claim before the committee of experts for the Progressive Codification of International Law, but it was rejected by the American, Wickersham. Professor Bingham thinks well of the Portuguese claim and of José León Suarez' opinion on title to the continental shelf. Bingham, pp. 52-58. S. 3744, 75th Cong., 3rd Sess., passed by the Senate May 5, 1938, supports the theory, although Alaska is Federal territory.

<sup>63</sup> This power to extend territories is generally said to vest in the Federal Government. W. F. Willoughby, *Constitutional Law of the United States*, 2d ed., 1929, Vol. I, p. 407; C. Burdick, *Law of the American Constitution*, 1932, p. 272.

<sup>64</sup> Bingham, pp. 11, 60, quoting State Department releases of March 25, 1938; Leonard, p. 121. See the numerous conventions controlling haddock and salmon fisheries on the high seas. Leonard, p. 110; Bingham, p. 27, and answer of the Department of State in 1926 to the Committee of Experts, above, pp. 160-161.

<sup>65</sup> Letter of March 16, 1929, League of Nations document C.74M.39.1929 V., pp. 129 and ff.

gins in Bristol Bay, goes out to the high seas and comes back to the Bay. Interestingly, also, the United States by enabling act or act admitting to the Union several states bordering the Gulf of Mexico has accepted without discussion their territorial boundaries, including an expanded marginal sea, as fixed in the State constitution or petition.

In view of this contradictory federal record, which both accepts and rejects the three-mile rule under certain circumstances, and in the absence of any controlling federal legislation or decisions, we are justified in believing that the State definition of the marginal sea is acceptable to the Federal Government and that the common law rights of the State should be admitted. Certainly this conclusion seems to follow in the absence of any contrary federal action or in the absence of any established rule of international law. If federal action were taken beyond the marginal sea, which let us assume *arguendo* is the three-mile belt, the result would be that within the three-mile belt state licensees would enjoy the right of mineral and fishery exploration and outside the marginal belt the State would have to tolerate federal licensees. It is probable that no regulatory system along an arbitrary boundary could function effectively when divided between two different jurisdictions. Since the marginal sea is definitely vested in the state, it is hardly conceivable that outside that belt another set of regulations could be effective or efficient.

Practical considerations thus lead to the conclusion that the State must be permitted to exercise jurisdiction over the submarine soil beyond the marginal sea on the continental shelf.



## MULTIPLE REPRESENTATION IN INTERNATIONAL ASSEMBLIES

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When the representatives of the Soviet Union, the United Kingdom, and the United States met at Yalta in February, 1945, the Soviet delegation raised the question of giving separate representation in the Assembly of the United Nations to the Byelorussian Soviet Socialist Republic and to the Ukrainian Soviet Socialist Republic. The United States delegation agreed to support this claim at San Francisco, but reserved the right of the United States to put in a similar claim for three votes for itself and its possessions. The Soviet delegation raised no objection to the latter claim and the British delegation agreed to support both claims.<sup>1</sup> No agreement was reached at the time with respect to the question of the participation of the two Soviet Republics at the San Francisco Conference itself. When the Yalta agreement was disclosed at the end of March objections were raised in different quarters against the principle of plural votes itself and very vehemently against the secrecy attached to the agreement. In order to pour some oil on the troubled waters the Government of the United States announced that the United States would not request for itself additional votes in the General Assembly.<sup>2</sup> The United States delegation was directed, however, to cast the vote of the United States in favor of the admission of the Byelorussian and Ukrainian Republics and on April 27, 1945, the San Francisco Conference unanimously invited these Republics to become initial members of the United Nations. On April 30, 1945, it permitted them to take seats at the Conference immediately.<sup>3</sup> The delegates of these republics at the Conference generally voted with the Soviet delegation but in a few instances their votes diverged. One might recall in that connection that while in the early days of the League of Nations the British Dominions followed quite closely the lead of the British delegation, twenty-five years later, at San Francisco, the British delegation found the Dominions sometimes among its most bitter opponents. It is quite possible that the position of the Soviet Republics might evolve along similar lines, though it might take some time.

The Soviet Republics are not the first component units of a larger union to be admitted into an international organization. The admission of the British Dominions and India to the League of Nations caused quite a commotion at the time. When the matter was considered in the United States Senate in 1920, that body adopted a reservation requesting that the United States "be entitled to cast a number of votes equal to that which any mem-

<sup>1</sup> United States, Department of State, *Bulletin*, Vol. XII (1945), p. 530.

<sup>2</sup> Same, pp. 600-601.

<sup>3</sup> Same, pp. 802, 806. See also The United Nations Conference on International Organization, *JOURNAL*, No. 4, p. 12; No. 6, p. 20.

ber of the league and its self-governing dominions, colonies, or parts of empire, in the aggregate shall be entitled to cast."<sup>4</sup> In 1945, however, it was mostly due to the insistence of a Senate group that the United States relinquished its claim to parity with the Soviet Union. Here again the future might bring a different approach.

The question of membership in the International Labor Organization brought to the fore not only the question of the British Dominions but also that of the States of the United States, as will shortly be explained. The United States delegation took a bold position in the matter, but was completely defeated. The story of membership in the Universal Postal Union and the International Telecommunication Union is also pertinent. The struggle for additional votes in these international organizations reached its climax in the period between the two wars and the issues are still in suspense. As a new step was now reached in the long evolution towards multiple representation in international assemblies, it will be useful to trace the history of the subject in the different international organizations in which the question has arisen. The lessons of the past may prove to be of some importance in the future.

### 1. *The League of Nations*

At the Paris Peace Conference in 1919 separate representation was granted to the British Dominions and India without much opposition. On January 2, 1919, Sir Robert Borden (Canada) succeeded in convincing the Imperial War Cabinet at London that the Dominions should have the same representation as other small allied nations, and that, in addition, the representatives of the British Empire should be drawn from a panel on which each Dominion Minister should have a place.<sup>5</sup> The original French "plan of the preliminary conversations between the Allied Ministers" of January 5, 1919, envisaged a diversified system of representation: 5 representatives for each Great Power with general interests, 3 for each small belligerent power with special interests, 2 for each new state, 1 for each neutral state, each small state which was only theoretically belligerent, and each state "in process of formation." The British Dominions were to participate on conditions equal to those adopted for small belligerent powers with special interests, and their delegates were to be "attached to the British Plenipotentiaries."<sup>6</sup> At the meeting of the Council of Ten, on January 12, 1919, Mr. Lloyd George asked that the number of representatives of the small nations be reduced to two for each of them and that the Dominions and India be entitled to send two representatives each, with the exception of Newfoundland which would

<sup>4</sup> This JOURNAL, Vol. 14 (1920), p. 201.

<sup>5</sup> R. M. Dawson, *The Development of Dominion Status, 1900-1936*, London, 1937, pp. 30-31, 178-180.

<sup>6</sup> United States, Department of State, *Foreign Relations, 1919, Paris Peace Conference*, Vol. I, pp. 386, 393.

be content with one representative. President Wilson opposed in principle separate representation of the Dominions, but was willing to concede to each of them one representative.<sup>7</sup> Next day a compromise was reached: Australia, Canada, and South Africa were given two representatives each, New Zealand, British India, and "the native states of India" obtained one representative each. Newfoundland had to be satisfied with representation on the British Empire's delegation.<sup>8</sup> In accordance with the original proposal of Sir Robert Borden, all the Dominions and India were also entitled to the benefit of the panel system,<sup>9</sup> which assured them of representation at some meetings to which states with special interests were not admitted.

The British draft convention for a League of Nations of January 16, 1919, expressly provided that the High Contracting Parties "recognise the right of the British Empire to separate representation in respect of the Dominions of the British Empire including India, at meetings of the Conference of the League, and also at meetings of the Council, at which matters affecting any particular Dominion [the words 'or affecting India' were added here on January 20] are under discussion."<sup>10</sup> When the American draft of the Covenant of the League of Nations of January 20, 1919 (so-called Wilson's Second Paris Draft) was presented to the other governments, the British delegation immediately objected to the proposal that the main organ of the League should be a "Body of Delegates" consisting of the ambassadors and ministers of the contracting states accredited to the government of the

<sup>7</sup> Same, Vol. III, pp. 482-486, 500-503.

<sup>8</sup> Same, pp. 531-533, 538-540. Through the medium of the British panel, Newfoundland was, for instance, represented at the session of the Preliminary Peace Conference of January 18, 1919: p. 157.

<sup>9</sup> Pp. 546-548, 567-568. The final text of Article II of the Rules of Conference ran as follows (pp. 172-173):

The Powers shall be represented by Plenipotentiary Delegates to the number of:  
Five for the United States of America, the British Empire, France, Italy, Japan;  
Three for Belgium, Brazil, Serbia;  
Two for China, Greece, the Hedjaz, Poland, Portugal, Roumania, Siam, the Czechoslovak Republic;  
One for Cuba, Guatemala, Hayti, Honduras, Liberia, Nicaragua, Panama;  
One for Bolivia, Ecuador, Peru, Uruguay.  
The British Dominions and India shall be represented as follows:—  
Two delegates each for Canada, Australia, South Africa, India (including the native States);  
One Delegate for New Zealand.

Each Delegation shall be entitled to set up a panel, but the number of Plenipotentiaries shall not exceed the figures given above.

The representatives of the Dominions (including Newfoundland) and of India can, moreover, be included in the representation of the British Empire by means of the panel system.

Montenegro shall be represented by one Delegate, but the manner of his appointment shall not be decided until the present political situation of that country becomes clear.

The conditions governing the representation of Russia shall be settled by the Conference when Russian affairs come up for discussion.

<sup>10</sup> D. H. Miller, *The Drafting of the Covenant*, New York, 1928, Vol. II, p. 109. See also same, p. 121.

country where the seat of the League was to be established; Lord Robert Cecil stated that such a provision would preclude the representation on the Body of Delegates of the Dominions and India, as they have no ambassadors or ministers.<sup>11</sup> The Cecil-Miller draft of January 27, 1919, met this objection by providing that the Body of Delegates should "normally" consist of representatives at the capital of the League, and by adding that "the British Dominions (Australia, Canada, Newfoundland, South Africa, and New Zealand) and India should be separately represented."<sup>12</sup> No such provision was, however, included in the draft of the Covenant submitted, on February 3, 1919, to the special Commission on the League of Nations,<sup>13</sup> and Cecil immediately reserved the question of the representation of the British Dominions.<sup>14</sup> On February 5, 1919, President Wilson proposed that "only self-governing states shall be admitted to membership in the League," adding that "colonies enjoying full powers of self-government may be admitted." Cecil was afraid that this provision might exclude India. President Wilson replied that if India were admitted to membership the Philippine Islands would also become admissible but he thought that both should be excluded. General Smuts saved the day by pointing out that India would be entitled to become a member as a signatory to the Covenant, and that, therefore, the conditions with respect to admission of non-signatory states will not apply to her. This solution was accepted both by Cecil and President Wilson.<sup>15</sup> When the draft of the Covenant was discussed on March 20, 1919, at a meeting with the delegates of the neutral powers, the Dutch delegate asked whether self-governing dominions and colonies which might be admitted to the League would have a vote, to which Lord Robert Cecil answered that "every state represented, including Dominions and Colonies, whatever its size or power, should have one vote and no more."<sup>16</sup> On April 20, 1919, in enumerating the original Members of the League of Nations in the annex of the Covenant, the question of putting in Newfoundland was raised, but Cecil did not insist on putting her in; thus she was again sacrificed, as Miller reports, "because we had had enough trouble about the Dominions already."<sup>17</sup> All other Dominions and India appear in the list of the original Members of the League, out of their alphabetical order, in an indentation under the British Empire, Canada being named first, and being followed in accordance with their political rank by Australia, South Africa, New Zealand, and India.<sup>18</sup>

<sup>11</sup> Miller, Vol. I, pp. 53-54, 57; Vol. II, p. 98.

<sup>12</sup> Same, Vol. I, pp. 58, 61; Vol. II, pp. 131, 134.

<sup>13</sup> Same, Vol. II, p. 232.

<sup>14</sup> Same, Vol. I, p. 150; Vol. II, p. 257.

<sup>15</sup> Same, Vol. I, pp. 157-158, 161-165, 227; Vol. II, pp. 260-261, 303. See C. Seymour, *The Intimate Papers of Colonel House*, Boston, 1928, Vol. IV, p. 311.

<sup>16</sup> Miller, Vol. I, p. 307; Vol. II, p. 625.

<sup>17</sup> Same, Vol. I, p. 477.

<sup>18</sup> As Miller states, "the legal difference between the Dominions and India and the states which are Members of the League is thus symbolically indicated by a quarter of an inch of difference in type alignment." Same, Vol. I, p. 493. With respect to the eligibility of the Dominions for a seat on the Council, see same, Vol. I, p. 489. Canada sat on the Council

The Irish Free State was admitted to the League in 1923, by unanimous vote of the Assembly.<sup>19</sup> A special subcommittee of the Sixth Committee of the Fourth Assembly to which the question had been referred reported, in answer to a question whether the Irish Free State is recognized by any states, that it "is a Dominion forming part of the British Empire upon the same conditions as the other Dominions which are already Members of the League."<sup>20</sup> The relevancy of this statement might be doubted.

## 2. *The International Labor Organization*

Some difficulties also arose at Paris with respect to the position of the British Dominions in the International Labor Organization. The British memorandum of January 20, 1919, stated that the Dominions and India should be entitled "to separate representation and separate voting power, since they are autonomous on labor matters." It added that "the same claim might be made as regards the French Colonies."<sup>21</sup> The British draft convention of January 21, 1918, provided in Article 14 that "the High Contracting Parties recognize the right of the British Empire to separate representation in respect of the Dominions of the British Empire, including India, at meetings of the Annual Conference."<sup>22</sup> Paragraph 1 of Chapter III of the British draft of January 26, 1918, was couched in more general terms, as it provided that "any self-governing Dominion or Colony which constitutes a separate political unit for the administration of labor laws, may, on the demand of the sovereign state of which it forms a part, become a separate party to this convention in all ways as if it were an independent state."<sup>23</sup> The provision was narrowed again to the British Dominions exclusively in Article 34 of the British draft of February 2, 1919, which became the working document of the Commission on International Labor Legislation. It provided that "the self-governing Dominions of the British Empire and India may become parties to this convention, and have the same rights and obligations thereunder as if they were independent states."<sup>24</sup> On February 26, 1919, the British delegation turned around again and proposed that "the British Dominions and India, and also the fully self-governing Colonies or Possessions of other Powers shall have the same rights and obligations under this Convention as if they were separate High Contracting Parties." The Belgian delegate countered that the colonies of other countries did not possess an autonomy equal to that enjoyed by the British colonies and could not, therefore, be placed on the same footing. He proposed accordingly that

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from 1928 to 1930, Ireland from 1931 to 1933, Australia from 1934 to 1936, New Zealand from 1937 to 1939, and South Africa from 1940 to 1942 all dates inclusive.

<sup>19</sup> Records of the Fourth Assembly, Plenary Meetings, p. 24.

<sup>20</sup> *Op. cit.*, p. 166.

<sup>21</sup> J. T. Shotwell, Editor, *The Origins of the International Labor Organization*, New York, 1934, Vol. II, p. 121.

<sup>22</sup> Same, Vol. I, p. 410.

<sup>23</sup> Same, Vol. II, p. 140.

<sup>24</sup> Same, Vol. I, pp. 171, 410.

The British Dominions and India shall have the same rights and obligations under this Convention as if they were separate High Contracting Parties.

Subject to the approval of the Executive Council of the League of Nations the self-governing protectorates and colonies of other powers shall have the same rights and obligations if their mother country had agreed to their exercising them.

Mr. Robinson (United States) proposed that "sovereign states members of federal states" should be placed in the same position as the British Dominions if they possess, as did the states of the United States, special competence with respect to labor legislation. Mr. Barnes (British Empire) thought that this proposal would impair the unity of the United States, and that if Canada and Australia followed this example the international labor conference would become a congress of such proportions that it would not be able to do any useful work. Mr. Barnes opposed also the Belgian proposal insofar as it lodged in the Conference the power of control over the relations between a mother country and its self-governing colonies. He thought that the same object could be accomplished by specifying that the colonies must be "fully self-governing." Sir Malcolm Delevigne (British Empire) proposed that the Council of the League be substituted for the Conference in the Belgian proposal,<sup>25</sup> and that the application should come from the mother country and not from the colony.<sup>26</sup>

The joint Belgian-British draft presented on the next day followed the Delevigne proposals. It retained the first paragraph of the Belgian proposal, but modified the second paragraph as follows:

The same shall apply to any colony or possession of any of the High Contracting Parties which on the application of such High Contracting Party is recognised as fully self-governing by the Executive Council of the League of Nations.

Mr. Robinson proposed again the addition of the words "and the several states of a federation of states" after the word "India" in the first paragraph, on the additional ground that the different states of the United States had the right to conclude treaties, provided that the federal authority agreed. Mr. Fontaine (France) thought that, as in federal countries other than the United States labor questions were within the competence of the federal government, the phrase "states which belong to a federation and which have autonomy in labor legislation" would limit the clause to the United States only. The multiplication of the number of delegates might be further avoided by combining the states of the United States in a number of groups and granting representation to the groups and not to individual states. Mr. Gompers (United States) added that the American proposal was more equitable than the alternative system which would give the same

<sup>25</sup> The original Belgian proposal did in fact envisage the competence of the "Council," but the discussion centered around giving that power to the "Conference" itself.

<sup>26</sup> Shotwell, Vol. I, pp. 171-172 Vol. II, pp. 194-196.

number of votes to the United States with a population of 100,000,000 and to a tiny state with a very small population. Mr. Robinson embodied all these suggestions in the following proposal:

The British Dominions and India and the several states of a federation of states where the states have reserved in whole or in part their autonomy in respect to labor legislation shall have the same rights and obligations, and in such case the representation at the Conference shall in number have reference to the population and industrial importance of the federation of states, such representation to be fixed by the Conference.

When the question was put to vote, only the Czechoslovak delegate voted with the United States, while the British Empire, Italy, Japan, Belgium, and Poland, and one French delegate voted against them, and one French delegate abstained. The Belgian-British proposal was adopted by the same majority,<sup>27</sup> and without any further change became Article 35 of the drafts of March 10 and March 24.<sup>28</sup> The Committee's report accompanying the later draft gave no account of the struggle over Article 35 and stated merely that "colonies which were fully self-governing, not only as regards labor legislation but generally, must be regarded as separate entities for the purposes of the Labor Conference."<sup>29</sup>

When the draft convention came before the British Empire Delegation, the delegates of the Dominions immediately objected to Article 35 on the ground that the clause "as if they were High Contracting Parties" implied that they were not, and insisted on the deletion of the whole clause and on making the membership of the International Labor Organization automatic for all members of the League of Nations. A Canadian proposal adopted at the fourth plenary session of the Preliminary Peace Conference, on April 11, 1919, authorized the Drafting Committee "to make such amendments as may be necessary to have the Convention conform to the Covenant of the League of Nations in the character of its membership and in the method of adherence."<sup>30</sup> The Dominions were thus assured that all the victories which they might win with respect to membership in the League would instantaneously improve their position in the Labor Organization. But the Drafting Committee proved quite obdurate and Sir Robert Borden had to plead his case again before the Council of Four; only upon the latter's intervention would the Drafting Committee agree to delete the clause on Dominions and, in consequence, Article 421 of the Treaty of Versailles dealt only with not fully self-governing colonies.<sup>31</sup>

<sup>27</sup> Shotwell, Vol. I, pp. 173-174; Vol. II, pp. 198-201. See also Vol. II, p. 207.

<sup>28</sup> Same, Vol. I, pp. 411-413.

<sup>29</sup> Same, Vol. II, p. 376.

<sup>30</sup> Same, Vol. I, pp. 204, 210-211, 218-220; Vol. II, pp. 406-409.

<sup>31</sup> With respect to the simultaneous struggle of the Dominions for eligibility to the Governing Body of the International Labor Office, see same, Vol. I, pp. 183-184, 210-211, 218-220, 419; Vol. II, pp. 207-208. Both Canada and India obtained permanent seats on the Governing Body in 1922; the Dominions were also continuously represented in the employers' and workers' groups of the Governing Body.

### 3. *The Universal Postal Union*

When the Universal Postal Union was established in 1874 each of the twenty-two member countries was given one vote.<sup>32</sup> In 1876 British India and "the French colonies" were admitted to the Union by special arrangement.<sup>33</sup> Numerous other colonies acceded to the Union on similar terms in 1876-1878.<sup>34</sup> When the Congress of the Union assembled at Paris in 1878 the French Government proposed that the colonial possessions of each member of the Union be considered as forming a separate "country," and be given one vote each. To mitigate the effect of such a provision, and to guarantee real representation, the United States proposed that the colonies should be represented by their own inhabitants. But this proposal was withdrawn when it was pointed out that the colonies like other states must have the right to choose whom they pleased for representatives. While Russia protested strongly against giving to colonies a status equal to that accorded to metropolitan areas Great Britain opposed the French proposal on the ground that each group of British colonies should have one vote. In particular Great Britain requested separate votes for India and Canada. The conference agreed to give a separate vote to India, and single votes to "the whole" of the British, Danish, French, Netherlands, Portuguese, and Spanish colonies. Great Britain was allowed to transfer the vote of "the whole of the British colonies" to Canada.<sup>35</sup>

In 1885 the Australian colonies asked for five votes, Great Britain demanded two votes for its colonies in the Orient and in the West and also a vote for its colonies in South Africa, and the delegate of the French colonies requested a second vote for the French colonies. Finally one vote was given to the Australian colonies and one to the whole of the British colonies on condition that the South African colonies join the Union.<sup>36</sup> Tunis, a French Protectorate, joined the Union in 1888 and has been listed ever since in the preamble as one of the countries members of the Union. No doubts seem to have arisen as to its right to vote.

In 1891 the Australian colonies attempted to get two votes, one for the

<sup>32</sup> *British & Foreign State Papers*, Vol. 65, p. 13; Martens, *Nouveau Recueil Général de Traités*, 2e série, Vol. I, p. 651. Austria-Hungary, Netherlands-Luxemburg, and Sweden-Norway, though they constituted at the time unions of states, did not sign the treaty as single entities; Austria, Hungary, Luxemburg, the Netherlands, Norway and Sweden all signed the treaty separately. One could claim that these unions of states were given two votes each, but see B. Akzin, "Membership in the Universal Postal Union," this JOURNAL, Vol. 27 (1933), p. 651, at p. 652. Denmark and Iceland were in the same position after 1919.

<sup>33</sup> *British & Foreign State Papers*, Vol. 67, p. 549.

<sup>34</sup> See Akzin, pp. 654-659; Buehler, *Der Weltpostverein*, Berlin, 1930 pp. 27-30, 78-79.

<sup>35</sup> *Documents du Congrès Postal de Paris*, 1878, pp. 6, 18, 50, 76-79, 240, 250-1, 397-8, 508-9, 636.

<sup>36</sup> *Documents du Congrès Postal de Lisbonne*, 1885, Vol. I, p. 68; Vol II, pp. 59-60, 63-6, 68, 71-3, 95-9, 377.



Southern and one for the Northern group, but the Congress recognized only one vote for "the whole of the British colonies in Australasia."<sup>37</sup>

In 1897 Germany asked for a vote for "the whole of the German colonies" and France asked for a vote for Indochina. Both requests were granted and a vote was given to the "whole of the British colonies," which was to be transferred to the South African colonies upon their accession.<sup>38</sup>

After the Spanish-American war the United States asked for three special votes: one for Cuba, one for Hawaii, and one for Puerto Rico, the Philippine Islands, and Guam taken as a group. This claim was rejected in 1900,<sup>39</sup> but in 1903 a vote was granted to the whole of the insular possessions of the United States. While there was no great opposition to granting this vote to the United States new claims made by Great Britain (for New Zealand, for the colonies of the Cape and Natal, for the colonies of the Orange Free State and the Transvaal, and for the whole of other British possessions) were opposed by both small and big states, and the First Commission of the Congress voted all these claims down by a vote of 11 to 8. Great Britain argued that the African colonies had during their independence three separate votes in the Union, and that it would be inequitable to take away these votes merely because they had become parts of the British Empire. On reconsideration one vote was given to the South African colonies and the vote of the whole of the British possessions was transferred to New Zealand by a vote of 22 to 20, with 17 abstentions. The French delegation opposed in principle the granting of these new votes as all states should be considered equal regardless of the size of their territory or population but it ended by asking for and obtaining an additional vote for Algeria. Similarly Germany abandoned her opposition when it was given an additional vote for its African colonies. These compromises encouraged Portugal to ask for a second vote for its colonies to be exercised by the African colonies, while the Netherlands asked for a second additional vote to be given to Netherlands Indies and Italy asked for a vote for the whole of its colonies. All these claims were accepted by the Congress, though over twenty delegations showed their unwillingness to accept the compromise by abstaining from voting on the issue.<sup>40</sup>

The 1920 Congress had before it on the one hand the American proposal to abolish all additional votes and the Swiss proposal to abolish the votes created in 1906, and on the other hand a number of requests for new votes. The Swiss proposal was rejected in the First Commission of the Congress

<sup>37</sup> *Documents du Congrès Postal de Vienne*, 1891, pp. 381-3, 419, 471, 643-9, 715.

<sup>38</sup> *Documents du Congrès Postal de Washington*, 1897, pp. 62-3, 385, 435-437, 486, 681, 715, 741, 745.

<sup>39</sup> *Rapport de gestion du Bureau de l'Union postale universelle*, 1900, p. 12; same, 1901, p. 10.

<sup>40</sup> *Documents du Congrès Postal de Rome*, 1906, Vol. I, pp. 113-115, Vol. II, pp. 76, 197-203, 252, 319-321, 561-564, 589-595, 634-635.

without any debate. When the United States made their proposal in a plenary session of the Congress, it met a storm of protest from the interested Dominions and colonies and from their mother countries. The Venezuelan delegate raised the preliminary question whether the different colonies should be allowed to vote on the question of their right to vote; his proposal that they abstain from voting was rejected by the acting president of the Congress (of Swiss nationality). On final vote the American proposal was rejected by 41 votes to 22. Only Latin American states and Spain and her colonies voted with the United States; Austria, Bulgaria, China, Colombia, Ecuador, Germany, and Hungary abstained from voting. Ecuador then proposed that only sovereign nations and dominions and colonies which have autonomous parliaments should have the right to vote. This proposal was also rejected by 35 votes to 17. In consequence the United States renewed its request for a separate vote for the Philippines. The Congress agreed to this request; it also granted two additional votes to Japan (for Korea and for other colonies), and gave the vote previously exercised by the Congo Free State to the colony of the Belgian Congo. The Danish colonies in the West Indies having been transferred to the United States, their vote was abolished. Similarly the two German colonial votes were abolished in view of the changes wrought by the Treaty of Versailles.<sup>41</sup> The two zones of Morocco, French and Spanish, were accepted into the Union at the time of the Madrid Congress, and were given two separate votes without any discussion.<sup>42</sup>

As a result of these changes Article 29 of the Universal Postal Convention of November 30, 1920, read as follows:<sup>43</sup>

*Protectorates and Colonies included in the Union*

For the application of the foregoing Articles 24, 27, and 28,<sup>44</sup> the following are considered as forming a single country or Administration, as the case may be:

1. The Colony of the Belgian Congo;
2. The Empire of British India;
3. The Dominion of Canada;
4. The Commonwealth of Australia with British New Guinea;
5. The Union of South Africa;
6. The other Dominions and the whole of the British Colonies and Protectorates;<sup>45</sup>

<sup>41</sup> *Documents du Congrès Postal de Madrid, 1920*, Vol. I, pp. 65-66, 68; Vol. II, pp. 43, 84, 89, 119, 123, 131, 216, 217-221, 437-438, 440, 786-790.

<sup>42</sup> Same, p. 747; see also same, p. 789. Iceland's right to a separate delegation and vote in the 1920 Congress does not seem to have been questioned by anybody, though it was represented by a Danish official and has not taken part in previous congresses. See footnote 1, above.

<sup>43</sup> Translation from United States Statutes at Large, Vol. 42, Part 2, pp. 2000-2001.

<sup>44</sup> These articles relate, respectively, to the Bureau of the Union and its expenses, to congresses and voting therein, and to voting on proposals made between congresses.

<sup>45</sup> According to Article V of the Final Protocol to the Convention, "Note is taken of the declaration made by the British delegation in the name of their Government to the effect

7. The Philippine Islands;
8. The whole of the other island possessions of the United States of America, comprising the islands of Hawaii, Porto Rico, Guam, and the Virgin Islands of the United States of America;
9. The whole of the Spanish Colonies;
10. Algeria;
11. The French Colonies and Protectorates in Indo-China;
12. The whole of the other French Colonies;
13. The whole of the Italian Colonies;
14. Chosen (Korea);
15. The whole of the other Japanese Dependencies;
16. The Dutch East Indies;
17. The Dutch Colonies in America;
18. The Portuguese Colonies of Africa;
19. The Portuguese Colonies in Asia and Oceania.

If colonial votes are added to the votes possessed by the mother country the distribution of votes in 1920 was as follows: British Empire—6 votes, French Empire—6 votes (including Morocco and Tunis), Japan, Netherlands, Portugal, Spain (including Morocco), and United States—3 votes each, Belgium and Italy—2 votes each, the other 42 countries present at Madrid—one vote each.

At the Stockholm Congress, in 1924, France asked that votes be given to French colonies in continental Africa and to Syria and Lebanon, Portugal asked for a vote for Mozambique, and Great Britain asked for a vote for the Irish Free State. Mexico proposed that, while the colonies might continue to be represented at the congresses, they should at least abstain from voting. Later Mexico modified its proposal so as to give votes to the British Dominions (with the exception of India) while other colonies were to have no votes until they had reached an autonomous position equal to that enjoyed by these dominions. Switzerland proposed that all countries having more than one colonial vote should abandon the votes given to the whole of their other colonial possessions; this would reduce the colonial votes from 19 to 13. The Soviet Union seconded the amended Mexican proposals, but asked at the same time that in addition to the vote possessed by the Union separate votes be given to four Soviet Socialist Republics: the Russian, the White Russian, the Transcaucasian, and the Ukrainian. In order to avoid confusion between the Dominions and the other colonies, Canada proposed that the references to the Dominions and India should be deleted from the article on colonial votes, that these countries should be treated as regular members of the Union and in consequence be enumerated in the preamble to the convention in alphabetical order. After a heated debate France and Portugal withdrew their claims for new votes, the Canadian drafting proposal was

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that it has assigned to New Zealand, with the Cook Islands and other island dependencies, the vote which article 29, par. 6, of the Convention attributes to the other dominions and the whole of the British colonies and protectorates": *same*, p. 2006.

accepted, and the Irish Free State was granted a vote without being named in the colonial article. The Swiss proposal was rejected by 28 votes to 6, the Mexican proposal by 27 votes to 9, the Soviet Union's claim for 4 new votes by 23 to 1. Due to the transfer of the British Dominions, the number of colonial votes was reduced at Stockholm to 14.<sup>46</sup>

In preparation for the London Congress of 1929, the Soviet Union proposed that the voting rights given to groups of colonies should be abolished and that votes should be given only to colonies enjoying real autonomy. On the other hand it asked that in place of the one vote now held by the Union, or in addition to it, six votes should be given to its six constituent Republics (adding to the list presented in 1924 the Turkmenian and Uzbek Republics). Uruguay proposed the abolition of all votes of colonies, Dominions, and possessions, while the Argentine Republic proposed that only those colonies which had autonomous parliaments should have votes. The Netherlands Indies proposed the abolition of the colonial article on a different ground, namely that every country named in the preamble to the Convention should be entitled to a vote by this very fact. Germany thought that only groups of colonies should be named in the special article, for the other colonies the right to vote being implied in their enumeration in the preamble. When a preparatory commission of the Union met at Paris in 1928, Uruguay, in the name of the Latin American Republics, threatened to boycott the London Congress if the Commission rejected the proposal to abolish colonial votes. In consequence the Commission refrained from making any recommendations on the subject and limited itself to stating that a division of opinion existed with respect to the retention of colonial votes.<sup>47</sup>

During the debate in the London Congress the colonial votes were defended on various grounds. Most of the colonies had joined the Union before some of the countries which were now trying to deprive them of votes. Some of the colonies exercised their right to vote for fifty years without warping the decisions of the Union. The policies of the colonies were often different from those advocated by their mother countries. Some colonies even had adhered to agreements which their mother countries refused to ratify. To abandon the *status quo* would be not only immoral but also illegal as the colonies were admitted by agreements which cannot be rescinded unilaterally. The opposition to colonial votes argued that the colonies usually voted with their mother countries and that their votes are equivalent to giving a multiple vote to the mother country. In consequence countries such as those of the Western Hemisphere which did not have colonies found themselves in an inferior position. The interests of the colonies could be properly defended by the mother countries and most of the world's colonies did not have direct representation and were in fact defended by mother

<sup>46</sup> *Documents du Congrès Postal de Stockholm*, 1924, Vol. I, pp. 4-5, 407, 464-465, 476; Vol. II, pp. 36, 119, 124, 128, 149, 204-218, 270, 387-388, 705-707, 846.

<sup>47</sup> *Documents du Congrès Postal de Londres*, 1929, Vol. I, pp. 20-30, 1372-1380.

countries. Each of the larger countries had a reservoir of colonies and tried to get separate votes for them at every opportunity. This process of multiplication could be pursued without limit and might lead to a domination of the Union by a group of colonial countries. The decisions taken by previous congresses with respect to voting should not bind forever all future congresses and there must be a way to change them when need arises. Previous decisions were often results of accidents and temporary compromises. A new majority had arisen in the Union and it should have the right to make such changes as it may desire. The opposition did not persuade the majority and the decision to maintain the *status quo* was made by 42 votes against 9, while 7 countries abstained. When the Soviet Union proposed that the Congress should adopt at least a *vœu* that the next Congress should proceed to a radical revision of the voting principle, the proposal rallied only 15 votes (11 Latin American countries, China, Norway, Soviet Union, Turkey) out of 74, while 24 countries preferred to abstain. Of the American countries present only Bolivia voted with the majority.<sup>48</sup>

The Levant states under French mandate (Syria and Lebanon), which were refused a vote in 1924, adhered to the Union in 1931, and the 1934 Convention mentions them in the preamble, not under the colonies.<sup>49</sup> The Cairo Conference of 1934 did not grant any new votes; it limited itself to recognizing a new division of the two groups of Portuguese colonies into colonies of West Africa and colonies of East Africa, Asia, and Oceania. The Netherlands colonies in America changed their name to "Curaçao and Surinam."<sup>50</sup>

The Buenos Aires Congress of 1939 transferred the Philippines from the colonial article to the preamble, and reversed the trend of the previous congresses by granting two new colonial votes: to Italian East Africa and to "the whole of the British colonies."<sup>51</sup>

As a result of these developments, Article 8 of the Buenos Aires Convention recognized the following colonial votes:<sup>52</sup>

*Colonies, Protectorates, etc.*

The following are considered as forming a single country or a single Administration of the Union, as the case may be, in the sense of the Convention and Agreements, particularly in regard to their right to vote in Congresses and Conferences and in the interval between meetings, as well as their contribution to the expenses of the International Bureau of the Universal Postal Union:

1. The whole of the Possessions of the United States of America, comprising Hawaii, Puerto Rico, Guam, and the Virgin Islands of the United States of America;
2. The Colony of the Belgian Congo;

<sup>48</sup> Same, Vol. II, pp. 136-140, 149-154, 565-566, 651.

<sup>49</sup> Hudson, *International Legislation*, Vol. VI, p. 647.

<sup>50</sup> *Documents du Congrès Postal de Jaire*, 1934, Vol. II, pp. 192-213, 544, 596.

<sup>51</sup> *Documents du Congrès Postal de Buenos Aires*, 1939, Vol. II, pp. 52-53, 521.

<sup>52</sup> League of Nations, *Treaty Series*, Vol. 202, p. 171.

3. The whole of the Spanish Colonies;
4. Algeria;
5. The French Colonies and Protectorates in Indo-China;
6. The whole of the other French Colonies;
7. The whole of the British Colonies, including the Oversea Territories, the Protectorates and the Territories under Suzerainty or Mandate;
8. The whole of the Italian Colonies and Possessions other than Italian East Africa;
9. Italian East Africa;
10. Chosen;
11. The whole of the other Japanese Dependencies;
12. Curaçao and Surinam;
13. The Netherlands Indies;
14. The Portuguese Colonies in West Africa;
15. The Portuguese Colonies in East Africa, Asia and Oceania.

In addition, the following countries generally considered as colonies in 1939 are named in the preamble to the Convention: The Levant States under French mandate, Morocco (except the Spanish Zone), Morocco (Spanish Zone), Philippines, and Tunisia. While Lebanon, Syria and the Philippines have been recognized now as separate members of the United Nations, the independence of the others is still under a cloud. The French Empire now has six votes, Italy, Japan, and Netherlands have three each, Belgium, Great Britain, Spain and the United States have two. The British Dominions and India have six votes which some might wish to add to the British two. China and the Soviet Union continue to have but one vote. One is tempted to agree with the statement made by the delegate of the Soviet Union in 1929 that the whole system does not look too equitable. While there might be some justification for the willingness to preserve acquired rights, the whole structure seems to be lopsided. Perhaps a system will be devised some day distributing votes in accordance with some scientific criterion rather than with accidental compromises. The plea made in 1929 by the Soviet delegate to establish such a criterion fell on deaf ears.<sup>53</sup>

#### 4. *International Telegraphic Union*

When the International Telegraphic Union was established in 1865, its membership was restricted to European countries; several German states joined the Union as separate members.<sup>54</sup> On April 8, 1837, the convention was extended by agreement of all the parties to Algeria and Tunisia,<sup>55</sup> but no separate status was given to these territories at the Vienna Conference of 1868. Even Austria-Hungary was given only one vote at the Vienna Conference. At the Rome Conference in 1872, the German delegate raised the

<sup>53</sup> *Documents du Congrès Postal de Londres*, 1929, Vol. II, pp. 150-153. See also the statement by the Swiss delegate, *Documents du Congrès Postal de Stockholm*, 1924, Vol. II, p. 209.

<sup>54</sup> For text of the Paris Convention of May 17, 1865, see *British & Foreign State Papers*, Vol. 56, p. 295; De Clercq, *Recueil des Traités de la France*, Vol. 9, p. 254.

<sup>55</sup> De Clercq, p. 273.

question of introducing a graduated scale of votes similar to the scale adopted for the expenses of the Union's bureau. When the British delegation asked for a separate vote for India, the Belgian delegate pointed out that once such a change in the rules was made all colonial administrations will clamor for separate votes. The Conference gave a vote to India but decided to postpone the general decision on the matter.<sup>56</sup>

The Congress held at St. Petersburg in 1875 had to face quite squarely the issue of additional votes. After a long discussion the following provision was inserted in Article 16 of the Convention:<sup>57</sup>

In the deliberations, each Administration has a right to one vote, subject to the condition, in the case of different Administrations of the same Government, that a claim for it has been made through the diplomatic channel to the Government of the Country where the Conference is to be held, before the date fixed for its opening, and that each one has a special and distinct representation.

This provision gave an automatic increase of votes to all administrations willing to send separate representations, provided they had notified their intention in time. At first only a few countries took advantage of this provision. At London, in 1879, the only colonial administrations represented were those of India and New Zealand.<sup>58</sup> In 1835, at Berlin, voting delegates from the following non-independent countries were present: Southern Australia, Bosnia-Herzegovina, Cochinchina, British Indies, New South Wales, Senegal, Tasmania, and Tunisia.<sup>59</sup> At Paris, in 1890, the following countries were added to this group: Cape of Good Hope, Netherlands Indies, Natal, New Zealand, Spanish Colonies, and Victoria.<sup>60</sup> In 1895, at Budapest, the newcomers were: Western Australia, New Caledonia, and Queensland.<sup>61</sup> In 1903, at London, the Commonwealth of Australia took the place of the six Australian colonies, keeping one vote only, but this decrease was compensated by the presence of the delegates from Ceylon, Crete, Indochina (in place of Cochinchina), Madagascar, and the Portuguese colonies.<sup>62</sup> At the Lisbon Conference of 1908, appeared new delegates from: Eritrea, Iceland, the Orange River Colony, and Transvaal.<sup>63</sup>

<sup>56</sup> *Documents de la Conférence Télégraphique Internationale de Rome*, 1872, pp. 223-225, 263, 307, 330.

<sup>57</sup> Translation from League of Nations *Treaty Series*, Vol. 57, p. 217.

<sup>58</sup> *British & Foreign State Papers*, Vol. 70, p. 62.

<sup>59</sup> *Documents de la Conférence Télégraphique Internationale de Berlin*, 1835, pp. 89-92, 271-276, 282, 303, 355, 520.

<sup>60</sup> *Documents de la Conférence Télégraphique Internationale de Paris*, 1890, pp. 102-106, 297-302, 557.

<sup>61</sup> *Documents de la Conférence Télégraphique Internationale de Budapest*, 1896, pp. 109-115, 473-478.

<sup>62</sup> *Documents de la Conférence Télégraphique Internationale de Londres*, 1903, pp. 112-117, 507-512, 627.

<sup>63</sup> *Documents de la Conférence Télégraphique Internationale de Lisbonne*, 1908, pp. 124-130, 477-483.

At the first conference held after World War I, at Paris, in 1925, the delegation of the Portuguese colonies asked for four separate votes: for Angola, for Cape Verde, Guinea, and St. Thomas and Prince Islands, for Portuguese India, Macao and Timor, and for Mozambique. The request was granted without any opposition.<sup>64</sup> Besides these colonies and the four British Dominions (Australia, Ireland, New Zealand, South Africa), the following colonies were also represented at the conference: Ceylon, Belgian Congo, Cyrenaica, Eritrea, British India, Netherlands Indies, French Indochina, Lebanon, Madagascar, Morocco, New Caledonia, Senegal, French Somaliland, Italian Somaliland, Syria, Tripoli, and Tunisia. As a result of these developments the French Empire had 10 votes at the international telegraphic conferences, the British Empire 7 votes, the Italian Empire 5 votes, the Portuguese Empire 5 votes, the Belgian and Dutch Empires 2 votes each.<sup>65</sup> While some of these countries and colonies were not represented at the Brussels Conference of 1928, the Netherlands delegation had there 3 votes (including one for Netherlands colonies in America). A voting delegate from Southern Rhodesia was also present.<sup>66</sup>

##### 5. *The Radiotelegraphic Conferences*

While no difficulties with respect to representation have arisen at the International Telegraphic Conferences, the situation was quite different at the parallel Radiotelegraphic Conferences held since 1906, in which a slightly different group of countries has participated.

The draft of a radiotelegraphic convention submitted to the Berlin Conference of 1906 by the German Government provided that at the conferences revising the radio telegraph regulations each country should have one vote only. The British delegation requested that the automatic system of granting additional votes which was adopted for the telegraphic conferences should be extended to the radiotelegraphic conferences. The British delegation added, in order to allay the fear that this system might be abused, that it was willing to accept a maximum of seven votes for administrations of the same government. The French delegation seconded the British proposal, while the Bulgarian, Rumanian, and Russian delegates opposed it. The Argentine delegation thought that the provinces of the Argentine Republic had as much autonomy as most of the colonies. The United States delegation expressed preference for the single vote system, but reserved its right to claim five votes if additional votes were given to other countries. The German delegation proposed that the whole question be decided by each conference for itself. The Hungarian delegate added to this proposal a proviso that no country should be granted more than six votes. The British proposal was rejected by 18 votes to 7. The German proposal was adopted by 15 votes to 10, and a maximum of six votes was established by a vote of

<sup>64</sup> *Documents de la Conférence Télégraphique Internationale de Paris, 1925*, Vol. II, pp. 27-28.

<sup>65</sup> Same, pp. 3-10, 156.

<sup>66</sup> *Documents de la Conférence Télégraphique Internationale de Bruxelles (1928)*, pp. 39-44.



11 to 8. The Russian delegation proposed then that the colonies should have no vote in questions concerning army and navy, thus limiting the participation of colonies with respect to subject matter. This amendment was rejected by 25 votes to 1. Russia returned again with an amendment granting to her the right to request additional votes at the next conference "in view of the great extent of her territories and of her long littoral." The Italian delegate thought that if special criteria for granting votes were established, the number of radio stations and the intensity of traffic should also be taken into consideration. The Russian delegation contented itself finally with the insertion of its reservation in the *procès-verbal* of the session.<sup>67</sup>

The text of Article 12 of the international radiotelegraphic convention adopted by the Berlin Conference on November 3, 1906, read as follows:<sup>68</sup>

These conferences shall be composed of delegates of the governments of the contracting countries.

In the deliberations, each country shall have one vote only.

If a government adheres to the convention for its colonies, possessions or protectorates, subsequent conferences may determine that the whole or a part of these colonies, possessions or protectorates is to be regarded as forming a country for the purposes of the foregoing paragraph. But the number of votes which one government including its colonies, possessions or protectorates, may exercise can not exceed six.

It was supplemented by Article I of the Final Protocol to the Convention as follows:<sup>69</sup>

The high contracting parties agree that at the next conference the number of votes which each country shall have (article 12 of the convention) shall be determined at the outset of the deliberations, so that the colonies, possessions, or protectorates admitted to the enjoyment of votes may be able to exercise their right of voting throughout all the proceedings of that conference.

The decision arrived at shall have immediate effect, and shall remain in force until it is varied by a later conference.

So far as the next conference is concerned, proposals for the admission of new votes in favor of colonies, possessions, or protectorates which may have adhered to the convention shall be addressed to the international bureau six months at least before the date of meeting of that conference. These proposals shall immediately be notified to the other contracting governments, which may, within a period of two months from the receipt of the notification, put forward similar proposals.

When the next Radiotelegraphic Conference assembled at London in 1912, Belgium asked for one additional vote, for the Belgian Congo; France asked for five additional votes: for French Equatorial Africa, French West Africa, Indochina, Madagascar, and Tunisia; Germany asked for three additional votes: for German East Africa, for the Protectorates in the Pacific, and for

<sup>67</sup> *Documents de la Conférence Radiotélégraphique Internationale de Berlin*, 1906, pp. 9, 66-72, 78-83, 102-105, 143-146, 155-6, 162, 164, 198-199, 309-310, 347, 352-353.

<sup>68</sup> Translation from this JOURNAL, Vol. 3 (1909), Supplément, p. 335. For the French text, see same.

<sup>69</sup> Same, p. 343.

Togo, Cameroon, and German South-West Africa; Great Britain asked for five additional votes: for Australia, Canada, India, New Zealand, and the Union of South Africa; Italy asked for additional votes, without specifying the number; Japan asked for one additional vote, for the whole of her colonial possessions; the Netherlands asked for two additional votes, for Curaçao and the Netherlands Indies; Portugal asked for two additional votes, one for her African possessions and one for the rest of her colonies. The Russian delegation thought that the additional votes should depend not only upon the fact of having colonial possessions, but also upon the size of territory, length of the coasts and the number of adjacent seas. It proposed that, if this point of view were not accepted, no country should have more than one vote in deliberations concerning military, naval and other questions of national defense. It made also a formal reservation that Russia should be granted a number of votes equal to the maximum granted to any other country. The United States delegation seconded the proposals of the Russian delegation and made similar reservations. Italy and Turkey also expressed approval of these proposals. Bulgaria opposed strongly all colonial votes, though later she found it possible to second the Russian demand for additional votes. The conference admitted all claims for additional votes, except those of Italy which were presented after the time-limit set by the 1906 Convention. No vote was given at the time to Bosnia and Herzegovina in view of the fact that it was not clear whether it was a "country" in the sense of Article 12 or a colony, possession or protectorate; the question was provisionally settled in the Final Protocol to the convention by giving a vote to Bosnia-Herzegovina, with a reservation as to its legal basis. The Conference decided later to follow the precedent of the Universal Postal Union and to include in the Convention a list of colonial "countries" or groups of countries which were entitled to a vote in the conferences. The list adopted, being a part of the Convention, was to be in force until the adoption of a new Convention at the end of the next conference. Besides the nineteen additional votes granted at the beginning of the Conference the following additional votes were granted: Russia—five, for the protectorates of Bokhara and Khiva, and the possessions in Central Asia, Eastern Siberia and Western Siberia; United States—five, for Alaska, the Canal Zone, Hawaii, the Philippines and Puerto Rico; Italy—two, for Eritrea and Somali (a claim for separate votes for Northern and Southern Somali was rejected); Spain—one, for Spanish Guinea. In view of the fact that all larger countries received five additional votes, Germany asked also for five votes in place of her former three, and three separate votes were granted to Cameroon, South-West Africa, and Togoland instead of one held by them in common.<sup>70</sup>

<sup>70</sup> *Documents de la Conférence Radiotélégraphique Internationale de Londres*, 1912, pp. 12, 115-121, 430-433, 437, 439-441, 445, 488, 492, 505, 510, 555, 567. See also D. P. Myers, "Non-Sovereign Representation in Public International Organs," *Actes du Congrès Mondial des Associations Internationales*, pp. 753-802; same, "Representation in Public International Organs," this JOURNAL, Vol. 8 (1914), pp. 81, 97-102.

Altogether the conference granted 35 additional votes (including that given to Bosnia-Herzegovina); France, Germany, Great Britain, Russia, and the United States were to have therefore at the next conference six votes each, Austria-Hungary, Italy, Netherlands and Portugal—three votes each, Belgium, Japan and Spain—two votes each, the sixteen remaining parties to the Convention—one vote each.

When the next conference met, at Washington, in 1927, it had to take into account numerous changes wrought by the first World War. A draft prepared at the preliminary conference held at Washington in 1920 provided for the creation of an Universal Electrical Communications Union. Article 22 of the draft contained the following provisions as to voting in the conferences of the Union: <sup>71</sup>

These Conferences shall be composed of delegates representing the Administrations of the contracting countries.

In the deliberations each country shall exercise one vote only.

If a Government accede to the Convention for its colonies, possessions, or protectorates, subsequent Conferences may decide that the whole or part of such colonies, possessions, or protectorates is to be regarded as forming a country for the purposes of the foregoing clause. Nevertheless, the number of votes to be exercised by a Government, including its colonies, possessions, or protectorates, may not exceed six. The following Governments shall each have six votes: The United States, France, the British Empire, Italy, and Japan.

The following are regarded as forming each a single country for the purpose of the present Article:

The Belgian Congo;

The Spanish Colony of the Gulf of Guinea;

The Dutch Indies;

The Colony of Curaçao;

Portuguese West Africa; and

Portuguese East Africa and the Portuguese possessions in Asia.

In the preliminary proposals submitted to the 1927 Conference Japan made a demand for the six votes granted to her in the 1920 draft; the Netherlands and the United States thought that the list in Article 12 of the 1912 Convention should be revised; Germany reserved her right to additional votes; Greece asked for the abolition of the list, leaving to each country the decision which of the colonies should be regarded as separate "countries"; Great Britain thought that each contracting Government should be given one vote only, that each independent administration should be allowed to sign the Convention or adhere to it, and that the administrations of India, of the British dominions and of certain British colonies should be considered as independent administrations entitled to vote.<sup>72</sup> At the conference a sub-committee proposed that each Government should have one vote, that the executive power of any Dominion, colony, protectorate, possession, or terri-

<sup>71</sup> *Papers Relating to the Foreign Relations of the United States, 1920*, Vol. I, p. 156.

<sup>72</sup> *Documents de la Conférence Radiotélégraphique Internationale de Washington, 1927*, Vol. I, pp. 40-42, 51. See also same, pp. 727, 745-746.

tory under Mandate, which itself directs the services relating to radiocommunications or authorizes such service by one or more enterprises should be considered as a "government" entitled to separate delegation, that the whole of the colonial possessions of a country which do not belong to the above category should be entitled to a single delegation, and that at any voting the number of votes cast by the delegation of an independent state (including its possessions) should not exceed eight. The United States delegation asked that the question of colonial votes be postponed to the next conference and that Article 12 be suppressed, with the understanding that the British Dominions and certain other countries in a special position (for instance, Morocco and Tunisia) should be recognized as separate countries entitled to sign the convention in alphabetical order. The United States proposal to postpone the decision was accepted by 20 votes to 4, but all the countries entitled to representation by the 1912 Convention were allowed to vote at the 1927 Conference. Though Germany had lost her colonies by virtue of the Versailles Treaty, the Conference unanimously allowed her to cast the six votes granted to her in 1912. As the Soviet Union was not invited to the Washington conference, no question arose as to the additional votes granted previously to Russia. The United States Government was empowered to start diplomatic negotiations with respect to voting in order to arrive at a solution before the opening of the next conference. It was also decided that the manner in which the signatures of the 1927 Convention would be made should have no effect upon the right of a country to a vote at the next conference.<sup>73</sup>

#### 6. *The Telecommunications Union*

To achieve an amalgamation of the telegraphic and radiotelegraphic conventions simultaneous telegraphic and radiotelegraphic conferences were held at Madrid in 1932. As the United States failed in the attempt to solve the question of voting by diplomatic negotiations, a joint committee on the right to vote was established by the two conferences and a number of proposals were submitted to it. The Spanish Government, the host of the conference, proposed that one vote be granted to each delegation present, including the colonial delegations, at least until the Conference made a decision on the subject. China proposed a maximum of six votes for any country. The United States delegation proposed that the right of vote be granted only to independent countries and to territories possessing a great measure of autonomy—which were, for instance, eligible to membership in the League of Nations and which were able to send delegations to international conferences entirely free from control by any other delegation. Prior to the conference the American proposal was accepted by forty-two Governments, and only four Governments (Belgium, France, Netherlands, and Portugal) expressed a desire to retain additional votes. Japan seconded the

<sup>73</sup> Same, Vol. II, pp. 142-149, 151-152, 650, 732, 801-802, 815, 915-916.

American proposal, but reserved her right to request a number of votes equal to that granted to other colonial powers if the American proposal was not accepted. Similar reservation was later made by the American delegation itself. The Soviet Union joined the request for abolishing the colonial votes and reestablishing equality among the members of the organization, stating, however, at the same time that it would like to see the colonies adhering directly to the convention and enjoying upon the basis of equality all the rights of the contracting parties. The Argentine and Greek delegations asked that both the plurality of votes and the colonial votes be abolished in the future convention, but the Greek delegation thought that during the Madrid conference delegations of all signatory countries should be allowed to vote. The Swiss delegation proposed that each country not entirely independent but claiming independence in the field of telecommunications should present the constitutional documents establishing that independence, and that a special juridical committee should scrutinize these documents and admit the voting right of any country which presented sufficient evidence; at the Madrid Conference the colonies would be allowed to vote on the regulations, but not on the new convention as the precedents adopted by previous conferences would not apply to the deliberations concerning that convention. The Italian delegation made a number of alternative proposals, the most important of which gave a right to two votes to the nine countries possessing colonies. A similar proposal was made by Brazil. France, Germany, and Portugal thought that until a new system was adopted, each country should have the number of votes given to it at the Washington Conference of 1927. Germany claimed six votes for the Madrid Conference on that basis, but was willing to accept for the future the American proposal. A joint proposal made by Czechoslovakia, Hungary, and Switzerland gave votes to all sovereign countries and to countries having complete freedom over their telecommunications services (British Dominions, India, Netherlands Indies, Morocco, Tunisia); it provided also that the American, Belgian, British, French, Italian, Japanese, Portuguese, and Spanish colonies taken as groups should be given one vote each to be cast for each group by one member of the group or by the colonial office of the mother country. The delegation of the Portuguese colonies defended the right of vote of colonies on the following grounds: this right had been exercised in all previous conferences, the interests of the mother country and of the colonies often diverged and could not be defended properly by just one delegation, the telecommunication services of the colonies were in some cases more important than those of the mother country, the colonies had never been accused of voting against the best interests of the Union. The Netherlands Indies and the Belgian Congo proposed that full membership in the Union should be granted to all countries which had their own legislation and administration in telecommunication matters and enjoyed in these matters a complete independence from the administration of any other country. Great Britain

complained that at a recent voting she had only one colonial vote while France had four (in fact France had in that commission four votes altogether, not five); as the United States agreed to separate votes for British dominions, Great Britain approved the American proposals for single votes. While some delegations were willing to accept the League of Nations' criteria, others pointed out that the Covenant allowed the admission of a "fully self-governing colony" and thought that some of the colonial countries participating in the Union belonged to that category. When a new criterion was sought, the Soviet Union thought that one could take into account the importance of traffic, length of communications, size of population, etc. Germany proposed that as such criterion the "importance in the field of telecommunications" might be used, alone or in combination with "possession of colonies," and that if an additional vote should be granted to countries having colonies, a vote should also be granted to countries of special importance in the field of telecommunications such as Germany. Similarly, Poland expressed the view that if plurality of votes were adopted, factors other than colonies should also be taken into account, for instance—the international importance of the national telecommunication services of the different countries.

When the question whether the right to vote should be given only to independent countries was finally voted upon, only Germany, Greece, Mexico, Poland and the Soviet Union voted for this restriction; while the Argentine Republic abstained, the United States voted for the more extensive provision, in order to include the British Dominions and India. The conference proceeded then to the Czechoslovak-Hungarian-Swiss proposal admitting the votes of the British Dominions, India, Netherlands Indies, Morocco, Tunisia, and of the whole of colonial possessions of the eight colonial powers. The United States delegation declared that some of the countries enumerated expressly in this proposal did not possess more autonomy than the United States possessions and that the United States reserved the right to have as many votes as the most favored other country; that, once the system of plurality of votes was adopted, the mother country should have the right to cast the vote for those colonies which did not have a separate representative; that the United States would not oppose giving to Japan a number of votes equal to that possessed by the most favored country, nor giving an additional vote to Germany and to the Soviet Union. Italy also requested that she be given as many votes as were given to any other country. France protested against giving any special status to British Dominions; if their separate votes were maintained, as they ought to be, other countries should be also given a multiple vote. Poland pointed out that if certain countries were given additional votes not on account of their colonies but on account of their "importance," Poland should also be given an additional vote. Greece thought that some colonial countries having special international position might be granted a separate vote, but no country should be granted more

than one vote because of its "importance;" the colonial votes are cast in the name of separate territorial entities, but the principle of "importance" would lead to plurality pure and simple. In view of the United States position, the Czechoslovak, Hungarian, and Swiss delegations withdrew their compromise proposal and declared that the principle of equality would require that they also be given as many votes as were given to any other country. They ended by saying that they might accept a solution which would give to big and small colonial powers, whether present or former, a double vote, provided no further exceptions were made; they would be willing to acknowledge, also, the special position of the Netherlands Indies, Morocco, and Tunisia which had actually a separate administration and had always had separate representation. The British delegation proposed that an additional vote be given to Germany and the Soviet Union, though it would prefer not to mention the basis of this exception; putting it on the ground of "importance" would lead to new discussions. Poland immediately reiterated its claim to equality with Germany. Spain asked for a vote for Spanish Morocco if French Morocco were given one. The Netherlands Indies asked for a status equal to that given to British India. The Portuguese colonies attempted to bring about a solution by proposing that each of the colonies enumerated in the Czechoslovak-Hungarian-Swiss proposal should be allowed to vote on all questions, but that its vote should be counted only if it did not agree with the vote cast by the mother country; thus if both votes were cast on the same side, they would be counted as one, while they would be counted as two votes if they were cast on different sides. This proposal was rejected by 9 votes to 6.

A subcommittee worked out three possible solutions: (a) separate votes should be given to the five British Dominions, to British India, to Netherlands Indies, to Tunisia (or Morocco), and to the whole of colonial possessions of the eight colonial powers, and second votes should be given to Germany and the Soviet Union; (b) votes should be given to all countries enumerated under (a), except British India and Tunisia (or Morocco); (c) votes should be given not only to the countries enumerated under (a), but also to Alaska (or Philippines), to Korea (or Formosa), to Tripolitania (or Cyrenaica), and to Southern Rhodesia (or some other British colony). Ten delegations were willing to accept the first alternative, six preferred the other solutions, while some opposed all three. Poland agreed finally to giving additional votes to Germany and the Soviet Union, provided that the exception were put on the ground of "the tradition of previous conferences." When the different propositions were submitted to vote the first alternative rallied 11 votes (Belgium, France, Germany, Great Britain, Netherlands Indies, Italy, the Netherlands, Poland, Portugal, Spain, and Switzerland), while 5 voted against (the Argentine Republic, Greece, Japan, Soviet Union, and the United States). The United States was willing to accept the third alternative and was ready to accept the majority view if a vote were granted to the

Philippines. Mexico opposed all colonial votes but would not object to a grant of additional votes to some states provided that such a vote were also granted to her. Italy requested an additional vote if one were granted to the United States. Germany asked for two additional votes if additional votes were granted to Italy and the United States. Great Britain thought that the Soviet Union should be granted the same number of votes as might be given to Germany, and Germany made later a similar proposal. Great Britain asked also for a vote for Southern Rhodesia. France opposed this request as increasing the British vote to four, thus starting a new general competition for a fourth vote. Later France asked for a vote for Indochina if one were given to Southern Rhodesia. The President of the Committee pointed out that all attempts should be directed to reducing the number of votes, and that all claims on behalf of new colonies should be rejected; while efforts should be made to assure voting rights to those countries which had long participated in the Union and paid a share of its expenses for many years, the situation was entirely different where claims were made by countries which had never paid a part of the Union's expenses. The United States delegation offered to accept temporarily the subcommittee's first alternative, provided that it be allowed to vote for the American possessions though it did not have full powers for them. France proposed the substitution of "French protectorates of Morocco and Tunisia" for "Tunisia (or Morocco)," it being understood that these two protectorates would have together one vote only. Belgium substituted for its colonies "the Belgian Congo and the mandated territories of Ruanda-Urundi." Similarly, Japan preferred to enumerate its colonies.<sup>74</sup>

After two months of discussion, an almost unanimous agreement was reached, the Soviet Union being the only dissenter. It was decided to insert no provision in the Telecommunications Convention, but to ask the United States to continue diplomatic negotiations concerning the definite solution of the problem of votes. On the other hand, in order that the Conference might proceed with its deliberations, the following provision was adopted as Article 21 of the Internal Regulations of the Conference:<sup>75</sup>

§ 1. Exclusively for the plenary assemblies of the Madrid Conferences, and it being understood that this provision does not constitute a precedent, the following countries or groups of countries participating in these Conferences shall have a deliberative vote:<sup>76</sup>

Union of South Africa	Austria
Germany	Commonwealth of Australia
Argentine Republic	Belgium

<sup>74</sup> *Documents de la Conférence Radiotélégraphique Internationale de Madrid*, 1932, Vol. I, pp. 8, 96-97, 621, 794-795, 826-838, 840-841, 848-849, 850-851, 852-854, 858, 862, 867, 870-871, 872-873, 882, 896-897, 902-903, 905, 908-909; Vol. II, pp. 32, 39-43, 433-470, 479-508.

<sup>75</sup> Translation from French; for French text see same, Vol. II, p. 53.

<sup>76</sup> In French alphabetical order.



Bolivia	British India
Brazil	Netherlands Indies
Canada	Irish Free State
Chile	Iceland
China	Italy
Vatican City State	The whole of the Italian Colonies and the Italian Islands of the Aegean Sea
Republic of Colombia	Japan
Swiss Confederation	Chosen, Taiwan, Karafuto, the Leased Territory of Kwantung and the South Sea Islands under Japanese mandate
Belgian Congo and the Mandated Territories of Ruanda-Urundi	Latvia
Republic of Costa Rica	Liberia
Cuba	Lithuania
Denmark	Luxemburg
Free City of Danzig	Mexico
Dominican Republic	Nicaragua
Egypt	Norway
Ecuador	New Zealand
Spain	Panama
Spanish Zone of Morocco and the whole of Spanish Possessions	Paraguay
United States of America	Netherlands
The whole of the Colonies of the United States of America	Peru
Empire of Ethiopia	Persia
France	Poland
The whole of the French Colonies, Protectorates and Territories under French mandate	Portugal
Great Britain	The whole of the Portuguese Colonies
The whole of the British Colonies, Protectorates, Oversea Territories and Territories under British sovereignty or mandate	French Protectorates of Morocco and Tunisia
Greece	Rumania
Guatemala	Sweden
Republic of Honduras	Czechoslovakia
Hungary	Turkey
	Union of the Soviet Socialist Republics
	Uruguay
	Venezuela
	Yugoslavia

§ 2. Exceptionally, taking into account the traditions of preceding conferences, Germany and the U.S.S.R. shall have the right to an additional vote.

§ 3. In exception to the provisions of §1, in the votings relating to the Regulations the countries or groups of countries which are parties only of the Telegraphic Union or of the Radiotelegraphic Union can exercise their right to vote only with respect to the Telephone and Telegraph Regulations or with respect to the Radio Regulations.

§ 4. Each delegation can vote only for the country or the group of countries which it represents. But the delegations of Great Britain,

Spain and the United States can also vote for the whole of their colonies and possessions.

Each delegation which for a serious reason cannot participate in meetings has the power to transfer its vote or its votes to some other delegation. Under these circumstances no delegation shall, however, unite or dispose of votes of more than two delegations including its own one or two.

This provision gives three votes to France and Great Britain (including India, but not the British Dominions), two votes to Belgium, Germany, Italy, Japan, the Netherlands, Portugal, the Soviet Union, Spain, and the United States, all other countries having but one vote. While some of the additional votes may be classified as colonial votes, a number of them, especially those of Germany and the Soviet Union, are clearly additional votes.

When it seemed that everything was settled, a new demand was made by the delegation of the Soviet Union. After it had made an express reservation as to the system of plural votes adopted by the Committee, it called attention to the special conditions existing in the Soviet Union, where there were seven independent republics having their own organization and possessing the right to secede from the Union. It exhibited a letter charging it not only with the representation of the Soviet Union but also with the defense of the interests of the different republics. Accordingly it asked for separate votes for the seven republics (Russian, White Russian, Ukrainian, Transcaucasian, Tadzhik, Uzbek, and Turkmenian). The British delegation thought that this request came too late for being incorporated in the Madrid regulations, but it declared that these additional votes should be given to the Soviet Union in the future conferences. The French delegation accepted the point of view of the British delegation. The Soviet proposal was rejected by 14 votes to 2 (Spain and the Soviet Union), while Mexico abstained.<sup>77</sup>

The plenary assembly adopted the report of the Committee and the text of Article 21 of the Internal Regulations of the Conference proposed by it; it agreed that the United States should try to reach a more permanent solution through diplomatic negotiations. The Soviet claim was repeated in the plenary assembly, but it received no consideration as no other delegation seconded it. In consequence, the Soviet delegation refused to use the additional vote accorded to it by Article 21.<sup>78</sup>

In 1937 the United States Government sent a circular note to the members of the Telecommunications Union suggesting that the next conferences should adopt Article 21 of the Internal Regulations of the Madrid Conference with regard to voting and appoint a special committee to reconsider

<sup>77</sup> Same, Vol. II, pp. 504-50E.

<sup>78</sup> Same, Vol. II, pp. 49-54, 112; see also pp. 95-96, 113, 233-234. See P. de LaPradelle, "Le Droit de vote aux Conférences des télécommunications," in *Revue juridique internationale de la radioélectricité*, Vol. 9 (1933), pp. 398-424.

the question of voting at future conferences. Both suggestions were accepted and when the new Conferences assembled at Cairo in 1938 a joint committee on the right of vote was appointed. The main difficulty arose with respect to the Republics of Syria and Lebanon, for which separate votes were requested. The Committee thought that these countries were in a transition stage, not having yet reached their complete and full independence. With respect to the future the committee adopted the following recommendation:<sup>79</sup>

1. That for future plenipotentiary and administrative conferences the same rules apply with regard to voting as were applied at the Madrid and Cairo Telecommunications Conferences.

2. That consequently the countries listed in article 21 of the Internal Regulations of the Cairo Conferences will, as a matter of right, be entitled to vote at future telecommunications conferences.

3. That at the first plenary assembly of future plenipotentiary and administrative conferences countries that are not now listed in article 21 may ask to be included in the list of countries entitled to vote.

4. That in the case of countries whose independence and sovereignty is well recognized, such requests shall be acceded to as a matter of course by the first plenary assembly.

5. That the case of other countries making such requests shall be referred to a special committee on the right to vote for consideration and recommendation to the plenary assembly.

This recommendation was adopted by the joint plenary assembly by 38 votes to 3.<sup>80</sup>

### 7. Other International Organizations

Similar problems of representation and voting have arisen in a number of other international organizations. There was, for instance, a struggle over additional votes at the conference which created the International Institute of Agriculture at Rome in 1905. Very liberal provisions were finally adopted there and as a result Great Britain possesses twenty-two votes, the United States twenty-one, France nineteen, etc.<sup>81</sup> Additional votes are enjoyed by certain countries also in the International Union of Weights and Measures, the International Office of Public Health, the International Wine

<sup>79</sup> Translation from International Telecommunications Conferences, Cairo 1938, *Report to the Secretary of State by the Chairman of the American Delegation* (Department of State Publication 1286, Conference Series 39), p. 101. See also F. C. de Wolf, "The Cairo Telecommunication Conferences," in this JOURNAL, Vol. 32 (1938), pp. 562, 566-567; X.X.X., "La Syrie et le Liban, et le droit de vote aux Conférences de télécommunications du Caire," in *Revue internationale de la radioélectricité*, Vol. 14 (1938), pp. 5-25.

<sup>80</sup> *Documents de la Conférence Télégraphique et Téléphonique Internationale du Caire*, 1938, Vol. II, pp. 417-433, 473-474, 590. See also same, Vol. I, pp. 494-495; Vol. II, pp. 24-27, 66-69, 166-172, 174-176, 260-262, 614-615.

<sup>81</sup> See C. A. Riches, *Majority Rule in International Organization*, Baltimore, 1940, pp. 260-267.

Office, the International Office of Chemistry, and the International Institute of Refrigeration.

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The principle "one state one vote" is thus not sacrosanct. There have been exceptions in the past, and there is no reason to believe that there will be none in the future. The victory gained by the British Empire in the League of Nations has stabilized the position of the Dominions in the different international unions. At the next conferences, the Soviet Union's claims will be strengthened by her success at the San Francisco Conference. While at the moment the Soviet Union is satisfied with three votes, it is quite probable that additional votes will be demanded sooner or later for the other constituent republics of the Soviet Union. The experience of the different international organizations shows that each new exception precipitates an avalanche of new claims both by other component parts of the country to which the exception was granted and by other countries.

If these assumptions are correct, the question may be raised whether the United States were justified in relinquishing their claim to additional votes in the United Nations' General Assembly. It is true that in most cases the fact that a country holds a few votes in the Assembly does not really count, especially as the powers of the Assembly are quite limited. But if the representation of other countries is later increased, and if the General Assembly is able to strengthen its powers in the social and economic field, the United States' stand on the subject of additional votes might require revision. But what claims could United States make? Who should be the actual beneficiaries of the additional votes? The Philippine Commonwealth has a separate vote already. The grant of additional votes to Alaska, Hawaii, Puerto Rico, and the Virgin Islands would give to the United States' territories a better international position than is possessed by the States of the United States. As an alternative, one could take the Robinson-Fontaine proposal during the 1919 debate on the International Labor Organization. Additional votes could be granted to the States of the United States directly or to groups of them. In the first case, separate representation might be given either to the largest States (e.g., to those with population over 5,000,000) or, like in the Soviet Union, to States who border on a foreign country or the sea. If the group system were adopted, representation might be granted to the different geographic and economic regions of the United States. This system would have the additional advantage of enabling the different regions of the United States to defend their case directly before an international forum, and of relieving the United States' delegation of the tedious task of representing competing and contradictory interests.

Once the agreement on allocating additional votes in the national sphere is reached, the problem still would remain of getting it accepted internationally. Such acceptance could be facilitated if some international powers

were given to the States or groups of States under paragraph 3 of Section 10 of Article I of the United States' Constitution, which provides that "no State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops or Ships of War in time of Peace, enter into Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay." This provision authorizes the Congress to consent to an agreement between a State and a foreign country. The Congress may give its consent after the agreement is made or may consent in advance to States making certain types of agreements within the sphere of the powers reserved to the States, with or without the approval of the President of the United States. The States to which such agreement-making power were granted would be in about the same position as the republics of the Soviet Union. If this remedy is adopted, the United States claims might have a chance of success, especially if they are made simultaneously with new claims of the Soviet Union. Objections might be raised, however, that such an approach would jeopardize the unity of the United States, and the claims for parity with any other union of states might be abandoned on that ground. If that happens, the only remaining equitable solution would be to substitute for the present system of representation a system of weighted representation, giving to larger countries a representation proportionate to their size and strength.<sup>82</sup> International democracy can only be achieved by giving proper representation to the peoples of the United Nations according to their numbers. The principle of giving one vote equally to 300 thousand Luxemburgers and to over 130 million Americans assures perhaps equality to states, but certainly not to the peoples of the world. The desired results may be achieved in part by the system of multiple representation, but there are grave obstacles on the way. A system of proportionate representation, at least in the economic field, is the only one that might be able to bring a more lasting solution.

<sup>82</sup> See the author's article on "Weighting of Votes in an International Assembly," in *American Political Science Review*, Vol. 38 (1944), pp. 1192-1203; G. Clark, in *American Bar Association Journal*, Vol. 30 (1944), p. 671; H. F. Rudd, *A Method of Balanced Representation*, Durham, N. H., 1944, 23 pp.

## INTERNATIONAL ADMINISTRATION OF EUROPEAN INLAND WATERWAYS

By LOUIS B. WEHLE \*

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Gaius and Charlemagne and President Truman seem to be working hand in hand across the centuries to bring about coördination of European inland waterways. Under the law of the Roman Empire such waterways, when constituting or crossing international boundaries, were free to use by all nations within the Empire. Since 1815, as we shall presently see, there have been successive organized attempts, mostly unsuccessful, to revive and apply this principle of freedom of navigation of the Roman Law on the Rhine, the Danube, and elsewhere. The United States, through President Truman, at the July-August Berlin (Potsdam) conference of the victorious allies, proposed that navigation over the internal waterways of Continental Europe be free to all nations under international control. More recently, in the latter weeks of 1945, grave obstacles and problems threaten the realization of the Truman proposal. The writer believes that if we visualize clearly the mechanism and workings of an international body vested with control of inland river navigation, we can better appraise the merits of that proposal.

Accordingly we shall first take note of the European rivers and canals, both present and potential, to which the United States proposal would apply. Then we shall examine successive experiments in international control of navigation on the Rhine and the Danube undertaken since 1831, and shall note the main forms of administrative control which were evolved therein.<sup>1</sup> We shall next inquire concerning the status accorded today by international law to the Roman Law principle, *per se*, of freedom of navigation on inland international waterways. Against this background of earlier administrative experience and the present legal status of the principle of freedom of naviga-

\* As head of a recent economic mission of the United States to the Netherlands, Mr. Wehle incidentally had some concern with Rhine navigation problems; but in this article he expresses only his personal views.

<sup>1</sup> Little original historical research on the old and middle background facts is presented here. This has already been done by two experts of the first rank: Joseph P. Chamberlain of Columbia University marshalled American and foreign sources so well in 1923 in his *The Regime of the International Rivers: Danube and Rhine*, that we can dispense with any repetition of his citations, and Erigadier-General Sir Osborne Mance's *International River and Canal Transport*, issued under the auspices of the Royal Institute of International Affairs as one of its series on International Transport and Communications, in 1944, brings developments in Europe and elsewhere more or less up-to-date, beside carrying a classified bibliography and two helpful maps.

tion, we shall finally pursue the chief purpose of this article: to indicate briefly, and by way of a preliminary approach only, some of the basic methods of organization that might be available for a practicable administration of international river navigation control,—methods which the writer has borrowed in the main from contemporary techniques employed in private and government-owned corporations, in European “mixed” corporations owned jointly by the governments and citizens, in regional governmental affairs, in government regulation of transportation and public utilities, and in private and public finance,—methods which might be used in any regime of internal waterways, whether by the United Nations Organization, over the entire European continent, or by several nations under a convention covering more limited European areas.

#### PRESIDENT TRUMAN’S PROPOSAL CONCERNING EUROPEAN WATERWAYS CONTROL AND ITS LATER STATUS

The especially relevant part of President Truman’s radio report of August 9, 1945, to the public on his return from Potsdam reads as follows:<sup>2</sup>

One of the persistent causes for wars in Europe in the last two centuries has been the selfish control of the waterways of Europe. I mean the Danube, the Black Sea Straits, the Rhine, the Kiel Canal, and all the inland waterways of Europe which border upon two or more states.

The United States proposed at Berlin that there be free and unrestricted navigation of these inland waterways. We think this is important to the future peace and security of the world. We proposed that regulations for such navigation be provided by international authorities.

The function of the agencies would be to develop the use of the waterways and assure equal treatment on them for all nations. Membership on the agencies would include the United States, Great Britain, the Soviet Union and France, plus those states which border on the waterways.

This American proposal was referred to the Council of Ministers. At the generally abortive session of the Council in London on September 11–22, no action was taken. Foreign Secretary Bevin reported to the House of Commons on October 9 that it had, among other matters, been discussed, but that “we failed to settle it.”<sup>3</sup> He explained that ten days of negotiations had come to naught because the USSR had reversed its earlier interpretation of the terms of reference which the Berlin Conference had laid down for the procedure of the Council of Ministers; that the USSR now took the position that France and China should have been excluded from the negotiations, and that the United States should not participate in negotiations concerning Finland, but only the USSR and Great Britain; and that a deadlock had ensued. On October 26,<sup>4</sup> speaking again in the Commons

<sup>2</sup> See *The New York Times*, August 10, 1945, p. 12.

<sup>3</sup> Same, October 10, 1945, p. 1.

<sup>4</sup> See *The Washington Post*, October 27, 1945, p. 1.

about the difficulties encountered in the Council of Ministers on the European waterways proposal Mr. Bevin in effect stated his belief that Europe's inland waterways, potential highways for the movement of relief supplies and ordinary commerce, could be cleared "without endangering Russia one iota," if the factors of strategy and spheres of influence could be dropped from the picture. On October 27 President Truman, in his Navy Day address in New York, laid down twelve "fundamentals" of the foreign policy of the United States; the seventh reads: "We believe that all nations should have the freedom of the seas and equal rights to the navigation of boundary rivers and waterways and of rivers and waterways which pass through more than one country."<sup>5</sup> In his October address President Truman made two noticeable departures from his August report. His earlier reference was to "waterways of Europe"; his later one was impliedly to waterways everywhere. Also, in his earlier address he spoke of "all the inland waterways of Europe which border upon two or more states"; in his later one he added, "rivers and waterways which pass through more than one country." The President was not submitting formal phraseology, but either description would have been compatible with Article 331 of the Versailles Treaty which contemplated the internationalization of a river "providing more than one state with access to the sea."

It should be noted that the Kiel Canal, a purely domestic waterway,—a "national stream"<sup>6</sup>—falls outside these categories; its internationalization would be among the terms dictated to a defeated nation.

The United Nations Organization came into formal legal existence in a period of violent flux, complicated by inscrutable Russian dominance or pressures in Eastern and Southeastern Europe, in the Near and Middle East, and elsewhere, by the problems of the atomic bomb, and other grave questions, all of which suggest wide possibilities for all pending negotiations. No forward step was taken on the European inland waterways project at the second conference of the Council of Foreign Ministers of the United States, the United Kingdom and the U.S.S.R. held at Moscow on December 16 to 26, 1945.<sup>6a</sup> Together with the related question of the status of the Black Sea Straits, with the Iran-Azerbaijan-U.S.S.R. situation, and others, it was passed over for other perhaps more vital or imminent matters. But when the Council of Ministers and United Nations representatives shall have made some progress toward carrying out the principles and procedures agreed upon at Moscow for developing the peace treaties in Europe, stabilizing China, and so on, then it can be assumed that in due course there will be consideration of the proposals for European inland waterways control, along with other postponed issues.

Time will show whether a coöperative international regime of sovereign

<sup>5</sup> See *The New York Times*, October 28, 1945, p. 33.

<sup>6</sup> C. C. Hyde, *International Law*, Boston, 1945 (2d ed.), Vol. I, Sec. 159, p. 524, and note.

<sup>6a</sup> Text of Council's report in *The New York Times*, Dec. 28, 1945, p. 4.



states can be built to safeguard such freedom of navigation on the Danube as President Truman has urged, or even such imperfect freedom as existed under the pre-war regimes. For the present it seems that we can tentatively assume merely that some United Nations Organization regime for all continental European waterways will be established. We can inquire into the organizational principles suitable for such a comprehensive regime, bearing in mind how those principles would be applicable to a European regime of smaller scope.

#### THE INTERNAL WATERWAYS NETWORK OF CONTINENTAL EUROPE

What is the extent of the continental European inland waterways which are being considered for internationalization? We may note only the main waterways, starting with Belgium and the Netherlands and moving south and east across Europe. Antwerp, a North Sea port, is also now, by connecting canal, a Rhine port. A pre-war project for giving Antwerp direct access overland to the Dutch canal system encountered political difficulties.<sup>6b</sup>

Duisburg-Ruhrort on the Rhine near the Dutch border is the world's largest inland port. German canals now connect the Rhine at that point (a) with Amsterdam and Groningen in the Netherlands and with Emden; (b) cross-country with the Weser, serving Bremen; (c) with the Elbe, serving Dresden and Prague, and (d) with the Oder, which flows into the Baltic beyond Stettin and which in its upper reaches serves Ostava in Czechoslovakia, a city to be mentioned also in connection with canal projects.

Returning to the Rhine, at Strasbourg, about 240 miles above Duisburg, canals lead into the Mosel, Meuse, Marne, Aisne, Seine, Loire, Saone, and Rhone, thus connecting the Rhine with much of Northern and Southeastern France and with the Atlantic and Mediterranean.

Additional canals which were planned or had been under construction in the generation before 1938 were to have connected the Oder at Ostava (mentioned above) with the Danube at Vienna, also with the Vistula running into the Baltic, and with the Dniester running through the Ukraine into the Black Sea.<sup>7</sup> Another project, partly constructed, was to connect the Rhine with the upper Danube via the Main River, utilizing and enlarging the disused Ludwig Canal, built in 1845.<sup>8</sup>

Although formulated a generation or more ago (when most of Czechoslovakia was a part of Austria-Hungary), few of the plans for canals leading out of Ostava have gone very far. The Mittel-Europa military idea, then current, was responsible for some.<sup>9</sup> Among the obstacles that thwarted them were objections from state-owned railroads, fear of competition from Russian and Rumanian wheat, and the threat of lower rates from sea-going

<sup>6b</sup> Mance, work cited, pp. 48-51.

<sup>7</sup> Same, second map.

<sup>8</sup> *Foreign Affairs*, April 1930, Vol. 8, pp. 470-3.

<sup>9</sup> Chamberlain, work cited, pp. 105-10.

vessels. Another retarding factor<sup>10</sup> has been the chronic reluctance of European nations to surrender any of their sovereignty remarked by President Truman.

In connection with the question of derogations from sovereignty it might be suggested that perhaps the attitude of the USSR toward a United Nations waterways regime would be favorably influenced if the Black Sea Straits were included therein, with new concessions to Russia, although on that point Turkey may be hard to satisfy. In the Montreux Convention of 1936 the freedom of transit and navigation to which she agreed was hedged about with bristling restrictions as to aggregate tonnage, duration of the stay of ships, war vessels, and special limitations applicable to war conditions.<sup>11</sup>

Turkey having become a member of the United Nations Organization, proposals are now being made or will be made by the United States, Great Britain, and the USSR for modification of the Montreux Convention. Presumably the proposals of the latter two nations have not yet been transmitted, but on November 6, 1945, Secretary of State Byrnes announced through the press that the following suggestions for modification had been made by the United States in a note to Turkey: that the Straits be opened at all times to merchant vessels of all nations and to the transit of warships of the Black Sea powers; that, excepting for an agreed limited tonnage of warships in times of peace, passage through the Straits be denied to the warships of non-Black Sea powers at all times, unless with the specific consent of the Black Sea powers or unless when acting under authority of the United Nations; that Japan be eliminated as a signatory, and the United Nations Organization be substituted throughout for the League of Nations.<sup>12</sup> Such modifications would be advantageous to the USSR. Further discussion of the Straits situation in connection with President Truman's proposal is hardly worth while until Great Britain and Russia have spoken. Turkey's response should at any rate be more satisfactory this time than it seems to have been in 1594 when Queen Elizabeth's Ambassador "made his three demaunds (of the Emperor) such as he thought most expedient for her majesties honor & the peaceable traffique of our nation into his dominions: whereunto he answered in one word, Nolo, which is in Turkish as much as, it shal be done."<sup>13</sup> As Constantinople had been Roman, and Latin was the language of the upper strata in Europe, one surmises that the interpreter may have been uncommonly resourceful, and that the rough and ready English Ambassador was made unduly expectant.

<sup>10</sup> Mance, pp. 91-4.

<sup>11</sup> Berkol, "Le statut juridique actuel des portes maritime orientales de la Mediterranee" (1940); Fernand de Visscher, "La Nouvelle Convention des Detroits de Montreux," *Revue de Droit International*, 1936, No. 4, pp. 669-718.

<sup>12</sup> See *The Washington Post*, November 8, 1945, p. 3.

<sup>13</sup> Richard Hakluyt, *The Principal Navigations, Voyages, Traffiques & Discoveries of the English Nation*, Everyman's Library edition, Vol. IV, pp. 7-8.

President Truman urged development of the use of European inland waterways as well as their control. The obvious means are channel improvements and canalization. Let us suppose that the United States proposal, which includes the Kiel Canal and the Black Sea Straits, should be adopted and carried out: it would then seem reasonable to expect that the great river systems of Europe would in time be made into a complete and continuous continental, deep-channel network of inland waterways connecting the four seas—the Baltic, North, Mediterranean, and Black—with one another and with the Atlantic Ocean. This likelihood would be enhanced by the consideration, mentioned later in another connection, that canalization projects could at many points be combined with hydro-electric power production, flood control, and irrigation.

#### THE ROMAN LAW PRINCIPLE OF FREEDOM TO 1815

Strong and picturesque contrasts between ideals and conduct characterize the history of the international control of European inland rivers. Charlemagne, when he projected and began the construction of a canal to connect the Rhine and the Danube, was probably courting on the Roman Law principle of free navigation on international rivers to unify peoples through the intimacies of peaceful trade. Grotius was merely restating the Roman Law principle when he said: "rivers . . . ought to be open to those who, for legitimate reasons, have need to cross over [sic; pass along?] them."<sup>14</sup>

But during the nine hundred years between Charlemagne and Grotius privileged dwellers in castles on the Rhine continued to support themselves in the style to which they had become accustomed by levying heavy tribute upon the boatmen. And the princes and prelates who succeeded to these perquisites of the robber barons, and later the states and cities that wielded equivalent powers, continued to burden the boatmen and the goods which they carried by exacting tolls, dues, and customs. According to contemporary writings these must have come at times to the verge of extinguishing the river traffic. Professor Joseph P. Chamberlain points out that at the end of the eighteenth century "there were not less than thirty-two toll stations from Strassburg to Holland" (a distance of about 280 miles).<sup>15</sup>

The Roman Law principle of freedom in the navigation of international rivers was revived in June, 1815, by the Congress of Vienna, which declared: "The Powers whose territories are separated or traversed by the same navigable river engage to regulate, by common consent, everything regarding its navigation." The nations there represented also agreed to and announced broad principles appropriate thereto: navigation on such rivers should be entirely free; dues on navigation should be regulated in a uniform manner but might vary with local conditions; offices for dues collection should be as few as possible; each state should be responsible for keeping in repair tow-

<sup>14</sup> *De Jure Belli ac Pacis*, Classics of International Law edition, p. 196.

<sup>15</sup> Work cited, p. 156.

paths passing through its territory and for maintaining "the necessary works throughout the same extent in the bed of the river in order that no obstacles" might be experienced by navigation; no new staple duties or port or forced harbor dues should be established. Although the Vienna pronouncement had a suggestion of universality it was, after all, merely part of a contract between certain named states relating to their own waterways. As we follow the career of the principle of free navigation we find that it has been honored mainly in the breach.

#### NAVIGATION CONTROL ON THE RHINE AND THE DANUBE

Fundamental differences in physical geography, international politics, and in the state of the mechanical arts when the controls were instituted largely account for the divergencies in form between those developed on the Rhine and on the Danube in response to the call from Vienna.

##### *The Rhine Regime—Conditioned by the Horse on the Tow-Path*

The Rhine, originating in Switzerland, is navigable for about 550 miles from Basel. It forms (in terms of 1939 political geography) first a boundary between Switzerland and Germany; then between Germany and France almost to Karlsruhe; flows through German territory for about 240 miles, then, just beyond the Dutch frontier, divides into three branches which empty into the North Sea (a fourth, the Yssel, runs northward into the Zuider Zee). Agriculturally the Rhine valley is uncommonly rich and has come to be highly industrialized also. In 1935 the Rhine carried over 85 million tons of traffic, chiefly coal. Rotterdam is the center for its immense export and import traffic.

The recommendations of the Vienna Congress did not lead to action on the Rhine until 1831 when the Treaty of Mainz was concluded between Holland, Prussia, the Middle Rhine States, Baden, and France. It created a Central Commission with judicial functions relating to tolls, with limited advisory and supervisory functions, but with no power of enforcement. The provision that each riparian state was, in its discretion, to maintain its own tow-paths, collect its own tolls, and make channel and other navigation improvements on its part of the river, was in consonance with the German-French treaty of 1804, and followed literally Article 113 of the Final Act of the Congress of Vienna. The implications of the steamboat seem to have been missed at Mainz. Although the Treaty reaffirmed freedom of navigation as declared at Vienna in 1815 it paradoxically excluded from the river the masters of foreign ships by stipulating that licenses be given only to "subjects of Rhine states."<sup>16</sup>

In the years following the Treaty of Mainz excessive tolls continued to impede Rhine traffic. It seems that liberalization of German inter-state relations, confirmed in 1867 through revival of the *Zollverein*, might event-

<sup>16</sup> Chamberlain, as cited, p. 202.

ually have come to relieve this condition, but the real cure for it appeared magically from an unexpected source. Railroads were built along the river. The riparian governmental authorities saw that the barges would lose everything to the rails if the rates charged by the boatmen had to cover the navigation tolls and other official exactions. Under this pressure they became converted to the high principle of freedom of river navigation. The Treaty of Mannheim in 1869 reflected this conversion by abolishing navigation tolls, and so the matter stands today. But it made no essential change in the 1831 functions of the Central Commission. To assist the Commission in its advisory work a committee of hydraulic engineers was provided but each riparian state retained its ancient, pre-steam, discretionary responsibilities for its tow-path, bank, and channel improvements. Masters of foreign vessels were still ineligible for licenses.

The Treaty of Versailles and the subsequent Treaty of Barcelona (1921) effected no fundamental changes in the functions of the Central Rhine Commission.

#### *The Danube Regime—Conditioned by the Ocean Steamship*

On the Danube the Roman Law principle of freedom has been largely obscured or in eclipse.

Again in terms of 1939 political geography the Danube, with a course of about 1,770 miles, rises in Baden in southwestern Germany and flows East about 500 miles through German territory; about 300 miles across Austria (through Vienna); southeast in Hungary, turning south above Budapest, to Yugoslavia (about 300 miles); across the Northern bulge of Yugoslavia (about 150 miles); as a Yugoslav-Rumanian boundary for about 120 miles, in which there are a succession of cataracts and the "Iron Gates"; East for about 200 miles as a Rumanian-Bulgarian boundary; then through Rumania about 200 miles into the Black Sea. Although its navigable course is about three times as long as that of the Rhine, the Danube carries only a fraction of the Rhine's traffic.<sup>17</sup> Besides its rapids and rock obstructions it suffers badly from silting, especially at its mouths, which open into the tideless Black Sea.

The Treaty of Paris, concluded in 1856 after the Crimean War between England, France, Turkey, Russia, and Sardinia, established a Danube regime. Ocean steamships and river steamboats were then operating in the Danube estuaries or upriver. Large engineering works for clearing and deepening the channel had already been carried out or were in process or in prospect; locomotives were being employed on shore at rapids for upstream towage.

The Treaty of 1856 reaffirmed for the entire navigable river the principle of freedom, but it shortly came to be confined to the 106 or so miles between Braila and the Black Sea, which was navigable for seagoing ships. It abolished navigation tolls as such and established a temporary European

<sup>17</sup> Mance, pp. 66-8.

Commission which had power, with equality for all flags, to fix duties at such rates as would support improvements in navigation, and to plan and carry out improvements along the whole river. The life of the Commission was extended from time to time. During the next quarter century after 1856 the entire Danube delta passed to Russia and later to Rumania, when she was accorded a place on the Commission.

The Commission was never given power to punish crimes or violations of its charter, nor to assess damages; such jurisdiction resting in the Rumanian courts alone.<sup>18</sup> The treaties of Versailles and Barcelona affected the principles of navigation control on the maritime Danube as little as they did navigation on the Rhine.

No international regulation of the 1,400 miles or more of navigable reaches above Braila existed during most of the period 1856-1921. Under the Danube Statute of the latter year, works on the fluvial Danube not undertaken by its International Commission could be undertaken by the states with its approval,<sup>19</sup> and it was mostly in this way that improvements were made and maintained. Although the Commission enforced freedom of transit and was a stabilizing influence,<sup>20</sup> it did not, largely because of mounting political pressures in the region, put through much work of its own.<sup>21</sup>

The Versailles and Barcelona treaties did affect both the Rhine and Danube arrangements by providing a new system for arbitrating controversies, and also for their judicial determination by the Permanent Court of International Justice at The Hague. In the nineteen non-war years 1921-39 the Court adjudicated several cases involving either rights in the flow of international rivers or navigation on them.

International arrangements, other than those established on the Rhine and Danube, have been made, or have been the subject of negotiation, concerning navigation on rivers in Europe, Asia, Africa, and the Western Hemisphere,<sup>22</sup> but it does not seem worthwhile to examine them here.

#### PRESENT STATUS IN INTERNATIONAL LAW OF THE PRINCIPLE OF FREEDOM OF NAVIGATION

##### *Commercial Monopoly of Cabotage*

A touchstone of liberalism in international river control has been the treatment of traffic between local points within a riparian state—so-called *cabotage*. In the Congress of Vienna the European states triumphant over Napoleon agreed—France joining in—that navigation on rivers was to be "entirely free." Strictly the phrase seems to include freedom of foreign

<sup>18</sup> Green H. Hackworth, *Digest of International Law*, Washington, 1940, Vol. I, p. 599.

<sup>19</sup> Mance, p. 57.

<sup>20</sup> See, for one view, Grégoire Gafenco, *Preliminaires de la Guerre à L'Est*, Librairie de l'Université, Fribourg (Suisse), 1944, Ch. III, pp. 79-101. The author emphasizes the Commission's part in protecting the regime against Russian interference.

<sup>21</sup> Mance, pp. 62-4.

<sup>22</sup> Mance, pp. 47-8 and 69-87; Chamberlain, pp. 285-306.

ships to touch at and carry between local ports within a riparian state—in other words, to enjoy commercial equality with the ships of the local state. More often than not, however, European states today reserve a monopoly of *cabotage* for their own vessels against foreign ships, even of their riparian neighbors. In 1930 the League of Nations Transit Committee found that Belgium and The Netherlands did not reserve *cabotage* on the Rhine; that Germany waived it for a foreign state only pursuant to reciprocal arrangements; but that France definitely held her domestic waterways traffic for herself.<sup>23</sup> We cannot ignore the fact that the Dutch, in the years just before World War II resisted Belgian proposals to construct two canals connecting Antwerp with the Maas estuary for integration with Holland's intricate local canal system.<sup>24</sup> On the maritime Danube Rumania has guarded her *cabotage* jealously and on the fluvial Danube both she and Yugoslavia practically nullified the compromise attempted under the 1921 Danube Statute to allow only regular *cabotage* services to be reserved to the national flag of each.<sup>25</sup> Outside of Europe, the reservation of *cabotage* is common practice, as, for instance, in the United States in connection with coastwise, canal, and inland river routes.

The merits of *cabotage* need not be discussed here. But it will have to be reckoned with by the proponents of any literal freedom of European inland navigation, which assimilates equality of commercial opportunity for a foreign non-riparian ship with equality of purely navigational transit rights.<sup>26</sup> Some international law writers, in generalizing about the present state of the law of inland waterways, seem to have understressed the significance of the widespread retention of *cabotage* in the actual practice of riparian states in Europe and elsewhere.

#### *Freedom of Navigation Dependent upon Agreement*

A test of the literal observance of the freedom apparently called for by the Vienna declaration is found in the question whether non-riparian State A could, in the absence of a treaty, rely solely upon the principle that an inland waterway in state B leading to the sea is freely open to a vessel flying A's flag upon the same terms as to State B's vessels. In 1910 Dr. Charles Cheney Hyde, in his *Notes on Rivers and Navigation in International Law*, wrote:<sup>27</sup>

The practice of maritime states during the past century or more justifies the following conclusions: First, that any right of navigation is dependent upon the consent of the territorial sovereign. Secondly,

<sup>23</sup> Mance, pp. 24, 61-2, 91.

<sup>24</sup> See note 1, above.

<sup>25</sup> Walker D. Hines, *Report to League of Nations on Danube Navigation*, League Document C.444 (a). M.164 (a). 1925. VII, pp. 24-7.

<sup>26</sup> See decision by the Permanent Court of International Justice, and separate opinions in the Oscar Chinn case, *Publications of Permanent Court of International Justice*, Series A/B, No. 63; also discussion by Dr. C. C. Hyde cited below, pp. 111, 112.

<sup>27</sup> This JOURNAL, Vol. IV (1910), pp. 145-155 (at pp. 154-5).

that the law of nations imposes upon such sovereign the duty to yield its consent to the navigation of its own waters by the inhabitants of any other upstream riparian state. Thirdly, that where a river and its tributaries afford the sole means of water communication between several riparian states and the ocean by reason of a channel of sufficient depth to be of general commercial value, it becomes the duty of any riparian state bordering the lower waters to consent to the free access to countries upstream by all foreign merchant vessels. Fourthly, that in the absence of arrangement for international regulation, the territorial sovereign may exercise large discretion in the control of navigation within its own waters."

Apparently Dr. Hyde was unable to say that the world had as yet realized the vision seemingly projected ninety-five years before by the Congress of Vienna. Although the conditions of his third proposition are said to make it the duty of a riparian state to consent to the free access by all foreign merchant vessels, Dr. Hyde indicates in his fourth proposition that where there is no international arrangement, the sovereign may exercise large discretion in the observance of that duty.

Dr. Hyde's position was confirmed in 1921 at the Conference of Barcelona, held under the auspices of the League of Nations. The Convention and Statute on the Regime of Navigable Waterways of International Concern stated:

with reservations as to *cabotage* and as to war vessels each contracting party agrees to accord to such waterways "which may be situated under its sovereignty or authority" free exercise of navigation to the vessels flying the flag of any of the other contracting states.

Here were two limitations upon the principle of freedom: first, *cabotage*, and second, the implied one that the freedom depends upon contract between states. And this declaration was made by a body of men striving for the utmost in liberalism.

In 1943 *The International Law of the Sea*, by Alexander Pearce Higgins, late Professor of International Law at the University of Cambridge, and C. John Colombos, of the London School of Economics and University College, London, and sometime Professor at The Hague Academy of International Law, was published in England. Paragraph 185 (p. 145) of Chapter VI, "Rivers," reads:

Another rule which is being increasingly recognized is that the rights of sovereignty which a littoral State enjoys over rivers crossing the territory must not be used in such a way as to hinder or put obstacles to their navigation when they constitute the necessary means of communication with other states or with the sea. Considerations based on the right of nations to international commerce justify, in fact, the freedom of navigation of rivers as of the seas. This view is nowadays generally admitted in principle for rivers . . . known as "boundary" or "international" rivers, but practice does not as yet sanction it for streams which are wholly within the territory of one state.



Paragraph 186 reads in part:

Freedom of navigation on international rivers is now universally accepted, although its full vindication remained unrecognized for a long time, riverain powers fixing passage tolls and dues which bore heavily on foreign ships.

The British authors (or author?—Professor Higgins died in 1935) just quoted, relying as they do upon conventions that provided for such freedom, evidently intended to confine their generalization to such contractual situations. We must also conclude that the authors' freedom of navigation eliminates the concept of commercial equality and is a right of transit alone.

In the only decisions by the Permanent Court of International Justice in which support has been given to freedom of navigation or to administrative jurisdiction connected therewith, on or in an international river or port, the Court's opinions have been based upon the existence of an agreement, and there has been no assumption by the Court that a general principle of international law could, in the absence of an agreement, have led to the same result.<sup>28</sup> It is also to be borne in mind that a state's sovereignty over its canals of a certain class has been presumed to be less susceptible to foreign claims than its naturally navigable international rivers.<sup>29</sup>

For a realistic appraisal, both of the Vienna principle and of *cabotage*, we can turn again to Dr. Charles Cheney Hyde, who in the second edition of his *International Law* (1945) says:<sup>30</sup>

Acts such as those of the Congress of Vienna or of the Berlin Conference must be regarded as having been designed primarily to apply the principles enunciated to the problems peculiar to special groups of rivers within specified areas. . . . The documents which have been examined reveal . . . the difficulty in establishing that there are rules universally applicable to what may be called the international navigable rivers of every continent, and which are to be deemed to be incorporated in the law of nations and hence obligatory upon all concerned. . . .

The concern of a non-riparian state in the use of an international navigable river is confined chiefly to the privilege of access through it to the point furthest upstream with which commercial intercourse by boat is permitted. . . . Yet it may be doubted whether in the absence of convention the law of nations has yet imposed such a restraint upon the riparian state, or conferred upon the non-riparian state such a benefit. . . . There is obviously no necessary discrimination when the riparian state or states assert a monopoly in the service of transportation through such sections of a river by vessels of their own, nor does that assertion necessarily mark an impediment in access to the ultimate

<sup>28</sup> See Hackworth, Vol. I, pp. 599–603; Permanent Court of International Justice, *Publications*, Series B, No. 14, pp. 38 ff.; M. O. Hudson, *World Court Reports*, 1935, p. 140; P.C.I.J. *Publications*, Series A, No. 23, p. 25; Series C, No. 17, Pt. II, p. 244; Hudson, p. 611.

<sup>29</sup> This thought is mentioned only as a *caveat*. An instance is Article 1 of the Barcelona Statute which excluded from its operation canals constructed to connect two navigable sections of a river separated by a non-navigable section.

<sup>30</sup> Pp. 562, 563, 564.

point of permitted commercial intercourse. Still, if discriminatory charges are exacted for services of transport as distinct from the privilege of transit, it may be doubted whether, in the absence of convention, any rule of international law is necessarily violated. . . . In general, to the riparian proprietors must be left the final decision touching the character of the regime that should prevail within waters traversing their territories.

*Would the Monopoly of Cabotage Survive the Establishment of  
Freedom of Navigation?*

Reservation of cabotage by a riparian state is of course a denial of commercial equality to the ships of other nations. The question then arises whether, if a state has agreed to freedom of navigation on its rivers, its reservation of *cabotage* is a breach of international law? Strangely enough, that question has not been squarely decided. Underlying it is a still broader issue: When state A has agreed to accord to state B freedom of navigation on its inland waters, can state A legally by any method deny commercial equality to state B's ships? This issue was decided in 1934 by the Permanent Court of International Justice in the Oscar Chinn case in favor of State A.<sup>21</sup> But the decision was given by a majority of six to five, and a study of the majority opinion and of the five separate minority opinions seems to leave the issue still unsettled. Our own Supreme Court has, on a number of questions, gradually swung over to the view of a cogent minority. Such a reversal is perhaps even more likely when, as here, the court is to be supplanted by a new one.

Briefly the facts were these: Chinn, a British subject who operated freight boats on the Congo River (in Belgian territory), competed in a small way with the dominant Congo freight boat operator, Unatra, a Belgian Company, the majority of whose stock was owned by the Belgian Government. In 1931, in the midst of the depression, the Belgian Government directed Unatra, and also some Belgian overland carriers, to reduce their freight rates by 33-75 per cent on various classes of freight, with the assurance that it would reimburse them for losses suffered thereby. (The Belgian Government later made such reimbursements to the Belgian carriers, including Unatra.) As a result, Unatra got all the business and Chinn's freight boats were driven off the river. The British Government claimed reparation against the Belgian Government to indemnify Chinn for loss and damage, chiefly on the ground that Belgium had violated the 1919 Convention of St. Germain revising the General Act of Berlin of 1885 and other international obligations.

The St. Germain Convention provided in Article 1: "The Signatory Powers undertake to maintain between their respective nationals and those of States, Members of the League of Nations, which may adhere to the present Convention a complete commercial equality . . .", and, in Article 5,

<sup>21</sup> Series A/B, No. 63.

that "navigation . . . shall be entirely free for merchant vessels. . . . Craft . . . belonging to the nationals of the Signatory Powers . . . shall be treated on a footing of perfect equality." Preceding the St. Germain Convention the General Act of Berlin (1885), relating to Central Africa, agreed that "the trade of all nations shall enjoy complete freedom." These two treaties were in direct line of descent from the 1815 Final Act of Vienna which declared: "navigation . . . shall be entirely free and shall not in respect to commerce be prohibited to anyone."

The majority opinion of the Permanent Court, holding that the acts of the Belgian Government had not violated any international obligation, stated essentially these grounds for its decision: (1) that freedom of trade as established by the St. Germain Convention does not mean absence of competition; (2) that freedom of commerce would have been infringed only if a monopoly had been in terms established for Unatra, whereas Mr. Chinn had not been prohibited from operating at a loss, had he chosen to do so, and that the Belgian Government had therefore not impaired the freedom of trade called for by the Convention; (3) that there was no violation of the Powers' undertaking to maintain "between their respective nationals . . . complete commercial equality" because the form of discrimination forbidden is based upon nationality alone; that the inequality suffered by Chinn was not worse than that which any Belgian company other than Unatra (had there been one) engaged in the business of public carrier by water would have suffered by reason of the special advantage accorded Unatra through its special relation to the Belgian Government; and that therefore there had been no discrimination against Mr. Chinn as a British national.

Sir Cecil Hurst concurred with the majority view that the creation of Unatra's "monopoly" did not violate commercial equality or liberty of navigation since no obstacle was imposed to Chinn's continuing to operate, though it might be unprofitable. But Sir Cecil dissented from the majority's decision on the ground that the Belgian Government had violated the Act of Berlin and the Convention of St. Germain in not having reimbursed Mr. Chinn on the same basis as Unatra for losses sustained through the reduction of rates—this being a violation of the individual commercial equality called for by the two treaties.

When it is borne in mind that the Belgian Government had not ordered Chinn to lower his rates and that it had no direct relation with him, the reader is left to wonder whether the philosophy of Sir Cecil's opinion differs in reality from that of his four colleagues who stood with him in splitting the Court.

M. Altamira dissented on two main grounds, first, that the majority had misinterpreted the Convention in not having taken account of its requirement of commercial equality; second (Sir Cecil's point); that there had been a denial of equality to Mr. Chinn because he had not been reimbursed for his losses and Unatra had.

M. Anzilotti also disagreed both with the decision and the grounds on which the majority based it. He said in part: <sup>31a</sup>

In my view, it is beyond doubt that, in the Convention of Saint Germain—as in all the other conventions relating to this subject, to which the present Convention is merely a sequel—navigation is regarded, and is protected, as a branch of economic activity, as a business. The purpose of Article 5 is to open the commercial exploitation of the waterways of the Congo Basin to everybody, so that everyone may reap the financial profits to be derived from it.

The freedom of navigation which Article 5 seeks to protect is not an abstract and academic freedom, but a tangible and effective freedom: the freedom to engage in a business in order to reap its profits. The purpose of this Article would be entirely stultified if the state were entitled to make it impossible for the shipping business to earn any profits, so long as every one was left free to engage in it: the idea of freedom of navigation which underlies Article 5 is something altogether different.

Jonkheer van Eysinga held that the General Act of Berlin of 1885 derived directly from the 1815 Congress of Vienna, and that its basis is Articles 108 and 116 of the Final Act of Vienna.

Indeed, from the very outset, freedom of fluvial navigation has included both the nautical aspect, in the sense of freedom of movement and the commercial aspect; . . . It is clear, therefore, that from the very beginning, freedom of fluvial navigation has been understood as an element of international trade, and that it was never complete in itself in the sense of freedom of movement. . . . It is this freedom of *commercial* navigation which the General Act of Berlin of 1885, as stated in its Preamble, provided also for the Congo and its tributaries; and there is nothing to show that the authors of Article 5 of the Convention of Saint Germain intended to alter that situation.<sup>32</sup>

M. Schücking, agreeing with van Eysinga, emphasized one of his arguments, namely that if the St. Germain Convention had the effect, as the majority held, of nullifying the Act of Berlin, it is itself invalid and ought not to be upheld by the Court.

These 1934 views of the Court's minority accord with language used in its judgment of September 10, 1929, by a ten to three vote on the territorial extent of the International Commission of the Oder River. The Commission had been created pursuant to Article 331 of the Versailles Treaty. The Court held that, since the Oder was an international river providing more than one state with access to the sea, the jurisdiction of the Commission extended along the Oder's navigable tributaries into Poland. Citing the historical practice of states, and the standards set by the Treaty of Vienna, the Court found that all riparian states had a community of interest in such a river.

This community of interest in a navigable river becomes the basis of a common legal right, the essential features of which are the perfect

<sup>31a</sup> P. 112.

<sup>32</sup> Pp. 140-1.

equality of all riparian States in the use of the whole course of the river and the exclusion of any preferential privilege of any one riparian state in relation to the others.<sup>33</sup>

The Court then goes on to say that the Treaty of Versailles extended this status of such a river to one of "complete internationalization, that is to say, the free use of the river for all states, riparian or not."<sup>33a</sup>

When due allowances are made for differences in the subject matter in the Chinn and Oder cases, the reasoning of the Court majority in the Chinn case carries it far afield from the Court's 1929 concept of "perfect equality" which it said had characterized an international river in the practice of states since the Treaty of Vienna.

Dispensing with further citations and discussion we may conclude that if, following the United States proposal at Berlin, an agreement should be entered into among nations for complete freedom of navigation, with commercial equality for all, on their respective internal waterways, there is some probability that the new International Court of Justice would come to find the reservation of *cabotage* by any of those nations to be an impairment of that freedom. Legislators and diplomats as draftsmen employ general principles sometimes for breadth of application, at others for avoidance of troublesome negotiation. In either case they tend to shift their burden to the courts. If abolition of *cabotage* should be intended by the treaty makers they would do best not to leave the issue to judicial construction.

#### SOME ELEMENTS OF A UNITED NATIONS ORGANIZATION (OR OF SOME OTHER CENTRAL BODY) FOR CONTROL OF INTERNATIONAL INLAND WATERWAYS

It is not the purpose of this article to give a complete exposition of the principles and details of such a plan for European inland navigation control as was implied by President Truman's proposal at Berlin. Several principles that probably ought to be considered can be merely touched upon here. Some of those mentioned below seem not to have been tried in connection with any international river regime; others are indicated by features of the Rhine and Danube controls or by obvious defects in one or the other; several would depend for their usefulness upon the extent to which the states will concede the claims of regionalism against sovereignty. We shall, on the whole, be assuming, in the following suggestions for organizational procedure, that the UNO will undertake to carry out the European waterways proposal in its full scope as now sponsored by the United States and Great Britain. However, as the idea may come to be adopted not by UNO, but by several nations acting on their own in a smaller European area, we sometimes use the phrase Central Authority to mean either UNO or such a smaller international body.

Principles for a system of inland waterways control can conveniently be considered in seven groups: I. Functions and Powers of the Executive

<sup>33</sup> Series A., No. 23, p. 27.

<sup>33a</sup> P. 28.

Agency, Whether Over-all or Regional; II. Personnel; III. Incorporation of Shore and Navigation Properties in a Region; IV. Special Problems for Solution by the Authorities; V. Adjustment of Jurisdiction among Regions, and Over-all United Nations' Control; VI. Justiciable Controversies; VII. Uniformity of Principles among Continents.

*I. Functions and Powers of the Executive Agency Whether Over-all or Regional*

(a) Should there be a single executive agency responsible for directly controlling all waterway regions, or should there be separate regional Authorities? President Truman apparently supplied the answer when he said: "Membership on the agencies would include the United States, Great Britain, the Soviet Union, and France, plus those states which border upon the waterways." This would be consistent with precedents both before and since Versailles and Barcelona. England, for instance, was a party to both the 1856 maritime Danube arrangement and the 1921 statute for the fluvial Danube; and, pursuant to the Treaty of Barcelona, she participates in the Rhine regime.

It seems practicable that there be separate regional authorities under joint riparian and non-riparian direction, and that, in turn, coordination between the regional Authorities be effected by the United Nations Organization or other Central Authority. This would make for objectivity in the formulation of regional policy and also for consistency and uniformity among the regions; at the same time, it would afford the essential democratic factor of regional initiative and of responsibility for local cooperation with the Central Authority.

(b) Should the powers of a regional Authority be supervisory and regulatory only or also executory? In other words, should the Authority have the power not only to plan and regulate, but also to construct or install, or to acquire, and then maintain and operate, improvements for navigation and for loading, unloading, warehousing and storage and for affording free ports, customs facilities, etc.? If so, should it have financial powers such as to obtain funds from users of the river through a license system or otherwise, and to borrow funds on its properties and rights, whether from private sources or from riparian states or from the International Bank for Reconstruction and Development?<sup>34</sup> The history of the maritime Danube navigation regime affords precedents for centralized executory authority, for the prin-

<sup>34</sup> We should mention here the European Central Inland Transportation Organization which came into formal existence on September 27, 1945, primarily as an emergency body to work with the military for the present in the restoration and coordination of inland traffic movements both on land and by water. The constitution of this organization is reproduced below, in the Supplement, at p. 31. A signatory is bound for two years, or as much longer as its elects. Funds for ECITO's work are to be contributed by the member governments according to a fixed budget procedure. The body's charter requires it to conform to any general policy of the United Nations. Presumably its activities would be subordinated to any functions that would be performed by a regime for inland navigation control.

ciple of licensing, and for power to borrow funds. The scope of the regional Authority's power would depend upon the physical and political conditions in each region, and on the extent to which the states are willing to pool their sovereignties for a common purpose.

It is doubtful that navigation license fees on the Rhine fifty or a hundred years ago would have supported the necessary channel and shore improvements for navigation as adequately as did the direct contributions by the riparian states. But today it seems that the costs of such improvements can be wholly or largely met on the Rhine and probably in some other regions out of the profits and other advantages incidental to hydro-electric, flow-stabilization, and irrigation works; and the regional Authorities should have powers broad enough to engage in such ventures. Furthermore, the far higher traffic density, either actual or in reasonable prospect, would yield large revenue from license fees or direct operation. The Danube and some other streams in such a European system are not so favorably circumstanced in this regard as is the Rhine. The United Nations Organization or other Central Authority should, upon the initiative of a regional Authority, have the power to call upon the states in a given region for contributions or guarantees to cover capital and operating deficits if earnings through license fees or operation are inadequate.<sup>35</sup>

(c) If the regional Authority is to have executory operational powers, what would be the appropriate scope of its regulatory and supervisory rights? It may be objected that this might mean vesting in one governmental body two conflicting functions—that of an operator and that of a judge among operators—in theory an unfortunate duality. We have, however, seen such a setup work with fair success in the cases of the United States Shipping Board and the Maritime Commission, and such quasi-judicial decisions by a regional Authority can be made subject to appeal to the Central Authority and in turn to judicial review.

Three further points can be discussed here together concerning the nature of the regional Authority's regulatory power.

Should the regional Authority control all navigation on the waterway, whether regular or irregular, whether internal to the region or external, including sea-going traffic, and, if so, should this be effected through policing regulations alone or through the leverage of licensing? Much can be said for making the regulation comprehensive. Partial jurisdiction is likely to lead to competitive difficulties. To use an inverse example in American transportation, it may be mentioned that federal regulation of inter-state railway rates was patently defective until the Supreme Court sanctioned extension of the Interstate Commerce Commission's jurisdiction to intra-state rates. It seems that the licensing system should be employed (at least for irregular traffic, if the regional Authority operates a regular service) and that it should at all events have police power.

<sup>35</sup> Hines, p. 30.

A cognate question is that of whether the regional Authority should have control of the rates charged in a particular region. If so it would presumably publish the legal rates and undertake to prevent extortion or discrimination through illegal rates and practices. Also in that case it should probably be enabled to protect the small operator from being driven off the river by the big fleet owner or by the producer of goods with the competitive advantage of being also their carrier. Such questions as these are familiar in the United States, and Congress has provided laws under which they can be handled.

If the Authority should have the rate-making function it would probably be feasible to accord to it the quasi-judicial power, on complaint and hearing, to lower or raise rates, to award reparations for extortion or unfair discrimination, and to penalize violations of its regulations. In that case should its decisions in such matters be enforceable by courts established under the United Nations Organization or otherwise? There are helpful precedents in both hemispheres.

## *II. Personnel*

How should the representatives on the regional Authority from each riparian State be selected? Presumably, the United Nations would name some of its personnel in accordance with the American proposal at Berlin. If, however, the regional Authority should take over wharves, warehouses, and other shore installations or their use, from a state or city, or from private corporations or individuals, through issuance of long-term obligations in payment, shouldn't a resident holder of the regional Authority's obligations participate in the selection of the representative from that state?

Furthermore, from a practical angle, it seems that engineering experience should perhaps be assured to each region either by requiring it for eligibility to be a representative on a regional Authority, or through direct appointments of engineers by the Central Authority.

## *III. Incorporation of Shore and Navigation Properties in a Region*

If a regional Authority should be empowered (and to this end the Authority should probably have the power of eminent domain) to acquire title to, or a lessee's right in, properties in a state, such as shore and channel installations, and perhaps vessels in addition to navigation service craft, presumably the Authority's long term obligations would be issued in exchange for such properties, with or without guarantee by the riparian state or by the Central Authority. If such obligations were given it might be practicable for the state to organize all such obligations of the regional Authority, issued to a state or to its nationals, into a State Trust. Such Trust would hold the obligations for the benefit of former owners of the properties or of their assignees, who would in turn hold certificates issued by the Trustee evidencing their interest in the Trust, and transferable only to the state or a national of it. If this course were pursued special financial safeguards for their holders



would probably be provided so long as the regional Authority's obligations remain unpaid. If the Authority's obligations were not guaranteed as suggested there could be a retention of a lien by such a State Trust upon the properties for which the regional Authority's obligations had been given and upon the earnings of the properties.

#### *IV. Special Problems for the Authorities*

To the extent that the Central Authority, in its constitutional arrangements for the regions, failed to deal finally with such matters as *cabotage*, customs duties, free ports, transit arrangements (i.e., uninterrupted passage through a state), subsidies by governmental authorities, war contingencies, labor and social insurance and sanitary control, it would be the task of the regional Authorities to settle these problems. But the Central Authority should continuously contribute the factors of stability, justice, flexibility, and uniformity.

#### *V. Adjustment of Jurisdiction among European Regions and Over-all United Nations or Central Authority Control*

Provision would be made for adjusting conflicts of jurisdiction between or among two or more regional Authorities over a canal or other waterway connecting two or more regions. Given a United Nations central authority for Europe, this question need not be labored here. If the United States suggestion at Berlin is adopted, the United Nations Organization would probably designate from non-riparian states some or even the majority of the members of such a central authority, and the regional Authorities might designate representatives as members. Any Central Authority would resolve conflicts of jurisdiction among regions, subject presumably to the judicial review mentioned under VI, below.

#### *VI. Justiciable Controversies*

Under Articles 36 and 37 of the Statute of the International Court of Justice, as approved in June 1945 by the United Nations Conference at San Francisco,<sup>36</sup> the new Court will succeed to the jurisdiction of the Permanent Court of International Justice, but will have wider powers. As part of a European system for control of inland navigation, procedure would naturally be provided for bringing controversies that arise under that system to arbitration, and to submission to lower courts and to courts of appeal, with final resort, in appropriate instances under the terms of the Statute, to the International Court of Justice.

#### *VII. Uniformity of Principles among Continents*

From the outset the United Nations Organization, if it adopts President Truman's proposal, will probably interest itself in the idea of an inter-con-

<sup>36</sup> See *The New York Times*, June 15, 1945, p. 16.

tinental Authority for seas and internal waterways, on which will rest the responsibility for harmonizing the principles and practices among the Authorities administering the continental internal waterway systems of the globe.

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Against a brief historical background of the control of European waterways and of the principles of international law involved we have considered here some of the possible features of a regime for all the rivers of that continent. The suggestions constitute at best a highly tentative adventure among contingencies, and their usefulness depends upon the kind of peace that can be developed. It seems, as the year 1946 opens, that the United States proposal,—no matter what its outcome may be in the near future,—could prove a lasting force for the liberalization of commerce among the nations and for world peace.

## RECENT ASPECTS OF THE CALVO DOCTRINE AND THE CHALLENGE TO INTERNATIONAL LAW

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### I

At the Third Conference of the Inter-American Bar Association held in Mexico City during July-August, 1944, a sub-committee<sup>1</sup> of the Committee on Post-War Problems proposed a draft resolution relative to the diplomatic protection of citizens abroad which, if ever officially accepted by the American Republics, would erase as between those countries all of the existing international law on the subject. The resolution urged, first of all, that "diplomatic protection of citizens abroad" be abolished in favor of an international protection of the rights of man. Pending the adoption of an appropriate international system to effect this purpose, diplomatic protection would be "transitorily" retained only in "clearly-defined cases of denial of justice restrictively construed and especially provided for in treaties or conventions to which the claimant and respondent states are parties." It further proposed a declaration that, "due to the 'similarity of their republican institutions, their unshakeable will for peace, their profound sentiment of humanity and tolerance, and their absolute adherence to the principles of international law, of the equal sovereignty of states and of individual liberty without religious or racial prejudices',<sup>2</sup> the nations of this Continent have attained a similar reasonable standard of justice which renders diplomatic protection unnecessary in their case." This pharisaical precept was said to derive from "the universally accepted principle, without a single discrepancy, that as between states fulfilling such condition equality of rights with nationals is the utmost to which an alien can aspire." Finally the resolution recommended that efforts be made to secure acceptance by the American Republics of two Continental conventions, subsequently transformable into world agreements, sanctioning (a) the integral validity of the Calvo Clause, and (b) the irresponsibility of the state for damages to alien residents arising out of civil wars.<sup>3</sup> These propositions were originally suggested to the Conference in a paper presented by Lic. García Robles of Mexico, dealing with "Diplomatic Protection, the Calvo Clause, and the Safeguard of the International Rights of Man." In that paper García Robles made the rather

<sup>1</sup> Subcommittee XIV, composed of Dr. Riesco, Dr. Condert, and Lic. García Robles.

<sup>2</sup> The passage within single quotation marks was textually taken from the "Declaration of the Principles of the Solidarity of America," approved at the Eighth International Conference of American States held at Lima, December 24, 1938. See this JOURNAL, Vol. 34 (1940), Supplement, p. 190; *International Conferences of American States*, First Supplement (1933-1940), Washington, 1940, p. 308.

<sup>3</sup> This JOURNAL, Vol. 39 (1945), pp. 558-559.

remarkable assertion that every thesis which defends diplomatic protection as a right of the state is a product of Hegelian influence and accords with totalitarian doctrines against which the United Nations were then fighting. (Diplomatic protection was denounced as an instrument of oppression for the use of strong states against the weak, as ineffective when employed by small powers, and as contrary to the democratic tendencies of modern law.) Therefore, he argued, it should be replaced by an international protection of the rights of man which avoids abuses to which diplomatic protection is subject, and which guarantees such rights for all men, irrespective of nationality, solely by virtue of their capacity as human beings.<sup>4</sup>

To one unfamiliar with the origin, antecedents, and history of this attractively phrased proposal, it might appear as a desirable, albeit revolutionary, doctrine, the aims of which are of the most laudable order. (A closer analysis of the three points of the resolution, when read as a whole reveals, however, that its purpose is quite other than what on the surface seems to be a noble effort to elevate the position of the individual in international law.) In reality it marks the final and logical phase of a determined campaign against one of the most fundamental pillars of international law. The current form of that campaign is but a variation on the theme announced by ex-President Cárdenas of Mexico in an address to the Congreso Internacional Por Paz on September 10, 1938, a few days after the celebrated exchange of notes between Mexico and the United States relative to the expropriation of American-owned agrarian properties.<sup>5</sup> It was in this address that Cárdenas voiced his protest against the "extraterritoriality of nationality," denouncing it as one of the "fundamental injustices" which had its origin in the theory of the Klan and of the continuity of the tribe through time and space.<sup>6</sup> Cárdenas' doctrine, in sum, would divest nationality of any legal consequences except within the national territory itself.<sup>7</sup> Abolition of diplomatic protection—the real, though unexpressed, purpose—would thereby be achieved, and the entire law of state responsibility repealed. Latin-American resistance to international claims had never before been expressed in quite these terms, although its spokesmen had often advanced legal arguments which tended to lead to the same consequence. Attempts to deny liability for injuries suffered by foreign subjects had mainly been based upon an alleged interpretation and application of existing international law, and upon various techniques designed to defeat the normal operation of principles of state responsibility generally accepted elsewhere.<sup>8</sup> Not the

<sup>4</sup> Mimeographed copy distributed to the delegates, p. 24.

<sup>5</sup> See the notes dated July 21, August 3, August 22, and September 2, 1938, reproduced in this JOURNAL, Vol. 32 (1938), Supplement, p. 181.

<sup>6</sup> Salvador Mendoza, *La Doctrina Cárdenas*, Mexico City, 1939, pp. 28-29. See the remarks of Philip Marshall Brown, on "The Cárdenas Doctrine," this JOURNAL, Vol. 34 (1940), p. 300.

<sup>7</sup> Mendoza, work cited, p. 31.

<sup>8</sup> For a discussion of the various legislative limitations which Latin-American States sought to place upon international claims, see Borchard, *The Diplomatic Protection of Citizens*

least important of these techniques, and one which is of special significance to an analysis of the draft resolution referred to at the beginning of this paper, was the contention that diplomatic protection is permissible only in the case of a denial of justice, which was then narrowly defined as a refusal of access to court or its equivalent (*i.e.*, judicial refusal to render a decision).<sup>9</sup> This restricted and unilateral definition (frequently enacted into the municipal law of various Latin-American countries)<sup>10</sup> is a perversion of the concept of denial of justice in international law. Under that well-settled concept the state's responsibility is engaged by every act (or omission) on the part of officials charged with administering justice to aliens which fails to meet certain reasonable civilized standards, regardless of its propriety as tested by the respondent state's national law.<sup>11</sup> Such an objective view of the law—an accurate reflection of the past fifty years' developments in international practice and jurisprudence—could hardly be expected to receive much sympathy from states desirous of reducing their potential liability as respondents. It never has. Their traditional attitude prior to the present war is well typified in the plea made by Dr. Cruchaga Ossa of Chile during the Eighth International Conference of American States at Lima, in 1938. Cruchaga Ossa demanded recognition of the validity of the Calvo Clause and of the "special circumstances" which rendered ordinary legal doctrine and precedents "inapplicable" to the Latin-American states on this point; he denied that a nation's obligations to foreigners under general international law could be any different or more extensive than those granted by a state to its own subjects, *i.e.*, that a diplomatic claim could ever be presented where foreigners were given equality of treatment with nationals; and he asserted that the final word in the matter of international obligations resided with the local courts.<sup>12</sup> So repeatedly have these arguments been rejected by international tribunals,<sup>13</sup> and so overwhelmingly have they been condemned

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*Abroad*, New York, 1927, §§ 392 and ff., and Freeman, *The International Responsibility of States for Denial of Justice*, London, 1938, pp. 456 and ff.

<sup>9</sup> Freeman, work cited, pp. 457-458.

<sup>10</sup> See, for example, a Salvador law of September 29, 1886 (*British and Foreign State Papers*, Vol. 77, p. 121 and Moore, *Digest of International Law*, Washington, 1906, Vol. 6, p. 267); for other laws to the same effect, Freeman, work cited, pp. 458-459.

<sup>11</sup> Cf. De Visscher, *Le Dénî de Justice en Droit International*, in *Recueil des Cours de l'Académie de Droit International de La Haye*, Vol. 52 (1935), pp. 375, 381, 390; Freeman, work cited, pp. 145-146, 558; Hyde, *International Law*, 2nd ed., New York, 1945, §§ 281, 287, and authorities cited. For recognition of the principle in international jurisprudence, see the *Chevreau* award (*France v. Great Britain*), June 9, 1931, reported in this JOURNAL, Vol. 27 (1933), pp. 153, 160; the *De Sebla* claim (*U. S. v. Panama*), *American and Panamanian General Claims Arbitration*, Report of Bert L. Hunt, Washington, 1934, p. 432; and the *Neer* claim (*U. S. v. Mexico*), *Opinions of Commissioners*, Washington, 1927, p. 73.

<sup>12</sup> *Octava Conferencia Internacional Americana, Diario de Sesiones*, Lima, 1939, pp. 302 and ff.

<sup>13</sup> In addition to the cases referred to in note 11, above see: the *Chattin* case (*U. S. v. Mexico*), *Opinions of Commissioners*, Washington, 1927, p. 441; the *Roberts* case, same, p.

by publicists outside Latin-America<sup>14</sup>—as well as by some Latin-American writers themselves<sup>15</sup>—that their persistent espousal can only be explained in the light of hopeful self-interest.

The Cárdenas doctrine broke with this orthodox method of invoking alleged international law to bar foreign claims and sought to transfer the entire controversy to the political level. But it escaped general notice until amplified and refined by Ramón Beteta, Mexico's able Under-Secretary for Foreign Affairs, at a meeting of the Eighth Scientific Congress, held in Washington, D. C., in 1940. Much of the paper which Beteta presented to the Congress was devoted to argument against diplomatic protection of foreign economic investments; protection of the person was to be distinguished from protection of property, as to which he said<sup>16</sup>:

*Entre hombres jurídicamente iguales, organizados en estados semejantes, con cultura análoga, la protección del extranjero no sólo es indebida sino anacrónica y tiene, en cuanto a los intereses económicos, la única misión de establecer indudables e indebidos privilegios.*

Ultimately this difference between person and property proves unimportant, as the true goal towards which the Latin-American countries were heading was "to suppress in their relations, *the supposed right of diplomatic protection.*"<sup>17</sup> Protection, argued Beteta, was a form of intervention which the American States had prohibited in their relations *inter se*.<sup>18</sup> Carried to its

105; the *Hopkins* case, same, p. 51; *The Phare (France v. Nicaragua)*, Moore, *International Arbitrations*, Washington, 1898, Vol. 5, p. 4870; *The Orient (U. S. v. Mexico)*, same, Vol. 3, p. 3229; the *Martini* case (*Italy v. Venezuela*), reported in this JOURNAL, Vol. 25 (1931), pp. 554, 577. See also the advisory opinion of the Permanent Court of International Justice in the case of the *Treatment of Polish Nationals in Danzig: Publications of the Court*, Series A/B, No. 44, at pp. 24-25, reproduced in M. O. Hudson, *World Court Reports*, Vol. II, p. 804.

<sup>14</sup> Among such authorities are: De Visscher, work cited, p. 390; Borchard, work cited, pp. 336-343; Fitzmaurice, "The Meaning of the Term 'Derial of Justice,'" in *British Yearbook of International Law*, Vol. XIII (1932), pp. 100-101; Hyde, work cited, § 266; Eagleton, *The Responsibility of States in International Law*, New York, 1928, p. 83; Kaufmann, *Les règles générales du droit de la paix*, in *Recueil des Cours de l'Académie de Droit International de La Haye*, Vol. 54, p. 428; Salvioli, in same, Vol. 46, p. 113; Eustathiadès, *La Responsabilité de l'Etat*, Paris, 1936, Vol. 1, Chapter VIII, in general; Brierly, *Law of Nations*, 3rd ed., Oxford, 1942, pp. 172-174; Schoen, *Die Völkerrechtliche Haftung der Staaten* (*Zeitschrift für Völkerrecht*, Band X), Breslau, 1917, pp. 88-90; doctrinal note to the *Eliza* case, La Pradelle-Politis, *Recueil des Arbitrages Internationaux*, Paris, 1923, Vol. II, p. 278.

<sup>15</sup> Cf. Bevilacqua, *Direito Publico Internacional*, Rio de Janeiro, 1911, Vol. I, p. 219; Accioly, *Tratado de Direito Internacional*, Rio de Janeiro 1933, Vol. I, § 416; Maurtua, *La Responsabilidad de los Estados* (address delivered at the University of Havana in November, 1929); the *Comentarios del Dr. Eugenio Cantero-Herrera ante la Comisión Permanente de Washington*, Washington, 1936, p. 7; Ulloa, *Derecho Internacional Publico*, 2nd ed., Lima, 1938, Vol. I, pp. 224, 243 and the remarks of Dr. Drago at the Second Hague Peace Conference (1907), quoted in the text (see note 58, below). Compare Lafayette Rodrigues Pereira, *Principios de Direito Internacional*, Vol. I, pp. 370-371.

<sup>16</sup> *Proceedings of the Eighth American Scientific Congress*, Washington (1940), Vol. X, p. 34.

<sup>17</sup> Same, p. 47. Italics supplied.

<sup>18</sup> Same, pp. 30-34, 40 and ff., and 47.

logical conclusion, the theory signified the abolition of all state responsibility for injuries to foreigners, whether originating in contract or in tortious governmental action.<sup>19</sup>

Such is precisely the point to which García Robles carried it at Mexico City, and the form which it took in the draft resolution. The only new feature was the introduction of some pious phraseology advocating an international guaranty of the rights of man. This seductive addition could have no other possible object than to render a discredited dogma<sup>20</sup> more palatable. But the basic doctrine remains the same. In one respect this presentation is even more dangerous for it thoroughly confuses the central issue. It diverts attention from the real end sought, viz., suppression of all international law protecting foreign subjects, while purporting to preach a creed which its very advocates would be the last to accept. In the guise of "liberalism," it reasserts the ancient theory of an unbridled sovereignty, that "states are responsible only to themselves."<sup>21</sup> Let us make no mistake about it: there is nothing progressive, humanitarian, or altruistic in the philosophy inspiring this resolution. Its exclusive aim is to free an interested state from restraints imposed by international law upon conduct which would otherwise produce a pecuniary liability to its sister nations. The far-reaching implications of this doctrine are so sinister and so deplorable that it should be resisted by the profession with every means at its command. To expose just what the resolution would accomplish and how it would operate, is the primary concern of this paper.

## II

As a preliminary it will be useful to probe somewhat deeper into the historical and juridical roots of the "no-responsibility" thesis in order to view the problem in its proper perspective. An analysis will then be made a) of the principal arguments that have been relied upon to attack the institution of diplomatic protection and b) of the text of the resolution itself. No useful purpose would be served here by recapitulating in detail the principles governing state responsibility for injuries to foreigners or by marshalling author-

<sup>19</sup> Beteta theorized that diplomatic protection was never permissible to assert an international claim and that only a denial of justice (which for him was the "impossibility of reparation") would warrant, not protection, but arbitration. Enforcement of the arbitral award could never be a matter for "diplomatic protection." This nebulous conception is somewhat bewildering in view of the traditional narrow definition of denial of justice prevailing in Latin-America. But the general intent of his thesis was clear: to exclude state responsibility in this class of cases. See *Proceedings of the Eighth American Scientific Congress*, Washington (1940), Vol. X, pp. 31, 47-48.

<sup>20</sup> For a critical analysis of this dogma, see Freeman, work cited, pp. 123 and ff., pp. 504 and ff., and pp. 532 and ff.

<sup>21</sup> This theory, expounded by Funck-Brentano and Sorel (*Précis du droit des gens*, Paris, 1877, pp. 224-225) and reproduced in Pradier-Fodéré (*Traité de Droit International Public*, Paris, 1895-1896, Vol. I, p. 329) is universally rejected by contemporary publicists, not excepting the leading Latin-American authorities.

ities to support these principles.<sup>22</sup> Yet several fundamental propositions are so well-established as to be no longer subject to doubt. One is that a state's duties to the subjects of a foreign nation may be more extensive than those owed to its own subjects. Conversely, under certain conditions they may be less extensive. The contention that equality with nationals is the measure of a state's international obligations to aliens has been repeatedly rejected by international claims commissions<sup>23</sup> as well as by the Permanent Court of International Justice itself. That court in the case concerning *Certain German Interests in Polish Upper Silesia* expressly recognized the existence of a common or generally accepted international law respecting the treatment of aliens and which is applicable to them despite municipal legislation.<sup>24</sup> An imposing array of arbitral awards has firmly established the rule that domestic laws and action must conform to international standards of civilized justice, or a diplomatic claim will lie.<sup>25</sup> Many of these decisions involved deprivation of property rights such as expropriation and unlawful seizures or destruction.<sup>26</sup> The result in a given case was not affected by the circumstance that property rights rather than personal rights were violated.<sup>27</sup> It is likewise well settled that the final word as to observance of a State's international obligations does not rest with its own supreme court. A judicial decision which violates the law of nations is on the same plane as such action by any other State organ.<sup>28</sup> Nothing is more

<sup>22</sup> See, for exhaustive studies of this subject, the works of Borchard, Eagleton and De Visscher, cited in note 14, above, in general, and the present writer's *International Responsibility of States for Denial of Justice*, London, 1938.

<sup>23</sup> Cf. the *Neer* case (*U. S. v. Mexico*) *Opinions of Commissioners*, Washington, 1927, p. 71, at p. 73; the *Faulkner* case, same, p. 86; the cases cited in notes 11 and 13, above; the authorities discussed in Freeman, work cited, pp. 540-532, and Professor Borchard's excellent paper on "The 'Minimum Standard' of the Treatment of Aliens," in *Proceedings of the American Society of International Law*, 1939, pp. 51 and ff.

<sup>24</sup> *Publications of the Court*, Series A, No. 7, p. 22 (reproduced in Hudson, *World Court Reports*, Vol. I, Washington, 1934, pp. 523-524). See also *The Chorzów Factory* case in same, Series A, No. 9, p. 27 (reproduced in Hudson, work cited, pp. 606-607).

<sup>25</sup> See the cases and authorities referred to in notes 11, 13, and 23, above; Hyde, work cited, § 266; and Professor Lauterpacht's recent monograph, *An International Bill of the Rights of Man*, New York, 1945, p. 48.

<sup>26</sup> Examples are furnished by the *De Sabla* claim cited in note 11, above; *Bronner's* case (*U. S. v. Mexico*), discussed in Whiteman, *Damages in International Law*, Washington, 1937, Vol. II, p. 931; *Mather and Glover* case, same, pp. 870-871; *Pawley's* case (*U. S. v. Haiti*), same, p. 872; the *Howland* case (*U. S. v. Mexico*), Moore, *International Arbitrations*, Vol. 3, p. 3227; *The Norwegian Ships* case (*Norway v. U. S.*), reported in this JOURNAL, Vol. 17, p. 387; Umpire Huber's *Rapports*, on *Réclamations Britanniques dans la Zone espagnole du Maroc*, La Haye, 1925, p. 60; and the authorities referred to in Freeman, work cited, p. 519, note.

<sup>27</sup> See Schwarzenberger's recent work, *International Law*, Vol. 1, London, 1945, pp. 87 and ff.; and Borchard, work cited, p. 62.

<sup>28</sup> Anzilotti, *Cours de Droit International*, Paris, 1929, p. 480. See the note to the *Yuille, Shortridge & Co.* case, La Pradelle-Politis, work cited, p. 113; Schoen, work cited, pp. 83-85; Triepel, *Völkerrecht, und Landesrecht*, Leipzig, 1899, p. 35C; Kohler, *Grundlagen des Völ-*



elementary than that a nation may not justify non-compliance with international duties upon the defective condition of its internal legislation or governmental organization.<sup>29</sup> Nor does positive international law sustain the restricted or bare procedural concept of denial of justice<sup>30</sup> under which responsibility would exist only where an alien is refused access to the local courts.<sup>31</sup> Such an extreme pretension in behalf of state sovereignty is no

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*kerrechts*, Stuttgart, 1918, p. 159; Reply of Switzerland, *Bases of Discussion* drawn up by the Preparatory Committee, Vol. III, *Responsibility of States*, League of Nations Publications, Ser. V, Legal, 1929, V. 3, p. 47; Eagleton, work cited, pp. 44, 67 and ff. and authorities cited; Cavaglieri, *Corso di Diritto Internazionale*, 1934, pp. 514-515. See the remarks of the Italian and Spanish delegates (Cavaglieri and Vidal) at the Hague Conference on the Codification of International Law, *Minutes of the Third Committee, Acts of the Conference*, League of Nations Publication, Ser. V, Legal, 1930, V. 17, Vol. IV, pp. 109, 118, resp.; De Visscher, work cited, p. 376; and especially Eustathiadès, work cited, pp. 29 and ff. "The position that a sovereign is internationally liable for rulings of his courts, in violation of international law, was taken by us early in the wars growing out of the French Revolution, and was finally acceded to by the British Government against whom it was advanced . . .": Mr. Bayard to Mr. Jackson, Sept. 7, 1886, Moore, *Digest*, Vol. VI, p. 680. Compare Wheaton, *Elements of International Law* (Dana ed.), Oxford, 1936, pp. 410-11. For general discussion, see Freeman, *The International Responsibility of States for Denial of Justice*, pp. 28 and ff.

<sup>29</sup> See Article 9 of the Resolutions voted by the *Institut de Droit International*, Lausanne Session, *Annuaire* (1927), Vol. 3, pp. 330 and ff.; De Visscher, *La Responsabilité des Etats* in *Bibliotheca Visseriana*, Vol. II, p. 105; Root, "The Basis of Protection to Citizens Residing Abroad," this JOURNAL, Vol. 4 (1910), p. 521; Bourquin, in *Recueil des Cours de l'Académie de Droit International de La Haye*, Vol. 35 (1931), p. 215; Eagleton, *The Responsibility of States in International Law*, New York, 1928, p. 33; Westlake, *International Law*, 2nd ed., Cambridge, 1910, Part I, p. 329. See the case of the *Eliza La Pradelle-Politis*, work cited, Vol. II, p. 271, especially at p. 276, and authorities there cited; and the various cases of mob violence at Denver, Rock Springs, New Orleans, etc., in Moore, *Digest*, Vol. VI, pp. 809 and ff. In *Tunstall's* case (failure to prosecute the murderers of a British subject), Secretary Evarts vigorously repudiated liability for, *inter alia*, the unsound reason that administration of the criminal laws within the States and territories was free from Federal interference: same, p. 662 at p. 663. "It is as little doubtful nowadays as it was in the day of the Geneva Arbitration that international law is paramount to decrees of nations and to municipal law . . .": *North American Dredging Co. Case (U. S. v. Mexico)*, *Opinions*, p. 21 at p. 25. And see the *Shufeldt Claim (U. S. v. Guatemala)*, this JOURNAL, Vol. 24 (1930), p. 799 at p. 818; to same effect: Lauterpacht, *Annual Digest of Public International Law Cases* (1929-30), p. 179 at p. 181, and the opinion in the *Yuille, Shortridge & Co. case*, La Pradelle-Politis, work cited, Vol. II, p. 105.

<sup>30</sup> This meaning of the term is a carry-over from its early significance in municipal legal systems. See Freeman, *The International Responsibility of States for Denial of Justice*, pp. 86 and ff.

<sup>31</sup> As authority for what he generously described as leaving an "ample opening for the arbitrary application of diplomatic protection," García Robles cited the view expressed by Gustavo Guerrero in a report which he prepared as *rapporteur* of a sub-committee set up by the Committee of Experts for the Progressive Codification of International Law under the auspices of the League of Nations. But the Guerrero report was unacceptable to the Committee of Experts, which later submitted Bases of Discussion 5 and 6 to the Hague Codification Conference of 1930. The Third Committee of that Conference finally adopted the following text:

truer of present law than it was during the classical period of Grotius,<sup>32</sup> Bynkershoek,<sup>33</sup> Wolff<sup>34</sup> and Vattel.<sup>35</sup> These celebrated fathers of our science held squarely that the denial of justice justifying reprisals included not only refusals to judge or unwarranted delays equivalent to a refusal but even an unjust judgment, or a judgment "plainly against right." And they further agreed that adjudication by the local courts was not conclusive of the justice of a decree as between nations.<sup>36</sup> The later growth of the law did not betray them. A conclusive body of decisions,<sup>37</sup> flanked by a mass of modern doctrinal authority<sup>38</sup> has definitely fixed the state's responsibility on a far broader scale than the insignificant degree of liability which the draft resolution would impose. Arbitrary arrests and imprisonment,<sup>39</sup> harsh treat-

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"A State is responsible if a foreigner suffers damage as a result of the fact:

"1. That a judicial decision, which is not subject to appeal, is clearly incompatible with the international obligations of the state.

"2. That, in a manner incompatible with the international obligations of the state, the foreigner has been hindered in the exercise of his rights by the judicial authorities or has encountered in his proceedings unjustifiable obstacles or delays implying a refusal to do justice.

"The claim against the state must be lodged not later than one year after the judicial decision has been given."

The proceedings of this Committee are found in the League of Nations Publication cited in note 28, above. For a detailed criticism of the Guerrero Report, see Freeman, work cited, pp. 120 and ff.

<sup>32</sup> *De Jure Belli ac Pacis Libri Tres*, Classics of International Law edition, Book III, Chapter II, par. 5, 1, p. 627.

<sup>33</sup> *Questionum Juris Publici Libri Duo*, Classics of International Law edition, Book I, Chap. 24, pp. 135-136.

<sup>34</sup> *Jus Gentium Methodo Scientifica Pertractatum*, Classics of International Law edition, § 587.

<sup>35</sup> *Le droit des gens ou principes de la loi naturelle*, Classics of International Law edition, Book II, § 350.

<sup>36</sup> "A right is denied you if you cannot acquire by a judgment that which is your own or ought to be made your own. It is plain that this can be brought about in two ways, either if the judge refuses to hear you, or if he gives an unjust decision. . . . Therefore, since civil laws bind only members of the state in which they are promulgated, among nations the decision of a judge whether properly or improperly made is not considered correct and just, even if it shall have been confirmed by a higher court. If then in a matter not doubtful a decision has been made plainly contrary to law, the decision is considered a nullity, and therefore the right denied is properly taken": Wolff, *Jus Gentium Methodo Scientifica Pertractatum*, § 587 (italics supplied). And see Hamilton's remarks in *The Federalist* (Lodge ed.), New York, 1888, p. 495.

<sup>37</sup> See the authorities cited in notes 39-43, below.

<sup>38</sup> In addition to the authorities cited in notes 14 and 15, above, see Wheaton, *Elements of International Law*, 5th ed., London, 1916, p. 607; Article 5 of the Draft prepared by the Institut de Droit International at Lausanne in 1927, *Annuaire de l'Institut*, Vol. 3, pp. 330 and ff.; Article 9 of the Draft Convention on Responsibility of States prepared by the Harvard Research in International Law, this JOURNAL, Vol. 23 (1929), Supplement, p. 173; Alvarez, *Exposé de motifs et déclaration des grands principes du droit international moderne* (Paris, 1936), Articles 25(b), 28, 29, 30, reproduced in Appendix V of Freeman, work cited, p. 725.

<sup>39</sup> The *Way* case (*U. S. v. Mexico*), *Opinions of Commissioners*, Washington, 1929, p. 94 and Lauterpacht, *Annual Digest of Public International Law Cases* (1927-1928), p. 210; the

ment during confinement,<sup>40</sup> unreasonable delays,<sup>41</sup> flagrant irregularities in the conduct of the proceedings,<sup>42</sup> and the very substance of the decree rendered<sup>43</sup> have regularly been held to create responsibility. The restricted

*Perry case (U. S. v. Panama)*, General Claims Arbitration, Report of Bert L. Hunt, Washington, 1934, p. 71; *The Chevreau Claim (France v. Great Britain)*, *Compromis . . . et Sentence du Tribunal d'Arbitrage*; Report distributed by the *Bureau International de la Cour Permanente d'Arbitrage*, p. 48. The award is also found in this JOURNAL, Vol. 27 (1933), p. 153; Green's case, Moore, *International Arbitrations*, Vol. 3, p. 3139. And see Whiteman, *Damages in International Law*, Vol. I, pp. 287-418, for an exhaustive collection of cases.

<sup>40</sup> *The Gahagan case*, Moore, work cited, pp. 3240-3241; *the Roberts case (U. S. v. Mexico)*, *Opinions of Commissioners*, 1927, p. 100; and cf. Article 12 of the *Draft Convention on Jurisdiction with respect to Crime*, and comment, Research in International Law, this JOURNAL, Vol. 29 (1935), Supplement, pp. 596, 601. Compare the *McAndrews and Forbes Co. case*, American-Turkish Claims Settlement, Nielsen, *Opinions and Report*, Washington, 1937, pp. 120, 127.

<sup>41</sup> *The Fabiani case (France v. Venezuela)*, Moore, *International Arbitrations*, Vol. 5, p. 4895, reported also in La Fontaine, *Pasicrisie Internationale*, Berne, 1902, p. 356; *The Cotesworth and Powell case (Great Britain v. Colombia)*, Moore, work cited, Vol. II, pp. 2050, 2085; the *Bullis case*, Ralston, *Venezuelan Arbitrations of 1903*, Washington, 1904, p. 170; the *Dyches case (U. S. v. Mexico)*, *Opinions of Commissioners* (1929), p. 193; the *Consonno case (Italy v. Persia)*, Moore, work cited, Vol. 5, p. 5019, also reported in La Fontaine, work cited, p. 342; *El Oro Mining and Railway Co. case (Great Britain v. Mexico)*, *Further Decisions and Opinions of the Commissioners*, London, 1933, p. 150. Compare the *White case (Great Britain v. Peru)*, La Pradelle-Politis, work cited, Vol. II, p. 305, also reported in La Fontaine, work cited, p. 46, and Moore, work cited, p. 4957. See also the authorities cited in Freeman, *The International Responsibility of States for Denial of Justice*, p. 243, note.

As early as 1650 Zouche, in his *Juris et Judicii Fecia-is* (Classics of International Law edition, p. 33) held justice to be denied where judgment could not be obtained against a debtor within a reasonable time.

<sup>42</sup> See the *Cotesworth and Powell case*, Moore, work cited, Vol. II, pp. 2072, 2075; the *Ballistini case*, Ralston, *Venezuelan Arbitrations of 1903*, p. 504; *The Fabiani case*, Moore, work cited, Vol. 5, p. 4899; *Idler case*, same, p. 3516; the *Robert E. Brown claim (U. S. v. Great Britain)*, American and British Claims Arbitration, Report of Fred K. Nielsen, pp. 198-199; *Smith v. Compañía Urbanizadora . . . de Marianao*, this JOURNAL, Vol. 24 (1930), p. 384; the *Chattin case (U. S. v. Mexico)*, *Opinions of Commissioners*, p. 435. "The refusal of a Chilean court, in 1852, on the trial for crime of an American citizen, to hear testimony on behalf of the defendant would, if sustained by the Chilean government, be considered by the United States as 'a gross outrage to an American citizen for which it will assuredly hold Chile responsible.'" Mr. Conrad to Mr. Peyton, Oct. 15, 1852, Moore, *Digest*, Vol. VI, p. 274; and the correspondence in the *Coles and Croswell case*, August 17, 1885, *British and Foreign State Papers*, Vol. 78, pp. 1308-1309. On judicial fraud and corruption as a basis of responsibility, see the *Medina case*, Moore, *Arbitrations*, Vol. 3, p. 2315. The subject of irregularities in the conduct of proceedings is discussed at length in Freeman, work cited, Chapter XI.

<sup>43</sup> *The Martini case (Italy v. Venezuela)*, this JOURNAL Vol. 25 (1931), pp. 567, 577; the *De Sabla claim (U. S. v. Panama)*, American and Panamanian General Claims Arbitration, Report of Bert L. Hunt, pp. 434-440; the *Solomon case*, same, pp. 479-481; *Van Bokkelen's case*, same, Vol. 2, pp. 1807 and ff.; *The Orient*, Moore, work cited, p. 3229; *Bronner's case*, work cited, p. 3134; the *Morton case (U. S. v. Mexico)*, *Opinions of Commissioners* (1929), pp. 160 and ff.; *Interocean Transportation Co. v. United States*, this JOURNAL, Vol. 32 (1938), pp. 593, 616-617; *The Betsey*, Moore, *International Adjudications*, Vol. 4, pp. 240-248.

view would immunize judgments contrary even to the provisions of a treaty or to general international law, a result incompatible with settled practice.

Finally, the Calvo Clause—a contractual undertaking by a foreign national whereby he agrees to waive any right which he may have to the diplomatic protection of his government in connection with matters arising under the contract—has consistently been held by international tribunals to be invalid to bar claims based upon a denial of justice or other violation of international law.<sup>44</sup> In some cases, however, tribunals have interpreted

For an analysis of the general problem of state responsibility for the substance of a judgment see the present writer's *International Responsibility of States for Denial of Justice*, Chapter XII.

<sup>44</sup> See the *Martini* case (*Italy v. Venezuela*), Ralston, *Venezuelan Arbitrations of 1903*, p. 841; *North American Dredging Co. case* (*U. S. v. Mexico*), *Opinions of the General Claims Commission*, p. 21, also reported in this JOURNAL, Vol. 20 (1926), p. 800; *International Fisheries case*, (*U. S. v. Mexico*), *Opinions of Commissioners* (1931), p. 207; *Interoceanic Railway Co. case* (*Great Britain v. Mexico*), *Further Decisions and Opinions of the Commissioners* (1933), p. 118.

*Accord*: Schwarzenberger, *International Law*, Vol. I, (1945), p. 64; Eagleton, work cited, p. 174; De Visscher, in *Recueil des Cours de l'Académie de la Haye*, Vol. 52, p. 432; Hoijer, *La Responsabilité Internationale des Etats*, Paris, 1930, p. 363; Fiore, *Diritto Internazionale Codificato*, § 539. And see the replies of the following governments to the questionnaire sent out by the League of Nations Preparatory Committee for the Progressive Codification of International Law: South Africa, Germany, Australia, Austria, Belgium, Denmark, Japan, Norway, Poland and Great Britain (whose reply accepted "as good law" the decision in the *North American Dredging Co. case*, approving, among other things, the Commission's statement to the effect that a stipulation in a contract purporting to bind the claimant not to apply to his government to intervene in the event of a denial of justice or violation of international law is void). *Bases of Discussion* (publication cited in note 28, above), pp. 133-135; supp. pp. 4 and 22.

On January 28, 1926, two months prior to the decision in the *Dredging Company case*, the Secretary of State of the United States wrote to the Mexican Minister of Foreign Affairs that his Government did "not admit that one of its citizens can contract by declaration or otherwise to bind his own Government not to invoke its rights under the rules of international law. Under the rules applicable to intercourse between states, an injury done by one state to a citizen of another state through a denial of justice is an injury done to a state whose national is injured. The right of his state to extend what is known as diplomatic protection cannot be waived by the individual": *Senate Document No. 96*, 69th Congress, 1st Session, p. 22. To the same effect: Mr. Bayard to Mr. Buck, Feb. 15, 1888, Moore, *Digest*, Vol. VI, p. 294; Mr. Bayard to Mr. Hall, March 27, 1888, same, p. 295; Mr. Gresham to Mr. Crawford, Sept. 4, 1893, same, p. 300; and more recently, the note from His Majesty's Government to the Mexican Government, in the *Mexican Eagle Oil Co. case*, April 21, 1938, *Correspondence, Mexico*, No. I, p. 9. The German government also refused to consider itself bound by contracts entered into by its nationals. Mr. Loomis to Mr. Hay, June 5, 1900, as cited. Scelle declares the Clause to be *juridiquement nulle*: *Recueil des Cours de l'Académie de la Haye*, Vol. 46, p. 66.

For detailed treatment of the Calvo Clause problem see Freeman, *The International Responsibility of States for Denial of Justice*, pp. 469-490; Feller, *The Mexican Claims Commissions*, Chapter 10; Eagleton, *Responsibility of States*, pp. 168-176; Borchard, *Diplomatic Protection*, Ch. IV; Ralston, *Law and Procedure of International Tribunals*, Stanford, 1926, pp. 58-72; same, *Supplement*, 1936, pp. 34-37; Dunn, *Protection of Nationals*, Baltimore,

the clause which they had before them as going no further than to bind the contractor to resort to local remedies for the solution of differences between the parties.<sup>45</sup> So construed the clause becomes simply a reaffirmation of the hornbook principle that a diplomatic claim may not be presented until the injured national has had recourse to and exhausted the remedies provided by the municipal law of the respondent state.<sup>46</sup> These dissimilar ways of looking at the Clause may account for some of the apparent confusion on a truly simple point of international law. In no award, however, has a tribunal confronted with the Calvo Clause rejected an international claim on that account where exhaustion of local remedies had terminated in a denial of justice. But that is precisely the effect which has been sought for the Clause by its advocates, who would discard the essential principle of the non-identity of state claims and private claims, and the distinction between private rights and state rights.<sup>47</sup> A private contract can not have the effect of vitiating the state's right of protection which springs from international law and is by that law alone subject to limitation.<sup>48</sup> Nevertheless, it has sometimes been seriously urged that inasmuch as an individual may expatriate himself altogether, he may take the lesser step of renouncing this portion of the rights which make up citizenship.<sup>49</sup> Such logic is of no avail against a rule of law to the contrary. The right to waive diplomatic protection is something completely beyond the competence of any individual and inheres exclusively in the domain of interstate action. Any attempt by a foreign government to bar the sovereign rights of another state in this premise is purely *ultra vires*.<sup>50</sup> García Robles asserted, curiously, that to deny the in-

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1932, pp. 169-172; same, *Diplomatic protection of Americans in Mexico*, New York, 1933, pp. 391-421; Harvard Research in International Law, *Responsibility of States*, work cited, p. 203; and, more briefly, De Visscher, work cited, pp. 431-432. A presentation of the Latin-American viewpoint is found in Rabasa, *Responsabilidad Internacional del Estado*, Mexico City, 1933, pp. 41-48; Beteta, in *Proceedings of the Eighth American Scientific Congress*, Vol. X, pp. 44 and ff.

<sup>45</sup> See the *North American Dredging Co.* case, cited in note 44, above.

<sup>46</sup> For recent reaffirmation of the principle see the decision of the Permanent Court of International Justice in the *Panevezys-Saldutiskis Railway* case, *Publications of the Court*, Series A/B No. 76, p. 18. The cases are collected and analyzed in Freeman, work cited, Ch. XV.

<sup>47</sup> A clear statement of this distinction was given by the Permanent Court of International Justice in the *Chorzów Factory* case. *Publications of the Court*, Series A, No. 17, p. 27.

<sup>48</sup> See Alvarez, *Le Droit International Américain* (Paris, 1910), pp. 121-122, where the same view is expressed, and Freeman, work cited, pp. 470 and ff.

<sup>49</sup> This was one of the arguments advanced by García Robles in his paper on *La Protección Diplomática, La Clausula Calvo y La Salvaguardia de los Derechos Internacionales del Hombre* at Mexico City, p. 21.

<sup>50</sup> "There can be no doubt that a state may exclude aliens entirely from its territory, provided no treaty provisions are violated. It might be urged that the power to exclude implies the power to admit on conditions. If it were permissible, however, to impose any condition whatever on such admission, all the protection furnished by the laboriously constructed system of international law could be destroyed by the act of a single state. The

tegral validity of the Calvo Clause was an "affront to the state which adduced it."<sup>51</sup> But it would be more accurate to characterize the use of such a clause to block diplomatic action as an impertinent usurpation of the sovereign prerogatives of another state. Admittedly there is room for sympathizing with the argument that an individual should not be allowed to fall back upon his government when he has solemnly promised not to do so in a contract which would not have been awarded without such a promise. On the other hand the Government which inserts such a condition should not be entitled to rely thereon when it resorts to outright spoliation. Where governmental authorities conduct themselves in accordance with international law, resort to the diplomatic process will be unnecessary—and unwarranted.

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The principles of responsibility which have been summarized above reflect the achievements of 150 years of international law in developing greater safeguards for the alien against wrongful injuries by authorities of the territorial state. They represent real progress in the tardy and painful evolution of a bill of rights for all men—progress which would be arrested and irretrievably reversed by the draft resolution.

### III

The patron saint of those who would overturn this system of guaranties is the great Argentine publicist Carlos Calvo whose celebrated treatise is constantly cited for the proposition that a government's liability can be no greater toward foreigners than that which it has toward its own subjects.<sup>52</sup> This overworked statement is found in a section of Calvo's treatise dealing with damages resulting from *force majeure*, public misfortunes, or fires necessitating the taking of measures in behalf of public safety. Those who cite it as an absolute maxim governing international responsibility not only lift it out of its context, but ignore principles which are laid down elsewhere in the same work. Calvo found fault not with those principles, but with their disregard and abuse by the stronger nations, whom he condemned for imposing upon small states a measure of duties different from that which they observed in their relations among themselves. What he deplored was their practice of seeking special privileges and favors for foreign subjects which the local law did not even provide for citizens.<sup>53</sup> The plea, in other words, was for recognition of the general principle of submission of foreign subjects

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result might well be a universal destruction of the rules sheltering aliens from injury": Feller in this JOURNAL, Vol. 27 (1933), p. 468. And cf. the note from His Majesty's Government to the Mexican Government in the *Mexican Eagle Oil Co.* case, April 21, 1938, *Correspondence*, Mexico No. I, p. 9.

<sup>51</sup> Work cited, p. 22.

<sup>52</sup> *Le Droit International Théorique et Pratique*, 5th ed., Paris, 1896, Vol. 3, § 1276.

<sup>53</sup> This is clear from the illustration which he gives of Great Britain's interference in the normal processes of criminal justice in the case of Captain MacDonald, who had been arrested by Prussian authorities; same, pp. 140 and ff.

to the local law—a thoroughly reasonable demand. But it did not go to the extent of maintaining that equality with nationals under that law was in itself a bar to any international inquiry. In a remarkable passage which, incidentally, is never quoted by advocates of the “no-responsibility” school he declares:

*Il appartient aux pouvoirs constitués d'organiser un système de mesures légales propres à mettre le gouvernement en état de remplir les devoirs internationaux, de réprimer et de punir les particuliers qui offensent les Etats amis ou leur portent préjudice. Mais il ne suffit pas qu'un Etat se soit fait un système de lois, et l'ait observé, pour en conclure qu'il doit être exonéré de toute responsabilité. Il peut se faire que ce système soit incomplet et inefficace. Or, quand les défauts ou les lacunes existent dans les lois, . . . on peut exiger que l'Etat prenne un surcroît de mesures de précaution correspondantes au risque du dommage à prévoir; et s'il a négligé de le faire, l'Etat est tenu responsable du fait des particuliers qui ont causé un dommage à des étrangers.<sup>54</sup>*

Nor is the Calvo thesis that State liability should not exist for injuries suffered by foreigners from mob violence or civil war as absolute as has been pretended. Even in this class of cases he admits responsibility would exist where governmental authorities have been at fault.<sup>55</sup> Here, too, he is but asserting the generally accepted principle that a state is not responsible for criminal acts of private individuals unless (a) there has been a failure to exercise reasonable diligence to prevent such acts, or (b) adequate measures have not been taken to apprehend and prosecute the culprits. Few propositions of law are supported by as much authority in international jurisprudence and literature as this one.<sup>56</sup>

According to Salvador Mendoza, the true genesis of the theory for which Calvo is so well known was not his treatise but some private correspondence which he exchanged with a number of European publicists concerning Drago's proposal that the use of armed force for the collection of public

<sup>54</sup> Work cited, p. 136

<sup>55</sup> Work cited, Vol. 6, p. 231; and see especially Vol. 3, p. 143.

<sup>56</sup> The cases are collected in Freeman, work cited, Chapter XIII. See also: Hyde, *International Law*, Vol. II, § 289; Borchard, *The Diplomatic Protection of Citizens Abroad*, p. 127; Dunn, *The Protection of Nationals*, pp. 150–151; Hershey, *The Essentials of International Public Law*, p. 257; Hall, *International Law*, 8th ed., p. 269; Halleck, *International Law*, (4th ed., 1908), pp. 227–228; Fenwick, *International Law*, p. 393; Stowell, *International Law*, p. 169; Bluntschli, *Das Moderne Völkerrecht* (Fr. ed., 1873) p. 223; Salvioli, in *Recueil des Cours*, Vol. 46 (1933), reprint, p. 115; Whiteman, work cited, Vol. I, p. 38, Triepel, work cited, pp. 324–325; Huber, in *Réclamations Britanniques*, p. 59, and his awards in the *Haj Mohammed Harrej* and *Rzini* cases, same, pp. 137 and 123, resp. See also the opinion of Umpire Findlay in *De Brissot's case*, Moore, *Arbitrations*, Vol. 3, p. 2969; Commissioner Nielsen in the *Chapman case* (*U. S. v. Mexico*), *Opinions of Commissioners* (1930–31), p. 121; the declaration of M. Urrutia at the Plenary Session of the Fourth Assembly of the League of Nations, Sept. 28, 1923, *Acts of the Fourth Assembly*, pp. 143–144; and the correspondence between Great Britain and Uruguay in the case of Captain Cornwall of the *Bobycito*, *British and Foreign State Papers*, Vol. 67 (1876), p. 130.

debts be prohibited.<sup>57</sup> But, whatever its origin, this idea is a distinct aberration from the classical conception of international law. Drago himself never voiced such an attitude. If his remarks at the Second Hague Peace Conference are examined, they will be found perfectly consistent with the general principles of responsibility summarized above. Thus he declared:

The lack of any court of claims and the refusal to constitute such a court, as well as decisions equally contrary to the fundamental laws and principles of right, would constitute what is known in jurisprudence as "denial of justice" and would come within the sphere of action of the law of nations, with all the consequences and responsibilities resulting therefrom for the states that disregard the law of nations. . . .

Arbitration is always welcome. It represents a step and a considerable one towards justice. No self-respecting nation can refuse to submit to it, but its effects will necessarily vary in cases of denial of justice and cases connected with loans. The denial of justice ascertained to exist by arbitration constitutes a common international law offense which should call for reparation. A denial of justice, like an act of piracy, is a thing which breaks the equilibrium of, and endangers, the universal community, and for this very reason falls within the immediate domain of international repression as provided for, accepted, and applied by the general consent of all nations.<sup>58</sup>

Similar sound statements were made by Matte, the Chilean delegate,<sup>59</sup> and Ruy Barbosa of Brazil.<sup>60</sup>

The rule ultimately adopted at the Conference proscribed recourse to armed force only for the recovery of governmental contract debts and even in this case a refusal of arbitration by the debtor state released the other party.<sup>61</sup> Moreover, Drago himself drew a distinction between public debts (bond claims) and other contractual obligations of the state,<sup>62</sup> which remained unaffected by the proposal. The fantastic proposition that interstate responsibility should be abolished never entered his mind. Drago's sole concern was to prevent a recurrence of such misfortunes as the blockade in 1902 by Germany, Great Britain, and Italy of certain ports in Venezuela to compel payment of pending claims against that country.<sup>63</sup> This episode was the immediate background of the limitation sought.

#### IV

Drago's doctrine—which barred armed intervention only in a special class of cases—was later supplemented by the American Republics in four

<sup>57</sup> *La Doctrina Cárdenas*, p. 22, note, and p. 23.

<sup>58</sup> *Proceedings of the Hague Peace Conference of 1907*, New York, 1920, Vol. II, pp. 247-9.

<sup>59</sup> Same, p. 273.

<sup>60</sup> Same, p. 275.

<sup>61</sup> Convention II of 1907, Paragraph 2, Article 1. Malloy, *Treaties, etc.* Vol. II, p. 2254; Scott, *The Hague Conventions and Declarations of 1907*, New York, 1915, p. 89.

<sup>62</sup> *Proceedings of The Hague Peace Conference of 1907*, Vol. II, pp. 246-248.

<sup>63</sup> See Hyde, *International Law*, 2nd ed. (1945), § 30c. On the Drago doctrine generally, see Drago, in this JOURNAL, Vol. I (1907), p. 692; Hershey, same, p. 26; Alfredo N. Vivot, *La Doctrina Drago*, Buenos Aires, 1911; Borchard, *The Diplomatic Protection of Citizens Abroad*, § 119.



international acts. At the Seventh Conference of American States (Montevideo, 1933), a "Convention on the Rights and Duties of States" was adopted which provided in Article 8 that "no state has the right to intervene in the internal or external affairs of another."<sup>64</sup> The same principle was reaffirmed at the Inter-American Conference for the Maintenance of Peace (Buenos Aires, 1936), in a "Declaration of Principles of Inter-American Solidarity and Coöperation." That instrument, after stating that "every act susceptible of disturbing the peace of America" affects each of the American nations and justifies initiation of the procedure of consultation provided for in a Convention on the subject signed at the same conference,<sup>65</sup> declared

3. That the following principles are accepted by the American community of nations:

- (a) Proscription of territorial conquest, and that, in consequence, no acquisition made through violence shall be recognized;
- (b) Intervention by one state in the internal or external affairs of another state is condemned;
- (c) Forcible collection of pecuniary debts is illegal; and
- (d) Any difference or dispute between the American nations, whatever its nature or origin, shall be settled by the methods of conciliation, or unrestricted arbitration, or through operation of international justice.<sup>66</sup>

An "Additional Protocol relative to Non-Intervention" was also signed at this Conference, the preamble of which expressed the desire of the governments represented "to assure the benefits of peace in their mutual relations and in their relations with all nations of the earth, and to abolish the practice of intervention." Articles 1 and 2 provided:

Article I.—The High Contracting Parties declare inadmissible the intervention of any one of them, directly or indirectly, and for whatever reason, in the internal or external affairs of any other of the Parties.

The violation of the provisions of this Article shall give rise to mutual consultation, with the object of exchanging views and seeking methods of peaceful adjustment.

Article 2.—It is agreed that every question concerning the interpretation of the present Additional Protocol, which it has not been possible to settle through diplomatic channels, shall be submitted to the procedure of conciliation provided for in the agreements in force, or to arbitration, or to judicial settlement.<sup>67</sup>

Finally, the "Declaration of American Principles" approved at Lima on December 24, 1938, proclaimed once again that "the intervention of any

<sup>64</sup> *International Conferences of American States, First Supplement* (1933-1940), Washington, 1940, p. 121.

<sup>65</sup> The Convention for the Maintenance, Preservation and Reestablishment of Peace, December 23, 1936, same, p. 189.

<sup>66</sup> Same, p. 160.

<sup>67</sup> Same, p. 191.

state in the internal or external affairs of another is inadmissible."<sup>68</sup> The Lima Conference also approved of a "Declaration of Principles of American Solidarity" providing for consultation in case "the peace, security or territorial integrity of any American Republic was threatened by acts of any nature that may impair them."<sup>69</sup>

Whether these declarations and agreements are read individually or collectively, their meaning is sufficiently precise to exclude doubt. The intent was to prohibit armed intervention—intervention by forceful means. For the weaker states of the New World, ever conscious of the temptation which they offered to other powers and sensitive to the menacing portents of a great world crisis, these agreements were of prime importance. Still fresh in their memory were the French intervention in Mexico in 1861, Germany's use of warships to demand an indemnity from Haiti in 1897; the combined action against Venezuela in 1902, and the instances of actual intervention by the United States in a number of Central American Republics for financial reasons.<sup>70</sup> But now it is suddenly maintained that these Inter-American commitments had a much broader scope; that diplomatic interposition—the presentation of a claim—is a form of intervention and that inasmuch as intervention has been barred the right of diplomatic protection is also. That anyone could seriously advance such a contention is next to incredible. Here again a logic spurred by excessive zeal strives to distort the law. There are numerous reasons—any single one of which is conclusive—why this sanguine theory is defective.

So far as the Montevideo Convention on the Rights and Duties of States is concerned, the reservation<sup>71</sup> made by the United States Delegation to the Plenary Session of the Conference on December 22, 1923 confirms that the United States was not subscribing to any such undertaking as is currently asserted. The "Declaration of Principles of Inter-American Solidarity" approved at Buenos Aires by its own terms contemplated exclusively acts susceptible of disturbing the peace of America<sup>72</sup> and the "peaceful solution of conflicts." Moreover, paragraph 3b condemning intervention appears in the text between two other limitations upon the use of force, which further attests what was meant by the term "intervention" as there used. On no rational basis can the presentation of a diplomatic claim ("protection") be regarded as an act "susceptible of disturbing the peace." Indeed it is often the first step in the solution of disputes which might otherwise become serious. It is essentially a friendly act which is part of the normal business of diplomatic relations. Such an act is no more a threat to the peace of the continental community than a request by a private creditor for payment of

<sup>68</sup> Same, p. 309, Par. 1.

<sup>69</sup> Same, p. 308.

<sup>70</sup> See the remarks of Mr. Braden in *Department of State Bulletin*, Vol. XIII, No. 323, p. 329.

<sup>71</sup> *International Conferences of American States*, First Supplement (1933-1940).

<sup>72</sup> See Paragraph No. 2 of the Declaration, as cited.

his debt would be a menace to public order in a municipal society. As Professor Borchard has accurately remarked,

Diplomatic protection is merely the advancing of a claim in diplomatic form without the exertion of any force behind it, without any coercion behind it. It simply asks the defendant country to submit to the processes of law. Why should any country object to that? Why should any country regard it as an insult to be asked to conform to the rule of law, and even to be willing to submit an issue to arbitration?<sup>73</sup>

The "Additional Protocol relative to Non-Intervention," likewise signed at the Buenos Aires Conference, formally expressed the same purpose as that of the Declaration just referred to, *viz.*, the desire "to assure the benefits of peace."<sup>74</sup> Still less does the "Declaration of American Principles" signed at Lima warrant the belief that "intervention" was meant to cover diplomatic protection. Not only was the true purpose of that declaration to proscribe the use of force in settling international differences,<sup>75</sup> but it was voted at a time when the threat to world peace, national security, and territorial integrity was never greater; when Germany, Italy, and Japan were pursuing wholesale the practice of real intervention in the affairs of neighboring states; and when the results of that practice were already too tragically apparent in China and Czechoslovakia.

There is one obvious rejoinder to the thesis that would stretch the non-intervention clause beyond its proper compass. If the parties had intended to outlaw the right of diplomatic protection, nothing would have been simpler than to say so in the instruments themselves, merely by adding the two-word phrase whose meaning is clear to all. They did not do so—and if they had, such a provision would never have been accepted by the United States. Relinquishment of anything as paramount as the right of diplomatic protection can not be lightly inferred from texts such as these. On the contrary, it would require evidence of the most convincing nature to overcome the strong presumption that the right had not been abandoned. In this connection it is worth noting that Article 5 of the Montevideo Convention on Rights and Duties of States declares that "the fundamental rights of States are not susceptible of being affected in any manner whatsoever."<sup>76</sup> Yet the Mexican school of thought would flick aside the fundamental right of protection by loose deduction and definition alone! This technique of destroying the rights of other states by unilaterally expanding the meaning of "intervention" bears a peculiar resemblance to the technique which has been contrived to reduce state responsibility by municipally-narrowed definitions of denial of justice. It is high time that such devices were discarded in favor of an objective approach to the law. Surely if the plea is to be made

<sup>73</sup> *Proc. of the Eighth American Scientific Congress*, Washington (1940), Vol. X, p. 71.

<sup>74</sup> *International Conferences of American States, First Supplement* (1933-1940), p. 191.

<sup>75</sup> See Paragraphs 2, 3, and 5 of the Declaration, *same*, p. 309.

<sup>76</sup> *Same*, p. 122.

that diplomatic protection amounts to intervention it would be far less spurious to retort that this attempted limitation on the right of protection constitutes, in a very real sense, an "intervention" in the internal and external affairs of a nation! A further point which has been overlooked is that both concurrent with and subsequent to the adoption of the non-intervention clauses, other instruments subscribed to at the Montevideo and Buenos Aires Conferences expressly or by implication reaffirm the right of diplomatic protection.<sup>77</sup> In fact at the Buenos Aires Conference in 1936 the Committee on Juridical Problems admitted that no agreement had been reached by the delegates on the elimination of "diplomatic" intervention in cases of pecuniary (i.e., contract) claims. It simply is not true, as García Robles avers, that diplomatic claims "have lost in America all legal foundation,"<sup>78</sup> and it is rash to pretend that they have. Nevertheless he (like Beteta) would even deny that diplomatic protection is a fundamental attribute of sovereignty, describing it as a "supposed" right, with a "pretended" legal and moral basis.<sup>79</sup> There is nothing supposed, fictitious, or counterfeit about it, as the records of hundreds of arbitral awards overwhelmingly demonstrate. In the *Mavromatis Palestine Concessions* case the Permanent Court of International Justice said:

It is an elementary principle of international law that a state is entitled to protect its subjects, when injured by acts contrary to international law committed by another state, from whom they have been unable to obtain satisfaction through the ordinary channels.<sup>80</sup>

But García Robles does not stop there. In presenting the resolution which he drafted at Mexico City, he offered as of "irrefutable validity" the proposition that "diplomatic protection is an artificial creation constructed in the nineteenth century for expansionist purposes."<sup>81</sup> This self-serving statement is neither valid nor irrefutable. It is historically so inaccurate as to depart from the arena of scientific argument. In fact the practice of extending diplomatic protection to a nation's citizens abroad was definitely

<sup>77</sup> See Article 3 of the Resolution on "International Responsibility of the State," approved at the Seventh International Conference of American States at Montevideo in 1933. Same, p. 91; and the recommendation on "Pecuniary Claims" approved at the Inter-American Conference for the Maintenance of Peace (1933), same, p. 165.

<sup>78</sup> Mimeographed copy of his Mexico City Address, p. 7.

<sup>79</sup> Same, p. 28; and cf. Beteta's address in *Proc. Fifth American Scientific Congress*, Vol. X, p. 30.

<sup>80</sup> *Publications of the Court*, Series A, No. 2, p. 12. Accord: *Gschwind v. Swiss Confederation*, in Lauterpacht, *Annual Digest of Public International Law Cases* (1931-32), p. 242. And see the opinion of Max Huber, in *Réclamations Britanniques dans la Zone espagnole du Maroc, Rapports*, p. 159: ". . . it is unquestionable, that, up to a certain point, the interest of the state in being able to protect its nationals and their property must carry more weight than respect for territorial sovereignty, even in the absence of conventional obligations."

Delegates from Latin-American countries to the Hague Peace Conference of 1907 took this principle for granted in discussing the proposed Drago Doctrine. Cf. *Proceedings of the Conference*, Vol. II, pp. 246 and ff.

<sup>81</sup> Work cited, p. 29.

established as far back as the French Revolution of 1789, although it did not originate then. Some of the primary elements of the relationship between the state and its citizens and of the former's protective functions were already present in the feudal system. Far from being an imperialistic outgrowth, it was a reflection of the rights of the individual which sought recognition in the democratic tide of the French Revolution.<sup>82</sup> But the true roots of the institution—and its substantive counterpart, the international responsibility of the state—go much farther back, namely to the system of private reprisals. The present right of diplomatic protection is nothing but a modern version of the classical right of princes to grant letters of reprisal to subjects who had been wronged in a foreign place<sup>83</sup>—a form of protection which was already standard in the fourteenth century.<sup>84</sup> With the birth of modern international law and the emergence of the European state-system after the Peace of Westphalia in 1648, exclusive power over exercise of the protective function then became vested in the state.

Consequently to charge that diplomatic protection is "in flagrant contradiction with international democratic tendencies"<sup>85</sup> is to ignore the democratic forces which operated to demand respect for the individual even when outside the limits of his own land. To describe the protective function as "Hegelian" and as "totalitarian in essence" is nonsense. Such an allegation resembles a familiar propaganda device whose sole purpose is to throw an adversary on the defensive. One might just as well contend that the individual who seeks to obtain redress for a wrong by means of a court action is a fascist. The issue here joined will not be resolved by the use of emotional labels. If anything is "anachronistic," "totalitarian," and anti-liberal, it is the dogma of extreme sovereignty which repudiates the international responsibility of the state, and which would remove all restraints upon arbitrary and illegal conduct, whether directed against nationals and foreigners alike, or against foreigners alone.

## V

The draft resolution is predicated primarily upon the postulate that the obligation of a state under international law is satisfied whenever a foreigner has been granted equality of treatment with nationals, (*i.e.*, that the international standard of justice is measured by a nation's own laws). This postulate, according to García Robles, has become a "basic inter-American principle" as a result of instruments (resolutions, agreements, and declarations) accepted by the American Republics, which—so it is alleged—have consecrated the principle that diplomatic protection is only permissible in the

<sup>82</sup> Borchard, *The Diplomatic Protection of Citizens Abroad*, p. 6.

<sup>83</sup> Freeman, work cited, p. 63.

<sup>84</sup> See *Da Legnano, Tractatus de Bello, de Reprisaliis et de Duello* (1360), Chapter CXXIII. See also Clark, "The English Practice with regard to Reprisals by private Persons," in this JOURNAL, Vol. 27 (1933), p. 695, at pp. 709-711.

<sup>85</sup> García Robles, as cited.

case of denial of justice interpreted restrictively. The instruments referred to are the following: (1) the Recommendation on Claims and Diplomatic Intervention adopted on April 18, 1890, at the First International Conference of American States; (2) the convention relative to the Rights of Aliens executed at the Second Conference of American States in 1902; (3) the Convention on Rights and Duties of States signed at the Seventh Conference at Montevideo in 1933; and (4) the Resolution on "International Responsibility of the State," unanimously adopted at the same Conference. Unless these Inter-American Acts have generated rules of law binding upon the states against whom they are now asserted, it is pointless to talk about the "basic principles" which they are said to establish. The only pertinent inquiry is whether they have modified the rights of all the American Republics. A study of these texts compels the conclusion that they have not.

The Recommendation adopted in 1890—which declared that a nation has no other obligations or responsibilities toward foreigners than those established by the constitution and laws in favor of natives—was not accepted by the United States delegation.<sup>86</sup> The Convention on the Rights of Aliens was never even signed (much less ratified) by Brazil, Cuba, the United States, Haiti, Panama and Venezuela.<sup>87</sup> Legally, therefore, it is a nullity with respect to these countries. García Robles cites Article 2 of this convention—which reproduces the recommendation adopted at the First Conference—as supporting his thesis; but Article 3 (which he omits to mention) expressly and affirmatively recognizes that a diplomatic claim could be made where the local courts were guilty of a "manifest denial of justice, or unusual delay, or evident violation of the principles of international law." Article 2 itself acknowledged that responsibility would arise where the "constituted authorities failed to comply with their duties."<sup>88</sup> No matter how it is construed this convention certainly does not sustain the viewpoint of the draft resolution, even apart from the fact that any discussion as to the convention's meaning is largely academic in the present case, inasmuch as it was rejected by six important republics.

Article 9 of the Convention on the Rights and Duties of States, concluded at Montevideo in 1933, provided that "nationals and foreigners are under the same protection of the law and the foreigners may not claim rights other or more extensive than those of nationals."<sup>89</sup> This article can not be viewed as anything other than a reaffirmation of the general principle of submission of foreigners to the local law. If it were taken literally, as an absolute principle, it would signify that even where international law was violated no diplomatic claim could ever be presented, inasmuch as this would be a right

<sup>86</sup> *International Conferences of American States* (1889-1928), Washington, 1931, p. 45.

<sup>87</sup> Only six States ratified it. See the *Status of the Pan American Treaties and Conventions*, revised to July 1, 1945, published by the Pan American Union.

<sup>88</sup> *International Conferences of American States* (1889-1928), p. 90.

<sup>89</sup> Same, *First Supplement* (1933-1940), p. 122.

"other or more extensive than those of nationals." Such a construction is negated by the adoption at the same Conference of a resolution ("4" above) impliedly recognizing interstate responsibility, which recommended that the entire problem be made the subject of further study.<sup>90</sup> Nor can that resolution be said to enact into law the limited doctrine claimed under it. We need not consider here whether an informal resolution can alter rights and obligations under international law. It is sufficient to observe that the text of the resolution, read as a whole, does nothing of the sort. Paragraph 2 thereof reaffirms "as a principle of international law, the civil equality of the foreigner with the national as the maximum limit of protection to which he may aspire in the positive legislation of the states." But this does not signify that when this equality has been granted by domestic legislation diplomatic protection is excluded. If that were so, paragraph 3 of the resolution, which expressly recognizes the propriety of diplomatic protection, would be meaningless. It is that paragraph, more than paragraph 2, which attempts to set limits upon the state's responsibility. It provides as follows:

3. . . . diplomatic protection cannot be initiated in favor of foreigners unless they exhaust all legal measures established by the laws of the country before which the action is begun. There are excepted those cases of manifest denial or unreasonable delay of justice which shall always be interpreted restrictively, that is, in favor of the sovereignty of the state in which the difference may have arisen. Should no agreement on said difference be reached through diplomatic channels, within a reasonable period of time, the matter shall then be referred to arbitration.<sup>91</sup>

So obscure is this text that it is difficult to extract anything more definite from it than the generally recognized principle that local remedies must be exhausted. Its draftsmen apparently tried to cover so much ground that they defeated their own purpose. What it literally says is that diplomatic protection can be initiated when local remedies have been exhausted, but that when there has been a denial of justice such remedies need not be exhausted. It hardly seems possible that this could have been the real intent. From the Latin-American viewpoint—as well as from that of general principles of state responsibility—such a provision is absurd. The injunction that denial or unreasonable delay of justice be interpreted restrictively, *i.e.*, "in favor of the sovereignty of the state"—whatever that means—only muddles a confused situation still further. To a delegate from the United States, "denial of justice" signifies the large concept of responsibility which has come to be a part of international jurisprudence; to Latin-Americans it usually means something much narrower. But the definition here attempted is neither. In short, it can only be concluded that the text of this resolution is too uncertain to create an obligatory legal norm.

Consequently, the "basic principles" inspiring the draft resolution lack

<sup>90</sup> Same, p. 91.

<sup>91</sup> Same, p. 92.

foundation in positive law. The divergence of views which prevailed at Buenos Aires in 1936, and again at Lima in 1938 with respect to "pecuniary" (contract) claims, further refutes any notion that substantial agreement on these principles has been attained in this hemisphere.<sup>92</sup> Finally the diplomatic practice of the United States—as well as of Cuba,<sup>93</sup>—subsequent to the Montevideo Conference, conclusively indicates that it does not regard itself as bound by any such principles as García Robles asserts. No clearer illustration of this can be adduced than the protest which it addressed to the Government of Mexico in connection with the expropriation of American-owned Agrarian properties. There again the Mexican Government invoked the defense that, under the various Pan American agreements, the aphorism "equality is the maximum" had become a rule of law, and that since no compensation was provided by Mexican legislation for nationals whose property was confiscated, none could be demanded for foreigners. This contention was flatly rejected by Secretary of State Cordell Hull in these measured terms:

The doctrine of equality of treatment, like that of just compensation . . . appears in many constitutions, bills of rights and documents of international validity. The word has invariably referred to equality in lawful rights of the person and to protection in exercising such lawful rights. There is now announced by your Government the astonishing theory that this treasured and cherished principle of equality, designed to protect both human and property rights, is to be invoked, not in the protection of personal rights and liberties, but as a chief ground of depriving and stripping individuals of their conceded rights. It is contended, in a word, that it is wholly justifiable to deprive an individual of his rights if all other persons are equally deprived, and if no victim is allowed to escape. In the instant case it is contended that confiscation is so justified. The proposition scarcely requires answer. . . . The plain question is whether American citizens owning property in Mexico shall be deprived of their properties and, in many instances, their very livelihood, in clear disregard of their just rights. It is far from legitimate for the Mexican Government to attempt to justify a policy which in essence constitutes bald confiscation by raising the issue of the wholly inapplicable doctrine of equality.<sup>94</sup>

Mr. Hull obviously did not regard the "good neighbor" policy as foreclosing the right of the United States to protect its subjects against violations of international law.

<sup>92</sup> At the Inter-American Conference for the Maintenance of Peace held at Buenos Aires in 1936, the effort to formulate principles tending to the elimination of diplomatic protection encountered such resistance that the Commission on Juridical Problems acknowledged that no sufficient unanimity existed as might serve as the basis of a convention; same, pp. 165, 166.

<sup>93</sup> See note 95, below.

✓ <sup>94</sup> Note addressed by Mr. Hull to the Mexican Ambassador, August 22, 1938, this JOURNAL, Vol. 32 (1938), p. 198. And see the comments of Professor Verdross in *Recueil des Cours de l'Académie de la Haye*, Vol. 37, p. 352.



## VI

That the institution of diplomatic protection contains imperfections none can deny. But these imperfections are by no means always to the disadvantage of smaller states, as the resolution's draftsman asserts. For every instance of arbitrary action by a claimant state, there is one of procrastination and refusal to arbitrate by a weaker neighbor. The alleged arbitrariness of the present system is an abuse which works both ways. Not infrequently reasonable demands to settle or adjudicate claims prove futile because of the respondent's refractory attitude. A typical example is furnished by the claim of Cuba on behalf of Dr. Cantero-Herrera against the Peruvian Government, which for over twenty years has steadfastly refused to recognize that there was any international question warranting arbitration in a case involving an alleged denial of justice by the Peruvian Courts.<sup>95</sup> It is not the exercise of diplomatic protection which is a source of friction in such a case, but the absence of a ready solvent for alleged wrongs. Elimination of protection will not remove the irritation provoked by wrongful and arbitrary treatment of foreign subjects; only a general raising of the standard of domestic justice will have that effect. But the abolition of protection—without an adequate substitute procedure—will inevitably work to depress that standard, increasing the sources of interstate conflict. The noxious effects of wrongs committed are not abated by destroying the means of obtaining justice. Nor is it correct to say that the protective system generally has not permitted small states to vindicate rights against larger respondents. There are many, many instances in which smaller powers have successfully prosecuted such claims. One celebrated example is that of the Norwegian claims against the United States, which finally culminated in a proceeding before the Permanent Court of Arbitration in 1922.<sup>96</sup> Early in its history, when it was a relatively weak nation, the United States itself effectively espoused numerous claims against European powers. Too often observers overlook the fact that for a great many years, indeed up until World War I, the United States was a debtor country; it did not on that account deny the validity of rules governing state responsibility.

It is true that the system of diplomatic interposition is susceptible of abuse by the stronger powers, and that history contains many instances of such abuse. More and more, however, the shoe appears to be on the other foot. Now certain of the weaker states have adopted a policy of resisting every claim, irrespective of merits, at all costs, and of seizing every opportunity to tear asunder the principles of state responsibility which operate for the benefit of the international community as a whole. This is a most

<sup>95</sup> See the *Blue Book of the Cuban Department of State*, Habana, 1933, containing the diplomatic notes exchanged in this case; the *Green Book on Denegación de Justicia en Perjuicio de Ciudadanos Cubanos*, Habana, 1933, and the *Comentarios* of Dr. Cantero-Herrera before the Permanent Commission of Washington, Washington, D. C., 1936.

<sup>96</sup> Scott, *Hague Court Reports*, 2nd Series, p. 39.

unfortunate tendency, not only from the standpoint of true justice, but from that of these states' real interests. To seek to eliminate diplomatic protection is short-sighted in that its disappearance must inevitably discourage the influx of that capital which undeveloped countries still need to fulfill their destiny. Yet apologists for some of these very countries are disinclined to acknowledge the advantages which have accrued to them from foreign investments; they invariably speak in injured terms of the alien who enters for the purpose of "exploiting" local riches, of enjoying blessings which he could not find at home. Seldom, if ever, are they ready to admit that without foreign economic assistance social and industrial progress would be—and has been—seriously retarded. That they in fact realize this, however, is apparent from their repeated efforts to induce foreign financial interests to underwrite projects for local development and improvement which would otherwise be impossible. An example in point is the electrical manufacturing company recently formed in Mexico with the substantial assistance of an American investment banking group (headed by Kuhn, Loeb & Co.) and Westinghouse Electric.<sup>97</sup>

In a final analysis all discussion as to the merits of the present system of protection is beside the point, for, as has already been observed, the real issue involved is the international responsibility of the State. Its opponents simply do not want any question raised as to compliance with their international obligations; they do not wish to run the risks of an adverse award that might result from submission to arbitration. They wish to encourage foreign capital to invest and they would like foreign talent to assist in developing the country but they also wish to be completely free to take any measures they desire without being subject to a demand for compensation arising out of violations of rights. In brief, they would have the benefits of their bargain but not its obligations.

## VII

Perhaps the most obvious deficiency of the present system—and here García Robles is absolutely correct—is its failure to protect stateless individuals. This, however, is rather a gap in the general international law of state responsibility, which has not recognized that a wrong against a person lacking nationality constitutes an international delinquency.<sup>98</sup> In other words, individual human beings as such are not beneficiaries of rights under

<sup>97</sup> *The New York Times*, September 11, 1945, p. 28. Even during the oil expropriation controversy it was reported that the Mexican Government was seeking financial aid from American interests to develop a better railway across the Isthmus of Tehuantepec, primarily for the purpose of facilitating the export of oil to Japan. Same, June 11, 1939, p. 3, and July 13, 1939, p. 36.

<sup>98</sup> *The Dickson Car Wheel case (U. S. v. Mexico)*, *Opinions of the Commissioners (1930-1931)*, p. 183; and see Oppenheim, *International Law*, Vol. I, 5th edition, § 312; Freeman's remarks in *Proc. Am. Soc. Int. Law* (1941), p. 19; and Leuterpacht, *An International Bill of the Rights of Man*, New York, 1945, pp. 47-48.

the law of nations. But that is hardly a reason for abolishing the only effective means now operating to safeguard the rights of individuals. The remedy is to improve it by a procedure through which all men, irrespective of their status as nationals of a given state, and whether stateless or not, can vindicate their rights against a delinquent state. Only when that is done, or when an adequate substitute for the protective system is instituted, will it be possible to consider whether that system should disappear. Direct access of individuals to a permanent international jurisdiction charged with effectuating the rights now guaranteed only to aliens, or the creation of an international organ for the purpose of exercising diplomatic protection in behalf of those who are now unprotected,<sup>99</sup> would achieve this high humanitarian purpose, so long neglected. What García Robles proposes is something entirely different. Far from promoting international rights for all men, it is virtually a declaration of no international rights for any man. Let us consider just why this is so.

The draft resolution would retain diplomatic protection "transitorily" (until an international system of protection is organized), but only for cases of denial of justice restrictively interpreted and which are provided for expressly in treaties and conventions between the parties. At the same time it would incorporate a recognition of the concept that the international standard of justice is measured by the extent of rights granted to nationals under the local law—a proposition which has been consistently repudiated by international tribunals.<sup>100</sup> The combination of these two ideas signifies that state responsibility would be eliminated. If the maximum of rights to which a foreigner is entitled under international law is equality with nationals, and if diplomatic protection is only permissible in the case of a refusal of access to court (the orthodox restrictive interpretation of denial of justice), then state responsibility could virtually never arise in practice, inasmuch as all states have courts or tribunals of some kind or another to which the alien is granted access. The result of this theory is that each state would become the final and exclusive judge of the standard of treatment which is to be granted to aliens, as well as of compliance with its international obligations. The restraining precepts of an external and reasonable standard of justice so laboriously developed to protect individuals from arbitrary injury at the hands of a foreign government, would cease to operate. With these restraints removed, all kinds of inhuman treatment of foreign subjects could be justified on the ground that they were "enjoying" the same level of injustice and mistreatment as were granted to natives under the local law. Is this the sacred democratic purpose for which García Robles has pleaded so ardently? Is this the enthronement of the rights of man which has been solemnly proclaimed to be one of the major purposes of the war? Just what

<sup>99</sup> See Jan Hostie's remarks in *Proc. Am. Soc. Int. Law* (1940), p. 43.

<sup>100</sup> See the authorities cited in notes 23 and 25, above, and especially, Borchard's discussion of the "minimum standard" in *Proc. Am. Soc. Int. Law* (1939), pp. 60 and ff.

could happen under these circumstances is illustrated by the following hypothesis: If a corrupt and oppressive dictatorship, modeled along Nazi lines, were to come into power in one of the countries of this hemisphere, introducing legislative reforms which crushed human liberties and made a mockery of human rights, no foreign government could interpose diplomatically to protect its subjects, as long as their treatment was on a par with that tolerated by the local laws for natives. Yet in Nazi Germany the only real protection afforded to foreign individuals who otherwise would have suffered as did natives was through this same maligned institution of diplomatic protection! That safeguard would be destroyed in the name of liberalism before an adequate system of guarantees had been provided, as the resolution is now written. If for no other reason, therefore, the draft resolution is defective in that it approaches the problem backwards. If what is sincerely desired is an international protection of the rights of man the correct procedure, both from a legal and from a humanitarian standpoint, is to create that safeguard first, not to destroy the only guarantees now existing in favor of the more limited group of individuals—aliens—already enjoying it.

As if the emasculated concept of protection found in the resolution were not sufficient to assure the result sought, even that very narrow basis is further limited to cases expressly recognized by treaties and conventions. But by far the greater part of the law of state responsibility has been built up independently of treaty, through the development of customary international law. The resolution would, of course, exclude this basis of liability, and sweep away at one stroke the system of guarantees which has been held by the Permanent Court of International Justice to form a part of general international law.

Furthermore the resolution seeks to foreclose any possible charge at some later date that domestic action may not have conformed to international standards of civilized justice by proclaiming that "the nations of this continent have attained a similar standard of justice which renders diplomatic protection unnecessary in their case." Acceptance of this proposition would betray a complete misapprehension concerning the nature and function of the standards doctrine as developed by international jurisprudence. No such inflexible principle is recognized by the law of nations. The fact that a state may have attained a reasonable standard of governmental administration does not of itself suffice to prevent responsibility from arising under any circumstances thereafter. That responsibility will still be engaged whenever the actual operation and administration of the governmental system, whether manifested through legislative, judicial or executive action, falls below the requisite standards of civilized justice imposed by international law. No state, no matter how highly developed, is immune from the charge that, in a given case, the administration of justice to aliens has fallen below the international level. Thus, in the *McEnery* case, the standard was

invoked against Great Britain by the United States in protesting against the imprisonment of one of its subjects.<sup>101</sup>

It is true that the resolution in terms contemplates only a "transitory" retention of the procedure which has been criticized above. But nothing acquires permanence more easily in governmental administration than a "temporary" measure. Once this breach has been torn in the law of state responsibility, we may rest assured that there will be no turning back. Is it to be assumed for one moment that, at a later date, when the international system of guarantees is established, the advocates of this resolution will assent to a larger measure of rights in individuals than they are now willing to recognize in foreign subjects? During the controversy between Mexico and the United States in 1938 over the expropriation of American-owned agrarian properties, the Mexican Government formally maintained that "the so-called rights of man . . . are not principles of international law."<sup>102</sup> This contention was advanced in a case involving the rights of aliens. Are the same authorities which took that position now prepared to accept what they then officially denied, and, further, to grant those rights to all individuals? Inasmuch as such action would enlarge the potential liability of respondent states far beyond that already recognized by general international law, the answer to this inquiry is obvious. Therein lies but another defect which is fatal to the draft resolution, for it contains no statement or declaration of the human rights that are to be protected by the proposed international machinery.

The result, then, is to consecrate the doctrine that aliens are henceforth to be deprived of real diplomatic protection and to prepare the way for an equally empty guaranty of hollow rights in all men. Such a philosophy is eminently contrary both to the high purposes of the United Nations Charter and to the spirit of international law. It would be tragic indeed if the nations of this hemisphere were to be recorded as the advocates of a creed which can only operate to the prejudice of the entire international community and to the everlasting discredit of the Pan-American movement.

<sup>101</sup> Mr. Frelinghuysen to Mr. Lowell, April 25, 1882, Moore, *Digest*, Vol. VI, pp. 276-277.

<sup>102</sup> Note from Señor Hay to the American Ambassador in Mexico City, September 2, 1938, this JOURNAL, Vol. 32 (1938), p. 204.

## TWO ARMISTICES AND A SURRENDER

By MALBONE W. GRAHAM

*Of the Board of Editors*

The publication, on November 6, 1945, of a series of documents embodying the terms of the armistice arrangements successively entered into between the Italian Government and the American and British Commanders in the Mediterranean area makes possible an accurate, if necessarily belated, evaluation of their form, content, and import. The texts<sup>1</sup> serve as an interesting and accurate record of the degree and intensity of cohesion of the coalition which Italy then faced in the field, and afford an insight into the variform problems which an armistice with a naval power inevitably raises. Because the laying down of Italian arms constituted the first concrete implementation of the concept of unconditional surrender the two armistices in which it was embodied offer an illuminating indication of the juridical form and content of "unconditional surrender" in 1943 with which the surrender instruments and orders of 1945 can be compared.

### THE SICILIAN ARMISTICE

The first armistice, officially characterized as "the short military armistice," is a terse document of twelve articles, virtually without preamble or preliminary motivations, signed at an undesignated place in Sicily on September 3, 1943, by General Dwight D. Eisenhower, Commander in Chief of Allied Forces, and Major General Walter B. Smith, U.S.A., his Chief of Staff, and by Marshal Pietro Badoglio, designated simply as "Head of the Italian Government," and Brigadier General Giuseppe Castellano, "attached to the Italian High Command," in the presence of ranking civilian and military dignitaries. Content aside, this first armistice between the Allied Forces and one of the Axis Powers has all the earmarks of a hastily concluded instrument, cast in the form of a military protocol, signed in the presence of enough political and military witnesses to vouch for its authenticity, and paying very little attention to form. Its outstanding trait is that it contained "the . . . conditions of an armistice . . . presented by General Dwight D. Eisenhower . . . acting by authority of the Governments of the United States and Great Britain and in the interest of the United Nations, and . . . accepted by Marshal Pietro Badoglio, head of the Italian Government." The term "unconditional" does not occur in the instrument itself, and "surrender" is used only to refer to the territory to be handed over "for such use as operational bases and other purposes as the Allies may

<sup>1</sup> For the texts of the documents involved see below, Supplement, pp. 1-21; also *Congressional Record*, 79th Congress, First Session, Vol. 91, No. 195, pp. A5081-A5086.

see fit" (Art. 6). The term "United Nations" is used only twice—in respect of facilities that might be used against them (Art. 2), and with regard to "prisoners or internees of the United Nations" (Art. 3). In short, the Sicilian Armistice is a "field document," brusque and impetuous in its phraseology and intended solely to serve as the instrument for advancing military operations.

These it sought to facilitate by the immediate cessation of all hostile activity by the Italian armed forces (Art. 1), by Italian denial of all facilities to the Germans (Art. 2), by the release of United Nations nationals in prison or under internment (Art. 3), and by immediate transfer of the fleet and aircraft into Allied hands (Art. 4) with power to requisition, in addition, Italian merchant shipping (Art. 5). It further surrendered all necessary territory for operational purposes (Art. 6) and guaranteed to the Allies free use of airfields and naval ports (Art. 7). In addition, all Italian armed forces were to be withdrawn into Italy (Art. 8), the Italian Government guaranteeing to employ all its available forces if necessary to insure prompt and exact compliance with the armistice terms (Art. 9). Two special stipulations gave the Allied Commander in Chief power to requisition shipping and to take any measures, including the establishment of Allied military government, deemed necessary for the protection of the Allied force (Arts. 5, 10). The final articles foreshadowed measures of disarmament, demobilization and demilitarization (Art. 11) and, at a later date, "other conditions of a political, economic and financial nature" (Art. 12). The armistice conditions were not to be made public without prior approval of the Allied Commander in Chief—a stipulation which kept the official text secret for more than two years. Only the English text was to be authentic.

#### GENESIS OF THE "ADDITIONAL CONDITIONS"

In the ensuing twenty-six days, during which military operations were vigorously pressed, the extremely fluid political situation in Italy changed considerably, and while the Italians failed, owing to counter-measures of the German occupying authorities, to liberate by their own action any extensive part of their own country, the authority of Marshal Badoglio as head of the Italian Government was consolidated in the regions where troops under his authority preponderated. It was under these changed circumstances that, on September 29, 1943, General Eisenhower concluded in Malta a second and far more elaborate instrument of armistice containing 44 articles, captioned "Additional Conditions of the Armistice with Italy."<sup>2</sup> In an accompanying letter handed to Marshal Badoglio after the signature, and therefore not to be regarded as a "covering note," General Eisenhower

<sup>2</sup> In the document made public on November 6, 1945, it is stated, without any indication in the text itself, that these are reproduced "as modified by the protocol signed November 9, 1943." For the latter document see Great Britain, *Parliamentary Papers*, Italy [Series], No. 1 (1945), Cm. 6693, p. 11 (Document No. 4).

recognized that, while the "Additional Conditions" were "based upon the situation obtaining prior to the cessation of hostilities," "developments since that time have altered considerably the status of Italy, which has become in effect a coöperator with the United Nations." In consequence he declared that the terms were already superseded by subsequent events and that several of the clauses had become obsolescent or had already been put into execution. Some of the terms, he conceded, were *ultra vires* for the Italian Government, and were and would be so recognized by the Allied Command. However, he declared, "this document represents the requirements with which the Italian Government can be expected to comply when in a position to do so." At the same time he held out the hope of a modification of both instruments "if military necessity or the extent of coöperation by the Italian Government makes this desirable." Marked modifications of the armistice did not, however, come about until February 24, 1945, when an *aide-memoire* from the President of the Control Commission announced marked relaxations of Allied control.

Seen in this context, the "Additional Conditions" reveal a marked change in the political climate, but evidence stern insistence on the legal rights acquired under both instruments. They are described in the preamble as conjointly containing "the terms on which the United States, United Kingdom, and Soviet Governments, acting on behalf of the United Nations, are prepared to suspend hostilities against Italy." Their presentation and acceptance give to the transaction somewhat of a contractual character,<sup>3</sup> and to the ensemble the earmarks of a preliminary peace possessed by both previous and subsequent armistices.<sup>4</sup>

#### THE MALTESE ARMISTICE

The first part of the Maltese Armistice, comprising Articles 1-17, is essentially concerned with the liquidation of the war on land, on the sea and in the air. Where the Sicilian Armistice merely commanded immediate cessation of hostile activity, the Maltese Armistice sets forth, with a wealth of detail, provisions for surrender, cessation of hostilities, issuance of subordinate instructions, and abstention from damage to real or personal property, public or private (Art. 1). The furnishing of information regarding the disposition of Italian and enemy forces and installations (Arts. 2, 10, 11), the securing of airfields and port facilities, the barracking of troops (Art. 3), the relocation of Italian land, sea or air forces (Art. 4) and their demobilization

<sup>3</sup> "These terms," concludes the preamble of the Malta Convention, "have been presented by General Dwight D. Eisenhower, Commander in Chief, Allied Forces, duly authorized to that effect;

"And have been accepted unconditionally by Marshal Pietro Badoglio, head of the Italian Government, representing the Supreme Command of Italian land, sea and air forces, and duly authorized to that effect by the Italian Government."

<sup>4</sup> See "Armistices—1944 Style" by the present writer, in this JOURNAL, Vol. 39, No. 2 (April, 1945), pp. 286-295, at p. 287.



as directed (Art. 6) are prescribed. Because of the importance of Italy as a maritime nation, special provisions govern the disposition of war and merchant vessels, including those of any other Axis member, which were, like aircraft, immobilized unless otherwise ordered (Arts. 7-8, 27, 28 (A)). The furnishing of information relating to defense and intercommunication installations, "mine fields or other obstacles to movement by land, sea, or air," including practical arrangements for the removal of the latter (Art. 10), and data as to war materiel (Art. 11) are required. Damage to or removal of war materiel, including "wireless, radio-location<sup>5</sup> or meteorological<sup>6</sup> stations, railroad, port or other installations or, in general, public or private utilities or property of any kind, wherever situated" was strictly forbidden, the responsibility for its maintenance and repair being placed on the Italian authorities (Art. 12). Finally, there is a stringent prohibition on the "manufacture, production and construction of war material and its import, export or transit, except as directed by the United Nations," a special engagement to comply with such directions being given by the Italian Government (Art. 13). In general, all radio and telecommunications passed under United Nations control (Art. 16), conformity to "such measures for the control and censorship of press and of other publications, of theatrical and cinematographic performances, of broadcasting, and also of all forms of intercommunication as the commander in chief may direct" being imposed.

The problem of merchant shipping presented a number of unusual aspects in Italy. The Malta Convention therefore minutely prescribed (Art. 14 (A), (B)) that all existing merchant tonnage and any constructed or completed during the force of the armistice should be put in good condition by the competent Italian authorities for such purposes as the United Nations might prescribe. This also applied to transport and port equipment. Transfer to enemy or neutral flags—shades of the Declaration of London!—was strictly prohibited, whereas the exercise of any existing options to repurchase or reacquire or resume control of Italian or former Italian vessels sold or otherwise transferred or chartered during the war was made mandatory—a stipulation imperiously dictated by the acute shipping shortage. To cope with the highly complex problem of United Nations shipping in Italian hands, "whether or not the title has been transferred as the result of

<sup>5</sup> This is believed to be the first international legal instrument in which radar, or radiolocation apparatus, is mentioned. No such mention occurs in the armistices with Rumania, Finland, Bulgaria or Hungary.

<sup>6</sup> This is likewise believed to be the first reference in an international instrument to meteorological installations. A year later, in the armistices with Rumania (Art. 3, Annex) and Hungary (Art. III, Annex) specific provision was made for placing at the disposal of the occupying Power, in complete good order and with the personnel required for their maintenance, all meteorological stations which might be required for military needs. No such stipulation occurs in the armistice with Bulgaria, but it is believed that Article 19 of the Armistice with Finland, binding her to "make available such materials and products as may be required by the United Nations for purposes connected with the war" would cover the case.

prize court proceedings or otherwise," complete surrender of such tonnage was ordered by Art. 15, the Italian Government being required "to secure any necessary transfers of title." This proviso particularly emphasizes the "preliminary peace" character of the Maltese Armistice, inasmuch as it not only undoes the work of Italian prize courts with crushing finality, but appears definitely to restore the *status quo ante*, alike in public and private law. The same treatment (except for quieting of title) was to be extended to neutral ships in Italian hands. Finally, all port and navigational facilities were to be opened to craft of the United Nations (Art. 17).

The second part of the Malta Convention (Arts. 18-33) governs the military occupation of Italy and the politico-economic regime to be established there. A progressive occupation is envisaged (Art. 18), the Italian Government covenanting to make available "all naval, military and air installations, power stations, oil refineries, public utility services, all ports and harbors, all transport and all intercommunication installations, facilities and equipment and such stocks as may be required by the United Nations" (Art. 19), both in occupied and non-occupied areas (Arts. 17, 21 (B)).<sup>7</sup> The occupation itself is characterized in Art. 20 as an action in which "the United Nations<sup>8</sup> will exercise all the rights of an occupying power throughout the territories or areas [involved], the administration of which will be provided for by the issue of proclamations, orders or regulations" binding upon all Italian administrative, judicial and public service personnel. A number of provisions (Arts. 21 (A), 22, 34, 35, 36) repeat almost verbatim the assurances of coöperation, provision of facilities for United Nations armed forces, and the arrangements for disarmament, demobilization and demilitarization contained in the Sicilian Armistice.

The economic clauses (Arts. 23-24, 33 (A), (B)) deal primarily with redemption of Allied military currency, the control of banks and businesses, of foreign exchange and foreign commercial and financial transactions, and the regulation of trade and production, all of which were subjected to United Nations control. There is an outright prohibition of financial, commercial or other intercourse with, or for the benefit of countries at war with any of the United Nations except under license. Obviously the Malta Convention does little more in this respect than set the framework for a financial regime, leaving to detailed orders, regulations or proclamations the necessary technical details.

<sup>7</sup> The elaborate enumeration of facilities to be turned over in occupied areas and made available in non-occupied areas was probably a precaution against potential recalcitrance on the part of the Italian armed forces or administration at a time when the margin of military advantage of the United Nations was not large. In the armistices of 1944 the generic categories were fewer and better thought out, the redundancies being largely eliminated. Cf. Graham, as cited, p. 290 and n. 16.

<sup>8</sup> By Art. 38 (A) "the term 'United Nations' in the present instrument includes the Allied Commander in Chief, the Control Commission and any other authority which the United Nations may designate."

The logical counterpart of economic non-intercourse is political. All diplomatic relations between Italy and any country at war with the United Nations were to be broken off, and all Italian diplomatic, consular, and other officials in such countries were to be recalled, while the United Nations reserved the right to lay down the principles governing the treatment of diplomatic and consular officials of pro-Axis states in Italy (Art. 25 (A)). The diplomatic and consular personnel of neutral countries in Italy became subject to United Nations directives contingently requiring their withdrawal, and sharply limiting their media of communication with home countries (Art. 25 (B))—a procedure, as has been noted elsewhere,<sup>9</sup> which marks a sharp recession in neutral rights and a corresponding enlargement of the concept of unneutral service.

Partly to prevent the possible escape of persons suspected of being war criminals or other Axis nationals, partly to prevent the augmenting, however remotely, of enemy man power, Italian subjects in general were prevented from leaving Italian territory (Art. 26), other Axis subjects being subjected to internment. (Art. 28 (B)). Conversely, all persons of Italian nationality serving or working for Axis powers were to be recalled as directed by the Allied Commander in Chief—a euphemism doubtless intended to cover a situation beyond the control of both the Italian Government and the United Nations. Property belonging to Axis nationals was to be automatically “impounded and kept in custody pending further orders” (Art. 28 (C))—apparently a conventional substitute for the more commonplace term “sequestration.” Finally, a brief statement (Art. 28 (D)) covered the general internment, custody or subsequent disposal, utilization or employment of Axis persons, vessels, aircraft, materiel or property.

#### REMEDIAL POLITICAL MEASURES

Because the Fascist regime was already in liquidation, special stress was put on the apprehension of war criminals. Article 29 contemplated the eventual apprehension and surrender into the hands of the United Nations of “Benito Mussolini, his chief Fascist associates, and all persons suspected of having committed war crimes or analogous offenses” who were so listed by the United Nations. The Italian Government was bound in advance to comply with any instructions given by the United Nations in that connection.

Of far greater significance were the provisions of Article 30 disbanding “all Fascist organizations, including all branches of the Fascist militia (MVSN), the Secret Police (OVRA), and all Fascist youth organizations” and compelling the Italian Government to comply with further directives abolishing Fascist institutions, dismissing and interning Fascist personnel, controlling Fascist funds and suppressing Fascist ideology and teaching. With these politically remedial measures went an imperative order that “all Italian

<sup>9</sup> Graham, p. 289.

laws involving discrimination on grounds of race, color, creed, or political opinions . . . be rescinded, and persons detained on such grounds . . . be released and relieved from all legal disabilities." Compliance with all further directives for repeal of Fascist legislation and the removal of resulting disabilities or prohibitions (Art. 31) was ordered.

Further remedial measures are found in the provisions of Art. 32, dealing with United Nations prisoners of war, political prisoners and internees and other foreign nationals in Italy. Specific guarantees against their removal out of reach of the United Nations were inserted, including special stipulations on behalf of "Abyssinian subjects" who, by existing Italian law, were regarded as Italian subjects. Military and political prisoners were to be handed over to the representatives of the United Nations for release; political prisoners—"persons of whatever nationality who have been placed under restriction, detention or sentence (including sentences *in absentia*) on account of their dealings or sympathies with the United Nations"—were additionally relieved from all legal disabilities; foreign nationals and the property of foreign states and nationals were to be safeguarded by such measures as the United Nations might direct.<sup>10</sup>

#### MISCELLANEOUS PROVISIONS

In sharp contrast to the Sicilian Armistice, the Malta Convention is extremely exact in its terminology, bearing in its concluding articles the strong impress of Anglo-American judicial technique by supplying unequivocal definitions of certain pertinent terms. Thus "United Nations," "Allied Commander in Chief," "Italian land, sea and air forces," "war material" and "Italian territory" all receive precise content (Arts. 38-41), the last term mentioned embracing all Italian colonies and dependencies including Albania "(but without prejudice to the question of sovereignty)," although the armistice was made basically inapplicable to colonial territory already occupied by the United Nations. The whole instrument went into effect immediately, to last until superseded or "until the voting into force of the peace treaty with Italy" (Art. 43). The possibility of denunciation of penalty for violation was formally inserted in the final article but is only *pro forma* and possesses no intrinsic interest. While English and Italian texts were signed, only the English is authentic, final power of interpretation being vested in a Control Commission whose functions are promissorily indicated by Article 37.

Such are the elaborate juridical embroideries of the sketchy field document concluded in Sicily. In the Malta Convention are found, full-blown, many of the provisions subsequently followed only in truncated phraseology in the armistices of 1944. What is most striking, however, is the high pin-

<sup>10</sup> This article appears to have been the prototype for the amnesty and liberation provisions of the armistices of 1944: Graham, p. 291. Religious or racial grounds for incarceration are not, however, covered by the Malta Convention.

nacle to which the corporate activity of the United Nations is raised, the term occurring some seventy times in the instrument<sup>11</sup> and marking the high point of wartime coöperation in unchartered form.

#### THE SURRENDER DOCUMENTS

In the light of the provisos surrounding Italy's withdrawal from the war in 1943 the various surrender documents executed by Japan in August and September, 1945, are worthy of careful analysis. They comprise documents of both a diplomatic and constitutional character on the one hand, and, on the other, those of a military nature. Beginning with the "Declaration issued by the heads of the Governments of the United States, China and Great Britain on July 26, 1945 at Potsdam and subsequently adhered to by the Union of Soviet Socialist Republics"<sup>12</sup> and continuing in the diplomatic correspondence between Japan and the United States, largely through the intermediary of Switzerland, they culminated in the acceptance, through diplomatic channels, on August 14, 1945, of the Potsdam Declaration.<sup>13</sup>

Thereafter the documents cease to be wholly international and assume a

<sup>11</sup> In amazing contrast, the *aide-memoire* of the President of the Allied Commission relaxing the Armistice, on February 25, 1945, completely filters out all reference to the United Nations save in Article 9, where two vestigial references to the United Nations seem to have crept in adventitiously. Otherwise the document invariably refers to the "Allied Governments," "Allied Powers," "Allied Military Government" or "Allied Commission." Perhaps the kindest, although not the only interpretation to put on this sharp regression of mention of the United Nations is that, seeing that the Yalta Agreement called for a definitely constituted United Nations Organization, it appeared desirable not to employ the term further in instruments of a military character falling outside the framework of the Dumbarton Oaks proposals.

<sup>12</sup> *Department of State Bulletin*, Vol. XIII, No. 318 (July 29, 1945), p. 137, not reproduced in this JOURNAL.

<sup>13</sup> *Department of State Bulletin*, No. 320 (August 12, 1945), pp. 205-206 and No. 321 (August 19, 1945), pp. 255-256. Essentially the pre-surrender negotiations comprised two exchanges of notes, the first declaring the readiness of the Japanese Government to accept the Potsdam Declaration "with the understanding that the said declaration does not comprise any demand which prejudices the prerogatives of His Majesty as a Sovereign Ruler" and the reply of Secretary of State Byrnes declaring that "From the moment of surrender the authority of the Emperor and the Japanese Government to rule the state shall be subject to the Supreme Commander of the Allied Powers." There followed, in four terse paragraphs, a thumbnail sketch of what the surrender terms would involve—a preview of the shape of things to come. In the second exchange of notes, the Japanese Government communicated a paraphrastic acceptance of the terms laid down in the first Byrnes note. To this Secretary Byrnes replied that he regarded the Japanese note "as full acceptance of the Potsdam Declaration and of [his] statement of August 11, 1945." Forthwith General MacArthur radioed the Japanese Emperor, the Japanese Imperial Government, and the Japanese General Headquarters that he had been designated as "the Supreme Commander for the Allied Powers, the United States, the Republic of China, the United Kingdom and the Union of Soviet Socialist Republics, and empowered to arrange directly with the Japanese authorities for the cessation of hostilities at the earliest practicable date." It is to be noted that the diplomatic exchanges put on record the bases of agreement, whereas General MacArthur undertook only to execute them by appropriate arrangements, not negotiations.

primarily domestic and constitutional character. They begin with an Imperial Rescript in the form of a proclamation, accepting the Potsdam Declaration and ordering the signature of the Instrument of Surrender, but also ordering the Japanese people to obey it and all General Orders issued thereunder. The credentials issued to the Japanese Delegates—one civilian, one military—respectively authorized them to attach their signatures by command and on behalf of the Emperor and the Government and General Staff respectively, to the Instrument of Surrender. The key document is, of course, the Instrument of Surrender, in signing which the Japanese delegates accepted the Potsdam Declaration, proclaimed unconditional surrender; commanded Japanese authorities, civil and military, to surrender, or obey and enforce orders, undertook "for the Emperor, the Japanese Government and their successors" to carry out the Potsdam Declaration, and expressly stated that "the authority of the Emperor and the Japanese Government to rule the state shall be subject to the Supreme Commander for the Allied Powers who will take such steps as he deems proper to effectuate these terms of surrender."<sup>14</sup>

Careful study reveals that the first, sixth and eighth paragraphs of the Instrument of Surrender have all the earmarks of an international agreement or engagement, whereas the second, third, fourth, fifth and seventh paragraphs are primarily stipulations of a domestic character. It is therefore impossible to classify the document as either domestic or international, since it partakes of the nature of both. In its essence, the Instrument effected generically a surrender (pars. 2 and 4), a cessation of hostilities, and a pledge of conservation of all civil and military materiel (par. 3), a transfer of authority over all civil, military and naval officials (pars. 5 and 6), an immediate liberation of all Allied prisoners of war and civilian internees, and made provision for their protection, care, maintenance and transportation (par. 7). Because its focus is perhaps intentionally on points of a dramatic significance, the Instrument of Surrender is, *per se*, quite inadequate to convey the impression of the modalities, if not terms, by which the Far Eastern hostilities ended. It is therefore necessary to have recourse to Japanese General Order No. 1, issued immediately after the surrender in Tokyo Bay, and to certain collateral documents<sup>15</sup> to get a comprehensive view of the immediate post-surrender orders and situation.

By Japanese General Order No. 1, a relatively detailed document in twelve articles, the Imperial General Headquarters ordered the cessation of

<sup>14</sup> Same, No. 324 (September 9, 1945), pp. 362-365; *this JOURNAL*, Vol. 39 (1945), Supplement, p. 264.

<sup>15</sup> A number of these are found in the collection published by the Chinese News Service in *China at War*, Vol. XV, Nos. 3-4 (Sept.-Oct. 1945), pp. 1-25, noteworthily the Nanking Surrender Document of September 9, 1945, and Order No. 1 of Generalissimo Chiang Kai-Shek, at pp. 17-23. Because of the inaccessibility of documents regarding the surrender arrangements in the Southwest Pacific area, no endeavor has been made to analyze the briefly reported proceedings and terms at Hong Kong, Singapore, Rangoon, and other places.

hostilities, the laying down of arms, immobilization and disarmament of armed forces in Japan and abroad, including Japanese-controlled forces, and the surrender of those forces and their weapons to specified local commanders (Art. 1).<sup>16</sup> Detailed lists of the disposition of armed forces, indicating precisely the units of every command, together with all types of materiel, were exacted of GHQ along with comparable naval and air information as well as that regarding minefields and other obstacles to navigation. Finally the locations of all camps and other places of detention of prisoners and internees were to be divulged (Arts. 2, 4). The immobilization of aircraft (Art. 3), of naval craft (Art. 4) and the removal of all obstacles to movement by land, sea, and air and restoration of navigation aids were commanded (Art. 5).<sup>17</sup> The retention in good order of all types of material and facilities was strictly enjoined, while the manufacture and distribution of arms, ammunition, and implements of war was to cease forthwith (Arts. 6-8).<sup>18</sup>

In view of the already known severity of treatment of civilian internees and prisoners of war, special care was taken to provide for their safety and well being, surrender, transportation and adequate documentation (Art. 9, A-D).<sup>19</sup> In the three concluding articles of the order provision was made for the aid and assistance of all Japanese and Japanese-controlled military and civil authorities in the occupation of Japan and Japanese-controlled areas by forces of the Allied Powers, for procuring the surrender of arms by the Japanese civilian population, and, contingently, for punishment at the hands of the Allied military authorities and the Japanese Government, apparently conjointly, in the event of delay or failure to comply (Arts. 10-12).<sup>20</sup>

It is clear from the foregoing that the Japanese Surrender Instrument and Order are by no means comparable to the Maltese Armistice. Rather does the Surrender Instrument stand closer comparison to the Sicilian Armistice in its conciseness and the definiteness of its objective. Only a compendium of the numerous orders and directives issued by General MacArthur to reorganize the Japanese economy would furnish fruitful detailed comparison with the Malta Convention, but the times are not yet ripe for that.

What is perhaps most outstanding in the first and last arrangements for

<sup>16</sup> Nanking Surrender Document, paragraphs 1-3, and Chinese Order No. 1, Arts. I, II, A, B, C, which basically conform to these stipulations; see also the Malta Convention, Arts. 1-2.

<sup>17</sup> Nanking Surrender Document, par. 3, Chinese Order No. 1, Art. II, D, and H, 1-5 and Art. III, A-F. See the Malta Convention, Arts. 3, 4, 7-11.

<sup>18</sup> Chinese Order No. 1, Art. II, H, 4-5. Compare the Malta Convention, Arts. 12, 13, 35.

<sup>19</sup> Nanking Surrender Document, par. 4; Chinese Order No. 1, Art. II, F, 1-4. Compare the Malta Convention Art. 32 (A).

<sup>20</sup> Nanking Surrender Document, pars. 5-7; Chinese Order No. 1, Art. IV; see also Malta Convention Arts. 34, 44.

the cessation of hostilities in World War II is the high degree of corporate effort of the United Nations evidenced in the first, and the almost negligible character of United Nations activity present in the final instruments. It is true that meanwhile a juridical structure, the United Nations Organization, was coming into being. Nevertheless, the surrender documents in the Far East reflect with painful poignancy the lapse of United Nations motifs and the visible disintegration of the wartime anti-Axis coalition. The utter absence of any Control Commission in the Pacific area, the unilateral initiation of policy, and the absence of all evidence of concerted consultation, all mark the close of a chapter recording an all-time high in international military collaboration, and the opening up of a new, and far from solidary, account in the ledger of contemporary history. Such at least, is the long-range trend inferable from the instruments under review.



## EDITORIAL COMMENT

### WORLD LAW

The British Foreign Minister, Mr. Ernest Bevin, made a remarkable pronouncement to the House of Commons on Friday, November 21, 1945, when he said:

I feel we are driven relentlessly along this road. We need a new study for the purpose of creating a world assembly elected directly from the people of the world as a whole, to whom the governments who form the United Nations are responsible and who, in fact, make the world law which they, the people, will then accept and be morally bound and willing to carry out. For it will be from their votes that the power will have been derived, and it will be for their direct representatives to carry out.

\* \* \*

The supreme act of government is the horrible duty of deciding matters which affect the life or death of the people. That power rests in this House as far as this country is concerned. I would merge that power into the greater power of a directly elected world assembly in order that the great repositories of destruction and science, on the one hand, may be their property, against the misuse of which it is their duty to protect us and, on the other hand, that they may determine in the ordinary sense whether a country is acting as an aggressor or not.

I am willing to sit with anybody, or any party, of any nation, to try to devise a franchise or constitution . . . for a world assembly . . . with a limited objective—the objective of peace. Once we can get to that stage I believe we shall have taken a great progressive step—from the moment you accept that, one phrase goes, and that is “international law.” That phrase presupposes conflict between nations. It would be replaced by “world law,” with a moral world force behind it . . . with a world judiciary to interpret it, with a world police to enforce it, with the decision of the people with their own votes resting in their own hands, irrespective of race or creed, as the great world sovereign elected authority which would hold in its care the destinies of the world.

The significance of this commitment is considerably enhanced by an earlier declaration of a similar nature by Mr. Anthony Eden, who preceded Mr. Bevin as Foreign Minister.

The constraining reason for so momentous a declaration is undoubtedly the profound alteration in international relations brought about by the atomic bomb. Statesmen and scientists alike seek protection through some form of international control. They believe that the only sound kind of control is to be had through a world government having the powers of a super-state to legislate and execute laws affecting directly the peoples of the world.

A “world law” of this character obviously would be different from international law. It is not obvious, however, that it should “replace” the law

of nations. The function of "world law" might properly be to augment, improve, and implement international law.

Those who are especially interested in the science of international law are constantly challenged to defend it when misinterpreted and discredited, even by its friends. A common misunderstanding concerns the sanctions of international law, which are different from the sanctions of municipal law. The followers of Austin are largely responsible for this misunderstanding.

The most serious error committed by the defenders of international law has been found in their parrot-like reaffirmation that it applies only between sovereign states. No wonder that responsible statesmen should call for a law that is primarily concerned with the rights and duties of individuals! They can see no way to control the manufacture and use of atomic bombs other than by a universal law that operates directly upon individuals.

It is unfortunately the fact that this conventional notion of international law as a law applying only between states should continue to be upheld by responsible authorities. Nevertheless in recent years there has been a decided trend towards the recognition that the fundamental object of international law, as of most law, is the protection of the rights of human beings. The whole field of private international law, which the Anglo-American jurists have rather scornfully called Conflict of Laws, is gradually being recognized as an integral part of international law. Writers in this JOURNAL have occasionally drawn attention to the fact that the *lex gentium* is actually a *lex populi*, as Grotius originally maintained. They have shown that the decisions of national courts and international tribunals have been concerned primarily with the interests and the rights of individuals. They have urged the proclamation of the constitutional rights of man. They have insisted on freedom of access by aggrieved aliens to international judicial tribunals for redress.

This movement in behalf of the rights of peoples and individuals has received considerable impetus of late. The creation of the Social and Economic Council of the United Nations Organization should greatly accelerate the movement.

The far-reaching significance of the demand for a "world law" should receive most thorough and serious consideration. The mere intimation that the agents of a world government might ignore the local authorities and proceed directly against individuals charged with an offense against that law is bound to cause grave concern. The resentment and ill-feeling which would surely be aroused by such an intrusion would be likely to injure international harmony and coöperation. This would apply equally within the United States and within Russia. Within the national's own state he normally has immediate remedies, either legal or political, for a violation of his rights. Any legal device to protect an individual against arbitrary or illegal action by a super-state would present serious difficulties of an unprecedented nature.

The proposal of a world government having supreme powers to enforce a "world law" may be the ultimate ideal towards which the peoples of all nations must strive. It is very doubtful, however, at this crisis, if it is wise or expedient to discredit the United Nations Organization, before it has even begun to function, by demands for another kind of world government.

The peoples of the world gathered together at San Francisco in the first real "Congress of Nations" felt that they had made great progress when they finally agreed on the Charter of the United Nations. They will not wish to have the task of the United Nations made more difficult by demands of statesmen, scientists, or perfectionists of any kind. Progress in international coöperation, even under the stimulus of the atomic bomb, should not be attempted by leaps and bounds beyond the power of adjustment by the bewildered and badly-frightened peoples of the world.

This crisis of civilization demands the best collective wisdom, the stoutest courage, and robust faith if we are to build a sound structure of international relations based on law. That law has grown out of the experience of mankind over the centuries. It cannot be "replaced" without chaotic results. It should be improved, strengthened, and implemented. That is a proper function of the United Nations Organization. By such orderly process a genuine "world law" may be evolved.

PHILIP MARSHALL BROWN

#### THE ATOMIC BOMB •

Who shall control the atomic bomb, manufacture it, or prohibit effectively its use by individual nations? The invention of this lethal weapon has confronted the American Government with one of its most troublesome dilemmas. On the one hand, there are those who seem to believe that the manufacture of the bomb cannot be kept an American secret—practically all the scientists, apparently the British Government, the CIO, and others—and who advocate "internationalizing" the process and seem to think that the Security Council of the UNO as transferee constitutes such an international organ. On the other hand, there are those, like President Truman and the military authorities, who want to keep the manufacture an American secret as long as possible or who would in particular keep the secret from Soviet Russia.

In between, other alternatives are suggested, such as the alleged British proposal to vest the secret—said by President Truman to be known to Great Britain and Canada, and by Professor Urey, to France and Denmark—in the military staff of the Security Council, representing the Big Five only, or in a new committee of UNO, or by delegated authority from UNO to let the United States act as custodian of the bomb with the understanding that it is to be placed at the disposal of the Security Council and used exclusively under orders from the military staff. It is alternatively suggested that the plants be made extraterritorial.<sup>1</sup> Ex-Justice Roberts' group at Dublin,

<sup>1</sup> *The New York Times*, November 1, 1945.

New Hampshire, recognizing that UNO is only a confederation of states, recommend that the organization be scrapped and a substitute be created in the form of a true international government vested with sovereign powers<sup>2</sup> over the use of force internationally (which the individual states would by hypothesis abandon) and having federal rights of legislation and administration with power to bind the constituent states and their individual members.

On November 15, 1945, Messrs. Truman, Attlee, and King published a statement undertaking to share whatever secret of manufacture there may be in the bomb, but only to share by transferring it to UNO, or a commission thereof, and only after other Powers (Russia is thought to be intended) agree to share their own military secrets, "thereby creating an atmosphere of reciprocal confidence."<sup>3</sup> Possibly better Russian cooperation with Anglo-American policies on other matters is an implied condition. In the meantime, however, we are informed that the United States is continuing to manufacture the bombs, but, it is said, only to insure the use of atomic energy "for peaceful purposes." Just how that can be done is not stated.

There is risk or futility in all these methods. Apart from the question how long any part of the process can be kept a secret—a possibility which the scientists seem to doubt—the gift of the secret to the UNO or the Security Council or the general staff of the Security Council or new organ of UNO, is in fact to give it to all the members of the Security Council if not of UNO. UNO is not a super-government or an organization independent of its members. The men who will compose its agencies, like the general staff, remain nationals of their own respective countries. If the secret is to be disclosed to all nations, vesting it in a UNO agency, established or new, is comprehensible. If the secret of manufacture is to be kept, even temporarily, it cannot be vested in a UNO agency, which merely represents the constituent powers. The states members of UNO have reserved all powers of sovereignty,<sup>4</sup> including the control of their military forces. UNO has no powers other than those found in the Charter, which does not extend to a prohibition of the national manufacture of anything.<sup>5</sup> If the secret is kept from Russia, for

<sup>2</sup> See also Norman Cousins, *Modern Man Is Obsolete*, New York, 1945, reviewed by John Davenport in same, November 4, 1945.

<sup>3</sup> Same, November 16, 1945. There is objection to the exclusion of Russia from the conference. "Sixty Days to War or Peace," in *The New Republic*, November 26, 1945, p. 691.

<sup>4</sup> With the veto power in each of the Big Five, and the reserved right of UNO to cross the territory of any smaller power, it seems unusual to speak of the "equality" of states; see *Report on the Charter by the Secretary of State*, June 28, 1945, p. 157. Former Secretary Eden in the House of Commons, on November 22, 1945, addressed a plea to the Big Five for the abandonment of the veto power and other *infringement* of sovereignty. *The New York Times*, November 23, 1945.

<sup>5</sup> A ban on industrial activities imposed by the Potsdam Agreement, which imposes the victor's will upon the vanquished and, in confiscating enemy assets, disregards the rights of private property. Russia's alleged removal of machinery and personalty is explained in part on the ground that by alleged governmental control it became public property. A Chinese

example, it is possible, though improbable, that for a few years Russian scientists will not discover the secret, but the distrust evidenced<sup>6</sup> will be considerable.<sup>7</sup> The proposal to establish a world government among the United Nations or the democracies among them would make sense if there were a possibility of establishing such a government with federal powers. But what Senator or member of the House would vote for the abandonment of the American Army or Navy or for abandoning control of national finances to any international government? And if the new government adopted a bill of rights and respected private property, how could Russia join—the proposed Court of International Justice must climb this hurdle—and if it does not, how can the United States and Britain join?

Yet the idea of the Roberts group is sound and logical, and it is believed that there is a possibility, in view of the stark realities, of vesting in a group of men, who shall enjoy extraterritoriality and complete detachment from national connections—which the UNO or its agencies does not have—the 5  
secret of the atomic bomb or enough to enable them to identify and detect improper use. Unless they enjoy and maintain their detachment the experiment fails. But the nations must agree that as a condition of the group being given the secret or the indicia thereof, this group of men or any other

philosopher some years ago condemned the Treaty of Versailles—from which much of Europe's troubles emanate—as the “most uncivilized paper written since men knew how to record thought” and then prophesied that it would “lead to more wars.” John Bassett Moore, *Collected Papers*, New Haven, 1944, Vol. VI, p. 422.

<sup>6</sup> *The New Republic*, Vol. 113 (November 5, 1945), p. 588, says editorially:

As long as we refuse to share the bomb with the rest of the world by placing its manufacture under international control, all our lofty sentiments, all our professions of peace and all our insistence on democratic processes will simply sound hypocritical to the other peoples of the world. The government's plan to exchange fundamental scientific information on atomic energy with other nations, but not to discuss “the processes of manufacturing the atomic bomb or any other instruments of war,” will surely give the impression that we intend to wield the bomb as a big stick in our foreign relations.

<sup>7</sup> On the assumption that the process of manufacture, if not the scientific formula, can be kept secret, the proposal for national control of the bomb is embodied in the Johnson-May bill. This was adopted by the committee after hearing only eight witnesses, and the method has given rise to much objection. All but one scientist seems to have opposed secrecy. The bill sets up an advisory group of nine commissioners appointed by the President, two paid commissioners to have virtual control over developments in atomic energy, except in time of war, when the Army has control. The commission is to control government stocks of ores, Federal lands containing ores, and government plants and processes. They may condemn private property having these resources. The managers would conduct researches and experiments for the use of atomic energy for all purposes. The security regulations are strict and carry heavy penalties. This is deemed by opponents of the bill, who are the majority of the scientists, an effort at totalitarian control. The McMahon committee of eleven in the Senate which is to work out a system of regulation, superseding, as it would, the Attlee-Truman-King executive agreement, seems, if we are to judge by its chairman, to favor sharing the secret under certain conditions, by giving it to the UNO. Professor Gray of Illinois testified that under the Senate bill introduced by Senator Magnuson, the results of government research “could be turned over to some private corporation on a monopoly basis.” There seems to be general agreement that this must not happen.

centralized agency shall not manufacture the bomb but shall, on the contrary, destroy all atom bomb works which are within the national jurisdiction of any signatory. If any industrial nation remains a non-signatory, and unless export is completely prohibited, the whole experiment fails. The group may need a non-partisan military police for this purpose and must be empowered to engage one. In addition, they must have the power of national inspection to see that the destruction and prohibition of bomb manufacture is carried out. That is a form of intervention which only a super-state can indulge.<sup>8</sup> *Russia will never allow it.*

The attempt at agreement with an offer to surrender the secret must be made soon. The *locus poenitentiae* is very restricted. The offer has only short-term value; delay diminishes the chances of agreement. Delay also gives distrust its opportunity; the mood for agreement will quickly vanish. Fully constructed works will not readily be surrendered; the gift must precede, not succeed, the atomic bomb race.

Prime Minister Attlee asks in a recent speech for the return of the rule of morality and of law in international relations.<sup>9</sup> In the debate in the House of Commons on November 23 Mr. Attlee made a plea for "mutual confidence" among nations and outlawing of war, a goal much to be desired. But when the larger nations undertook, to use Asquith's words, not to be "hampered by juridical niceties," i.e., law, in the conduct of war, they abandoned the rule of morality and of law and returned to primitive violence. It is doubtful whether exhortation can now produce the desired result. Neither confidence, nor an outlawry of war, nor an abatement of sovereignty is consistent with such a dispensation as was prepared by the Big Three at Potsdam.

If established, the group proposed would constitute an international government for the sole purpose of controlling the atomic bomb. In every

<sup>8</sup> In his speech of October 31, 1945, in New York, Secretary Byrnes reaffirmed the American policy of non-intervention, but qualified it by saying (*The New York Times*, November 1, 1945, p. 4):

We have learned that tyranny anywhere must be watched (more than watching marks recent policy!—E. B.) for it may come to threaten the security of neighboring nations and soon become the concern of all the nations. If, therefore, there are developments within the inter-American system which, realistically viewed, threaten our security (note the transition!) we consult with other members in an effort to agree upon common policy for our military protection.

At Montevideo, Buenos Aires, and Lima, the United States committed itself to non-intervention in the external or internal affairs of our neighbors to the south. This abnegation has been criticized as too sweeping and unrealistic. S. F. Bemis, *The Latin-American Policy of the United States*, New York, 1943, pp. 226, 276. It is unsafe to rely on American policy in the face of the somewhat contradictory record. Compare the statement of Assistant Secretary Berle with that of Senator Fulbright, this JOURNAL, Vol. 39 (1945), p. 771, note 11. Harold Laski, in denouncing Franco in Spain, has also said: "The day of non-intervention [in foreign internal affairs] is over." See criticism of this new doctrine in W. A. Orton, *The Liberal Tradition*, New Haven, 1945, pp. 231 and ff.

<sup>9</sup> *The New York Times*, November 20, 1945, p. 3.

other respect the nations retain their sovereignty. The difficulties of administration may prove great and, in any event, will require exceptional cooperation from every Power. No lethal weapon has ever been successfully outlawed; the success achieved by the reciprocal fear of poison gas is no analogy for the atom bomb. There would be a temptation to gain conclusive advantage from its early use. It may prove difficult to distinguish forbidden uses from purposes that are to be permitted and encouraged. It may be objected that while constituent governments may agree to the appointment of such a supernational group,<sup>10</sup> the attempt to destroy forbidden works or to inspect them will be resisted by individual powers. If that is the verdict of experience then we must face the inevitable consequences: the atomic race will be on.

EDWIN BORCHARD

#### INTERNATIONAL CONTROL OF THE ATOMIC BOMB

The atomic bomb is the most efficient instrument of mass destruction so far devised by the genius of man. Its use against the cities of Hiroshima and Nagasaki, however it may be justified, might seem to imperil "those standards of humane conduct which have been developed as an essential part of modern civilization."<sup>1</sup> We are warned in the Truman-Attlee-King Declaration that even graver threats to civilization may be in store for us.

Having developed the bomb under the stimulus of fear that it might be developed first by Germany, and having used it, as Cromwell said of a sanguinary massacre in Ireland, to prevent the effusion of blood, we are charged by our consciences to see that it shall never be used again. We can hardly be surprised, however, to find that some of those who have the strongest reasons for confidence in our magnanimity are deeply resentful of the fact that we have it in our power, temporarily, to destroy them without being ourselves destroyed.

The atomic bomb is an equalizer of nations in the same way that the six-shooter was an equalizer of men in our "Wild West." We may be sure that if one nation has atomic bombs in its armory, all other self-respecting nations will have atomic bombs in their armories as soon as they can get them. We

<sup>10</sup> It must be admitted that evidence of a genuine internationalism is sadly lacking. The demand for national conscription in peace, coming after two world wars, the pride taken in a monster navy, the celebration of Navy Day, the receptions given in this country to Messrs. Eisenhower, Wainwright, and Nimitz, are hardly manifestations of a growing internationalism. Wars promote not internationalism but nationalism. And yet, since an atomic bomb race signifies the possible passing of the human species, the nations may find the necessary courage to vest control of the bomb and the destruction of all the incidental works in an international group having this authority only. If successful in this experiment, the nations might be willing in time to go somewhat further. The gap between international science and national politics and economics was never more ominous.

<sup>1</sup> Quoted from a press release of Acting Secretary of State Welles, June 4, 1938, denouncing aerial bombings which had resulted in the death of "many hundreds of the civilian population" in China and Spain.

may be sure also that if atomic bombs are available to the belligerents in any major war of the future, the only effective deterrent to their use by one side will be the belief that the other side is prepared, as we were prepared, with respect to gases in World War II, to retaliate overwhelmingly in kind. Belligerents, as Dr. Hyde observes, will be "contemptuous of the dictates of humanity when they appear to frustrate a means of attaining an early and decisive victory," and "the equities of unoffending non-combatants, even where they are strongest, will be swept aside as inconsequential if they balk success."<sup>2</sup>

In these circumstances, and in view of the fact that the United States, Britain, and Canada are unwilling to utilize their present exclusive control of atomic power to impose lasting peace upon the world, there can be no doubt of the wisdom of the Truman-Attlee-King recommendation that atomic weapons and all other major weapons of mass destruction be eliminated from national armaments.<sup>3</sup> It is important to note, however, that this recommendation is subject to the prior establishment of control of atomic energy to the extent necessary to ensure its use only for peaceful purposes. The control envisaged must be international control. It would not be safe, at the present stage of the development of mankind on the social side, to entrust to national governments the sole responsibility for preventing quantities of plutonium or uranium 235, produced within their respective territories for peaceful purposes, from passing into the hands of makers of ordnance. It should be clear that the formal elimination of atomic weapons from national armaments will be actually dangerous to world peace unless it is preceded or immediately followed by the inauguration of a system of constant checks, under international auspices, upon the production of atomic energy and upon the use made of materials that could be applied to the manufacture of atomic bombs.

Messrs. Truman, Attlee, and King, in the declaration mentioned above, left the details of their recommendations to be worked out by a proposed Atomic Energy Commission. If such a body is set up, it will find useful a draft of an agreement considered at the Geneva Disarmament Conference in 1935 with respect to the manufacture of and trade in arms. This draft provided for a system of national supervision and inspection, supplemented by general supervision, special investigations, and on-the-spot inspections when deemed necessary, by an international body. It was accepted in principle by a committee which included representatives of the United States, France, Soviet Russia, and Great Britain.<sup>4</sup>

It may be presumed that the nations represented at the Geneva Disarmament Conference are no less conscious now than they were then of the

<sup>2</sup> Hyde, C. C., *International Law*, 1945 (2d ed.), Vol. III, pp. 1822, 1835.

<sup>3</sup> For text of declaration see below, Supplement, p. 48

<sup>4</sup> Details are summarized by Mrs. Laura Puffer Morgan in *Geneva Studies*, Vol. XI, No. 7 (1940).

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need for international supervision and inspection of the production and distribution of lethal weapons and their component parts. It may be presumed that it would be practicable now to obtain universal acceptance of a system of national supervision and inspection, supplemented, in special situations, by international supervision and inspection, in the field of atomic energy. It is submitted, however, that such a system would fall far short of affording effective safeguards against the military use of atomic energy. It is believed to be imperative to establish a system of day-to-day supervision and inspection, by competent representatives of an international body, of all production of atomic energy and of the location of all materials susceptible of use in the manufacture of atomic bombs. With such a system in effective operation, and with all the existing atomic bombs destroyed, the world might again breathe as easily as it did before August 6, 1945.

For effective operation, a system of constant international supervision and inspection would require the presence of a staff of scientists, of different nationalities, at every plant in which atomic energy is produced. The number of such plants would probably have to be limited by agreement, and special inducements, such as private laboratories for research, would probably have to be held out to the scientists charged with the duties of supervision and inspection at the production plants and throughout assigned areas. The agreement establishing the system would, of course, bind every member of the United Nations to coöperate fully with the international agency, to enact laws penalizing violations of the reasonable orders of the agency, and to give the agency such police support as might be required.

There is inherent in such a system of control the possibility of conflicts with national governments engaged in the production of atomic energy or permitting their citizens to engage in such production. For this reason, among others, it is believed to be appropriate to consider seriously whether the production of atomic energy and the distribution of plutonium, uranium 235, and similar materials susceptible of both military and non-military uses should not be entrusted exclusively to an international body. An agreement for the establishment of such an international monopoly might provide for the immediate use, without specific authorization of the Security Council, of international force, to be placed at the disposal of the International Atomic Energy Authority, for the seizure of any plant operating or any materials held in defiance of the Authority. The agreement might also provide that any person, official or unofficial, charged with specified acts of defiance of the Authority should be liable to punishment, upon conviction by an international tribunal, for crimes against the United Nations. The problem of national survival, presented in its most dramatic form by the atomic bomb, is such as to warrant radical departures from the patterns of international arrangements in the preatomic era.

EDGAR TURLINGTON

## HAS THE SUPREME COURT ABDICATED ONE OF ITS FUNCTIONS?

The recent decision of the Supreme Court in the *Hoffman* case<sup>1</sup> must cause concern to anyone interested in the development of international law. Despite, and perhaps because of, the continuous stream of criticism of international law as a body of legal principles, no one who gives any thought to the future of international relations can fail to be concerned with the development of that law. Almost every basic declaration by statesmen refers to the necessity of the rule of law. One of the principal criticisms of the Dumbarton Oaks Proposals was their failure to lay sufficient stress upon justice and law as principles upon which the new international organization would base its efforts for the promotion of world peace. These criticisms led to the insertion in the Charter of the United Nations of several important references to law and to justice.<sup>2</sup>

The *Hoffman* case is one in a long series of decisions of the highest courts of very many countries of the world relative to the immunities of foreign sovereigns and their property. Largely through the normal developmental process of national court decisions, an extensive body of international law has been developed on this subject.<sup>3</sup> Yet one reading the opinion of Chief Justice Stone in the *Hoffman* case might well assume that this is a subject with regard to which no body of law exists, a subject governed entirely by political considerations. According to the Chief Justice, "It is therefore not for the courts to deny an immunity which our Government has seen fit to allow, or to allow an immunity on new grounds which the Government has not seen fit to recognize." It might be argued that the only question involved is one of the distribution of functions under our constitutional system between the executive and judicial branches of the government. It is familiar doctrine in the courts of the United States and in the courts of other countries that certain questions which may be raised before courts are "political," and that with regard to them the courts will merely follow the views of the political or executive branch of the government.<sup>4</sup> In determining whether a particular group exercising governmental functions in a foreign country is or is not "the Government" of that country, or whether a particular individual represents in a diplomatic or other capacity the Government of a foreign country, the courts have customarily and properly turned to the executive for information. This is too familiar a proposition to require citation of

<sup>1</sup> *Republic of Mexico v. Hoffman* (1945), 324 U. S. 30; 65 S. Ct. 530; this JOURNAL, Vol. 39 (1945), p. 585.

<sup>2</sup> Especially the first paragraph of Article 1, and subparagraph a of paragraph 1 of Article 13.

<sup>3</sup> See, for example, the Harvard Research draft on the Competence of Courts, this JOURNAL, Vol. 26 (1932), Supplement, p. 453.

<sup>4</sup> The distinction between legal and political questions before both international and national tribunals is the subject of an abundant literature. This brief comment merely explores the fringes of one manifestation of the problem. See Post, *The Supreme Court and Political Questions*, 1936; Jaffe, *Judicial Aspects of Foreign Relations*.

authority. The practice before the British courts has perhaps been somewhat more consistent and more orderly than that in American courts.<sup>5</sup> Courts have occasionally indicated that these questions are ones of which they will take judicial notice, and that they merely inform themselves by consulting the executive.<sup>6</sup>

In cases involving sovereign immunity, it used to be assumed that the only question which the political branch of the government was called upon to decide was the status of the government or its agents.<sup>7</sup> The trend of the United States decisions, culminating in the *Hoffman* case, would now make it appear that the State Department must also determine the basic legal principle governing the immunity.<sup>8</sup> From the international point of view, this is a most unsatisfactory role for the Department of State to discharge. It is not organized in such a way as to facilitate its rendering what are essentially judicial decisions. Moreover, as its past practices have indicated,<sup>9</sup> it has been most reluctant to place itself in the position of sustaining or denying a foreign government's claim to immunity. It is the normal process of international affairs to insist that a question of this character must be submitted to the courts and that the diplomatic channel should be utilized only where the courts fail to do justice. If the foreign state believes that the decision of the highest court is not in conformity with international law, and that its rights have been prejudiced by an erroneous decision, it may then make complaint through the diplomatic channel. This situation is taken into account in a provision found in a number of arbitration treaties concluded around 1926 by the Scandinavian States and Finland. Article 8 of the Sweden-Finland Treaty of January 29, 1926, provides:

If the judicial sentence or arbitral award declares that a decision or measure of a court of law or other authority of any of the two States is

<sup>5</sup> See Desk, F., "The Plea of Sovereign Immunity and the New York Court of Appeals," in *Columbia Law Review*, Vol. XL (1940), p. 453.

<sup>6</sup> Lord Sumner in *Duff Development Co. Ltd. v. Government of Kelantan*, House of Lords, [1924] A. C. 797. For varying positions relative to the determination of territorial questions, see *The Fagerness*, Court of Appeal, [1927] Probate, 311; discussed in *British Year Book of International Law*, Vol. 9 (1928), p. 120; *Williams v. Suffolk Insurance Co.* (1839), 13 Pet. 415; *Tartar Chemical Co. v. US* (1902), 116 F. 726.

<sup>7</sup> See the excellent statement of the Attorney General in *Engelke v. Musmann*, House of Lords, [1928] A. C. 433, 436: "It is admitted, however, that such a statement [by the Secretary of State for Foreign Affairs concerning recognition of a person as a member of the diplomatic staff of a foreign ambassador] is conclusive upon the question of diplomatic status alone; and it is still for the court to determine as a matter of law whether, the diplomatic status having been conclusively proved, immunity from process necessarily follows."

<sup>8</sup> This seems to mark a departure from the position taken by Chief Justice Stone in *The Navemar* (1938), 303 U. S. 68, 75: "The Department of State having declined to act, the want of admiralty jurisdiction because of the alleged public status of the vessel and the right of the Spanish Government to demand possession of the vessel as owner if it so elected, were appropriate subjects for judicial inquiry upon proof of the matters alleged."

<sup>9</sup> See the numerous examples in Green Hackworth, *Digest of International Law*, Vol. II, Chap. VII.

wholly or in part contrary to international law, and if the constitutional law of that state does not permit, or only partially permits, the consequences of the decision or measure in question to be annulled, the parties agree that the judicial sentence or arbitral award shall award the injured party equitable satisfaction of some other kind.<sup>10</sup>

The writer cannot agree with the view expressed by Chief Justice Stone that the practice of recognition and allowance of a claim of immunity by the Department of State

is founded upon the policy, recognized both by the Department of State and the courts that their national interest will be better served in such cases, if the wrongs to suitors, involving our relations with a friendly foreign power, are righted through diplomatic negotiations rather than the compulsion of judicial proceedings.<sup>11</sup>

Far from contributing to the smooth functioning of our foreign policy, the present position of the Supreme Court, as indicated in the *Hoffman* case, may prove to be seriously detrimental. It is true that the Court recognizes that the foreign sovereign may present its claim in court, but in such a case the Chief Justice indicates that "the court will inquire whether the ground of immunity is one which it is the established policy of the Department to recognize." If it should become apparent that the State Department has a policy denying immunities in certain cases in which a foreign state believed the rule of international law to be otherwise, the foreign state might properly decline to go to the trouble and expense of court action, and demand immediate satisfaction through arbitration or otherwise. This would be in accord with the position taken by the United States in its controversy with Great Britain in 1915 concerning resort to the British Prize Courts.<sup>12</sup>

On this particular question of immunity, the British courts still assume a responsibility for determining the applicable rule of international law. As is clearly evident from the opinions in the case of the *Cristina*,<sup>13</sup> the British courts still take the view, enunciated in the classic statement of Mr. Justice Gray in *The Paquete Habana*,<sup>14</sup> that international law is part of the law of the land. As Dr. Ruth Masters has made clear,<sup>15</sup> this doctrine is not peculiar to England and the United States.<sup>16</sup> It is fortunate that this is the case, since it is still true, as Chief Justice Marshall pointed out in 1815, that "the decisions of the courts of every country show how the law of nations, in the given case, is understood in that country, and will be considered in adopting the rule which is to prevail in this."<sup>17</sup>

<sup>10</sup> 1926, L.N.T.S., No. 1192.

<sup>11</sup> *Ex-parte Republic of Peru* (1943), 318 U. S. 578, 589. Hyde, C. C., *International Law*, 1945 (2d ed.), Vol. II, pp. 912-913. <sup>12</sup> Hyde, work cited, Vol. 3, Sec. 894.

<sup>13</sup> House of Lords, [1938] A.C. 485. To same effect: *Wright v. Cantrell* (1943), Sup. Ct. of New South Wales, 44 State Reports N.S.W., 45, 46, and *Chung Chi Cheung v. the King*, Privy Council, [1939] A.C. 168.

<sup>14</sup> (1900), 175 U. S. 677.

<sup>15</sup> *International Law in National Courts*, New York, 1932.

<sup>16</sup> See particularly the statements of the Belgian Court of Cassation in the case of *Princesse Stéphanie c. Le Baron Goffinet* (1906), *Pandectes Périodiques*, Vol. I, 1.

<sup>17</sup> 30 *Hogsheads of Sugar v. Boyle* (1815), 9 Cranch. 191, 198.

The Department of State has not been wholly without fault in this new tendency to redistribute the functions between the courts and the political branch of the government, as is most clearly brought out in the statement submitted to the Appellate Division of the New York Supreme Court in the *Transandine* case.<sup>18</sup> In that suggestion, the State Department in effect undertook to tell the court how it should determine certain questions of law, but the New York Court of Appeals properly reached its own conclusion as to the legal rules applicable.

In recognition cases, which have led to a number of unsatisfactory decisions in our courts ever since problems arising from the Russian nationalization decrees were presented for their determination, the Supreme Court has tended more and more to yield the field to the Department of State and to enlarge the exclusive power of the executive. The *Pink* case is the latest step in this direction.<sup>19</sup> On the other hand, the Belgian Government has found no difficulty in leaving a larger field of operation to the courts. Replying to an interpolation in the Belgian Senate on April 6, 1933, the Belgian Minister of Foreign Affairs declared: "If the Belgian courts, judging in the plenitude of their independence, decided that Russian legislation today can produce certain effects in Belgium, the government has not seen in that fact any opposition to the policy of non-recognition of the government of the U.S.S.R. which it has followed."<sup>20</sup> As Lehman, J. said: "The State Department determines whether it will recognize its [the foreign Government's] existence as lawful, . . . The State Department determines only that question. It cannot determine how far the private rights and obligations of individuals are affected by acts of a body not sovereign or with which our Government will have no dealings. That question does not concern our foreign relations. It is not a political question but a judicial question."<sup>21</sup>

Pending the needed fundamental changes in the international legal system which can be made only by multipartite convention,<sup>22</sup> there is more need to-

<sup>18</sup> *Anderson v. N. V. Transandine Handelsmaatschappij* (194-), 289 N. Y. 9; this JOURNAL, Vol. 36 (1943), p. 701.

<sup>19</sup> *U. S. v. Pink* (1942), 315 U. S. 203; see this JOURNAL, Vol. 36 (1942), p. 282, and the comments upon the inadequacy of the presentation of points of international law in the case of *Guaranty Trust Co. v. U. S.* (19-), 304 U. S. 126, this JOURNAL, Vol. 32 (1938), p. 542. The effect of the decision in the *Pink* case upon the lower courts is brought out by the decision in *The Maret* (1944), 145 F. 2d 431.

<sup>20</sup> J. F. Williams, *La Doctrine de la Reconnaissance en Droit International et ses Développements Récents*, in *Recueil des Cours de l'Académie de Droit International, la Hayne*, Vol. 44 (1933), p. 255.

<sup>21</sup> *Russian Reinsurance Co. v. Stoddard* (1925), 240 N. Y. 149, 158.

<sup>22</sup> Mr. Justice Frankfurter recognized the need for these fundamental changes in a separate opinion in the *Pink* case when he said: "The opinions show both the English and the New York courts struggling to deal with these business consequences of major international complications through the application of traditional judicial concepts"; 315 U. S. 203, 235. It is respectfully suggested that the Supreme Court has not yet pointed the way to satisfactory new judicial concepts.

day than there ever has been before for the coöperation of national courts in contributing to the development of international law.<sup>23</sup> The new International Court of Justice and occasional arbitral courts will continue to play their part, but their activities should be abetted and supplemented by the courts of the various states. It would be a distinct disservice to the rule of law if it should eventuate that questions of international law should always have to be determined solely by international courts which are happily free from subservience to the national policy of any single state. It is still true, as Mr. Justice Cardozo stated in 1934,<sup>24</sup> that "international law, or the law that governs between states, has at times, like the common law within states, a twilight existence during which it is hardly distinguishable from morality or justice, till at length the *imprimatur* of a court attests its jural quality." Such an *imprimatur* cannot be impressed by the political branch of a government.

PHILIP C. JESSUP

<sup>23</sup> In addition to other cases referred to in this comment, the following cases in which opinions were delivered by members of the present bench of the Supreme Court, constitute contributions to international law: *Jordan v. Tashiro* (1928), 278 U. S. 123; *Nielsen v. Johnson* (1929), 279 U. S. 47; *U. S. v. Flores*, (1933) 289 U. S. 137; *U. S. v. O'Donnell*, (1939) 303 U. S. 501.

<sup>24</sup> *New Jersey v. Delaware* (1934), 291 U. S. 361, 383.

## CURRENT NOTES

### THE CONTINENTAL SHELF AND THE MARGINAL BELT

On September 28, 1945, the President of the United States issued two important proclamations of great interest to international lawyers.<sup>1</sup> One asserts the jurisdiction of the United States over the natural resources of the sub-soil and the sea bed of the continental shelf contiguous to the coasts of the United States beyond the three-mile limit and the other announces a new policy respecting the conservation and control of its coastal fisheries beyond territorial waters. This policy includes the establishment of conservation zones in areas of the high seas contiguous to coasts of the United States where fishing activities on a substantial scale have been or may be developed and maintained by United States nationals alone or by them and nationals of other states. If our nationals alone have used the fisheries, control is to be exercised by the United States exclusively. If nationals of other states have participated, control is to be provided by agreement between the United States and the other interested states. The proclamation concedes similar rights of control to other coastal states and disclaims any purpose to affect the character of the areas as high seas or the rights of navigation therein. The President also announced the issuance of two executive orders to implement the new policies.<sup>2</sup> By one of the orders the mineral resources of the continental shelf beneath the high seas included in one of the proclamations are reserved from exploitation and placed under administration of the Secretary of the Interior pending enactment of Congressional legislation. By the other order the Secretaries of State and of the Interior are directed to jointly recommend from time to time the establishment by executive orders of fishery conservation zones in areas of the high seas pursuant to the proclamation pertaining to that matter and also to recommend provisions to be incorporated in such orders relating to administration, regulation, and control of fishery resources and fishing activities in such zones.

These two proclamations radically alter the practice of our Government for over a century and a quarter with respect to the matters within their scope. Hitherto the territorial range of our coastal maritime jurisdiction generally has been confined by that practice and by occasional legislation to the limits prescribed by the Anglo-American three-mile doctrine and our Government always has insisted that other states similarly should limit their jurisdictions against American interests. Exceptions, in accordance with the practice of other states, have been made of seizing on the high seas ships freshly pursued from territorial waters after committing offenses therein, and of protective supervision against customs violations at short distances beyond the narrow belt of territorial coastal sea. Two recent further exceptions of a more novel

<sup>1</sup> Below, Supplement, pp. 45-47.

<sup>2</sup> Pp. 47, 48.

character are (1) the Anti-Smuggling Act of Aug. 5, 1935, authorizing the President, under certain conditions, to delimit zones of the high seas farther than the traditional twelve miles from our coasts within which our customs control might operate against smugglers and (2) the Declaration of Panama (1939), issued by states of the Pan-American Union, which delimits a neutral zone of the high seas over 300 miles in average width within which belligerent activities of the participants in World War II were prohibited in protection of neutral commerce of the Americas. The first of these two novel exceptions is suggestive of the conservation zone plan of the President's fisheries proclamation. Both exceptions illustrate the impact of the greatly altered conditions of our highly developed technological, industrial, commercial, and social life on problems of government, including international affairs. The radical changes in the nature, implements, and usages of warfare, the concomitant obliteration by action without previous agreement of much of the old legal restrictions on methods of war, especially at sea, and the consequent strangulation of the classical law of neutrality should suggest the possibility of analogous changes in the methods of waging peace through law.

With these exceptions, the peace-time practice of the United States has conformed so consistently to the traditional Anglo-American doctrine limiting territorial marginal seas to a three-mile belt (plus certain bays) and advocating strict adherence to the propaganda of Grotius for freedom of non-territorial high seas from national jurisdiction, that almost all American lawyers have been convinced that the doctrine is established international law. It is true that in the Bering Sea case the United States asserted jurisdiction to protect the Pribilof seals while they were in the high seas, but this jurisdiction was claimed on special grounds and the general Anglo-American doctrine was endorsed expressly on the record by both parties to the arbitration. However, the decision of the case has been considered by most American lawyers a conclusive confirmation of the doctrine as international law.

As a matter of fact these common beliefs of American lawyers are mistaken. The arbitral tribunal in the Bering Sea case did not decide that the Anglo-American doctrine was international law, since, as the President of the tribunal has stated, both parties agreed on this point and therefore the question was not involved in the case. Furthermore, the doctrine never has been approved by a majority of the coastal states and has been opposed expressly by many of them, especially on the matter of the territorial extent of a state's jurisdiction over coastal fisheries. Among other states Russia, Italy, France, Portugal, and Norway continually have insisted that the jurisdiction of a coastal state over its fisheries should extend more than three miles from shore. The substantial failure of the codification conference at The Hague in 1930 to agree on a territorial waters convention is cogent evidence that the traditional Anglo-American doctrine is not international law. Therefore the proclamations of the President cannot be condemned as counter to established law. They are only striking alterations of past propaganda,



claims, and policies of our government. Any critical appraisal of them should proceed from this premise and should be guided by an estimate of their consequences on the interests of the United States and of the international community.

The fisheries proclamation proposes a plan of conservation which concurs with the often expressed opinion of European experts through many decades past. Because of the frustrations, during the past century, of efforts to obtain effective conservation of fisheries by international control through treaties and the imminent danger of destruction of the valuable North Sea fisheries by the competitive fishing of nationals of many states, European experts have advocated that control of coastal states be extended beyond the three miles fixed by the North Sea Convention. Some have advocated in the case of other fisheries that coastal state control be extended to the edge of the continental shelf. In favor of this extended control it has been argued that preservation of coastal fisheries is of greater importance to the people of the coastal states than to others. In many cases of smaller states—e. g. Norway and Portugal—the fisheries are a principal source of food and livelihood for the coastal population. Therefore these states would have an incentive to conservation which foreign roving fishers lack. The constant menace to peace which the invasion of the fisheries by unlicensed foreign fishers have caused through the ages is another weighty argument for concession of control to coastal states. The people of coastal states strongly resent the devastating foreign invasions of the fisheries which they believe belong to them. A recent outbreak of this natural feeling was occasioned by the invasion of our salmon fisheries in Bristol Bay, Alaska, by the Japanese in 1936. This invasion caused threats of physical violence by our fishermen and suggestions of consequent Japanese naval protection of their fishing fleets. So strong was the resentment against the invasion, which might ruin the most valuable fishery in the world, that longshoremen on the Pacific Coast threatened to tie up every Japanese ship in an American port by refusing to move cargos until our Government should stop the Japanese intrusion, union fishermen suggested a boycott of Japanese products, and proposals were made to arm the American fishing fleet for attack on the invaders. In 1938 our Government secured a temporary ban from the Japanese Government against a continuance of use by its nationals of the Alaska salmon fisheries, but the agreement was temporary and there was no doubt of Japan's intention to resume extensive exploitation of American coastal fisheries outside territorial waters as soon as settlement of her troubles in Asia should free her hands for taking on this new controversy with the United States. Indeed, Japan had given notice of her intent to monopolize these fisheries with Canadian and American collaboration if possible or otherwise by destructive competition.

This episode convinced our Government that it was necessary to take decisive action to avoid similar serious difficulties in the future and to insure the

preservation of these valuable resources off our coasts. A century of experience with attempts to secure conservation through multilateral or numerous bilateral agreements had proven that such attempts were futile, although where only two or three states were actively using a fishery, valuable conservation agreements such as the Pacific halibut and sock-eye salmon treaties between the United States and Canada were possible. Meanwhile our traditional policy invited foreign fishing in areas where our fishermen believed that we should exercise exclusive control and if foreign invasion should result, our case for excluding the invaders would be sadly jeopardized by our unrevoked previous declarations of policy—as was our case in the Bering Sea arbitration and our case against the Japanese. Such a development would be extremely embarrassing. It was evident that there might arise overwhelming popular pressure to oust the invading fishermen who would be exercising a right, according to our Government's previous international propaganda, but a right which the American public would with reason refuse to recognize. Without question common sense—ordinary professional discretion, such as lawyers customarily exercise in their private practices—demanded that our Government should declare in advance what its action necessarily would be if an invasion such as that of the Japanese in Bristol Bay should recur, and thus free its future case from the estoppel of past practice and the implied invitation of its old policy.

There was an alternative suggestion that the old policy should not be abandoned until approval of all other states was won through multilateral or numerous bilateral treaties settling international law in favor of some conservation policy; but such a sedate procedure would be much too slow, tedious and doubtful to meet the dangers which lay in the constant possibility of new invasions of our tempting fisheries. These invasions might raise claims from which there could be no satisfactory recession and which could not easily be settled in peace because of strong insistent group pressures in the domestic politics of each contesting state.

The course adopted by the President under advice of the Secretaries of State and of the Interior therefore is wise and progressive statesmanship. It at once warns foreigners that the old invitation to invasion is withdrawn—a warning which generally will be heeded—and it gives legal protection in advance to national interests of great importance which politically we could not abandon or easily compromise. There is no doubt that any state with power to do so would defend its important coastal interests in like manner, as indeed some have done in the past. The old Anglo-American doctrine was designed and advocated to support fishing off foreign coasts to the detriment of the economic interests of the coastal states and the proponents of the doctrine felt quite sure (in our case until the Bristol Bay episode) that their important coastal interests would not be jeopardized by foreign invasions. The English, backed by their prestige and naval power, developed the doctrine in support of claims to fish off coasts of other states opposing their

claims—especially Russia, Iceland, and Norway. This policy persisted against the arguments of English, Scotch and Continental experts in favor of conservation because of the strong political pressure of the Grimsby trawlers. Norway continually refused to yield to England's constant diplomatic pressure (to which our traditional practice contributed argumentative support) and was still rallying against this pressure when World War II postponed conclusion of the controversy. Thus the encouragement which Norway felt, and her authorities privately acknowledged, over the reaction of our Government and people against the Japanese invasion of Bristol Bay will be intensified by the President's proclamations. Indeed no lover of justice can study the history of coastal fisheries and the economics of their use without reaching a conviction that the cases of the coastal states—especially such small coastal states as Norway and Portugal—have conclusive arguments of justice in their favor and that the Anglo-American doctrine which favored aggressive destructive invasions by large foreign commercial organizations, was against that justice to small states as well as large which should be a reality and not merely an academic theory of international law. Furthermore a thorough historical study should convince anyone that European experts are right in advocating coastal state control as the most practical step towards conservation of these valuable food resources of the world, hitherto threatened with destruction through piratical competitive over-fishing.

Of course in the case of fisheries which have been used by nationals of various states for many years, the foreign fishers may have acquired just claims to participation on the basis of usage, and this is recognized by the terms of the President's proclamation. Now that the Japanese and the Germans are out of the arena and the need of better justice in the world is acknowledged as a prime concern of peace seekers, we should expect little opposition abroad to the new policy. No doubt communication with other states preceded issuance of the proclamation—especially with Great Britain, which is the only state which would be likely to offer strong objection. Both as a wise preparation for protection of important American interests and as a contribution to the economic and social welfare of the international community, the fisheries proclamation should be commended heartily.

The proclamation concerning the minerals and other bedded resources of the continental shelf also should meet with approval. No state in the world would look with equanimity on the prospect of foreign unlicensed exploitation of minerals—especially oil—so near its shores. The chances of serious acrimonious conflicts resulting from such exploitations are obvious and are implied in the terms of the proclamation. Again it should be emphasized that there is no established practice of the states of the world against the proclaimed policy. The particular problem is almost an entirely new one and the solution adopted by the President is sound and should meet with no

serious opposition abroad. In this case also forehanded action by proclamation is wiser than the slow, tedious, and often disappointing process of negotiation of treaties with numerous states. The process of negotiation and confirmation of treaties, like that of national legislation, is not always solely a statesmanlike adjustment of competing interests. Often it is seriously complicated and controlled by selfish private group interests with strong influence in the politics of individual states, which thwart or delay the conscientious efforts of statesmen. There are striking examples of this phenomenon in our recent history. International injustices and often causes of wars have been due to such factors.

These proclamations, then, are a promising contribution to a better statesmanship which will serve the interests of a world order designed for peace and the mutual coöperation of peoples. They thus will contribute also to development of a democratic international law supporting the just claims of small states as well as large and increasing the chances of peace. This democratic law will develop through like frank appraisals of the competitive forces and varying conditions in our world today, instead of through mechanistic adherence to traditional ill-digested generalities and slogans devised by theoreticians of an unscientific age of subsidized piracy, matchlocks, wood fires and candle-light, wide-open spaces, and glorification of cruel aggressive force for selfish profit—theoreticians who could have foreseen little of the technology, industries, social pressures and dominant impulses of our crowded, complex, modern civilization.<sup>3</sup>

JOSEPH WALTER BINGHAM

#### ITALIAN SOCIETY FOR INTERNATIONAL ORGANIZATION

The Italian Society for International Organization was founded in Rome in October 1944 by a group of students of international problems. Its purpose is to promote a spirit of friendly coöperation among nations and the organization of the international community to preserve peace. To further its purposes, the Society sponsors research on problems of international law, politics, and economics, publishes books and periodicals, sponsors lectures and meetings, and furthers close connections between Italian and foreign groups interested in the above problems.

The Society has organized three Committees to study political, economic, and legal problems of international organization. At present the following volumes are in preparation: The United Nations Charters, Monetary Plans, and the Diplomatic Documents of the Second World War. Other volumes on problems of peace organization, foreign loans, and emigration are being

<sup>3</sup> For an excellent history of fishing in the sea and related international law and diplomacy, see the classic *Sovereignty of the Seas*, by T. W. Fulton. For authorities and precedents supporting my comments see also the notes to my brief on the Bristol Bay case: *Report on the International Law of Pacific Coastal Fisheries*, 1938, and Stefan Riesenfeld, *Protection of Coastal Fisheries Under International Law*, Washington, 1942.

prepared. Before the end of this year there will be issued a quarterly called *La Comunità Internazionale*. A weekly is also being planned.

The Society also promotes courses of lectures on international questions. It is now particularly interested in the possibility of obtaining lectures by American teachers and also in the exchange of American and Italian professors for lectures and studies.

The Executive Board of the Society consists of Dionisio Anzilotti, formerly President of the Permanent Court of Justice at the Hague and professor of International Law, University of Rome, Chairman; Tomaso Perassi, professor of International Law, University of Rome, Legal Advisor to the Italian Foreign Office, and Leopoldo Piccardi, Councillor of State, Deputy Chairmen; Roberto Ago, professor of International Law, University of Milan, and professor of Public American Law, Italian Center of American Studies, Secretary General; Pasquale Saraceno, professor of banking organization, Catholic University of Milan, Adviser on industrial reconstruction to the Italian Government and to the A.M.G., Treasurer; Carlo Antoni, professor of philosophy, University of Padoa, President of the I.R.C.E. (Institute for Cultural Relations with Foreign Countries); Count Giorgio Balladore-Pallieri, professor of International Law, Catholic University of Milan; Costantino Bresciani-Turroni, professor of Economics, University of Milan, formerly professor at the University of Cairo and adviser to the Egyptian Government; Federico Chabod, professor of Modern History, University of Milan; Luigi Einaudi, professor of Public Finance, University of Turin, formerly Member of the Committee of the League of Nations on problems of international double taxation; Mario Giuliano, professor of International Law, University of Urbino, private secretary to the Under-Secretary for Foreign Affairs; Guido Gonella, professor of Political Philosophy, editor of "Il Popolo," in Rome; Arturo Carlo Jemolo, professor of Canon Law, University of Rome, President of the R.A.I. (Italian Broadcasting Corporation); Raffaele Mattioli, professor of banking organization, member of the Italian Economic Mission to the U.S.A. (1944-1945); Gaetano Morelli, professor of International Law, University of Naples, member of the *Consiglio del Contenzioso Diplomatico*; Count Alessandro Passerin d'Entrèves, professor of International Law, University of Turin; Giuseppe Ugo Papi, professor of Economics, University of Rome, General Secretary of the International Institute of Agriculture; Massimo Pilotti, Attorney General to the Supreme Court of Italy, for some time Under Secretary-General of the League of Nations; Mario Rotondi, professor of Private and Comparative Law, Catholic University of Milan; Mario Scerni, professor of International Law, University of Genoa; Luigi Salvatorelli, professor of History of the Religions, editor of "La Nuova Europa"; Alberto Tarchiani, Italian Ambassador to the United States, formerly editor in chief, with Luigi Albertini, of the "Corriere della Sera"; Ezio Vanoni, professor of Public Finance, University of Venice.

MARIO SCERNI

## TRAINING AMERICAN CIVILIAN PERSONNEL FOR OCCUPATION DUTIES

The crying need for a more vital training program for Americans going abroad in an official or unofficial capacity is being recognized by an increasing number of colleges and universities, as well as by some military and government agencies. Best-known among activities in the latter group is the Civil Affairs Training Program, sponsored by the Office of the Provost Marshal General, which prepares AMG officers for duties in occupied areas.<sup>1</sup> Of civilian government agencies the Foreign Economic Administration was the first to set up and operate a "foreign area program"—that is, a course of training intended to show civilian personnel sent abroad how foreign people actually live and think, work and act, as conditioned by their geographic, political, economic, and environmental and cultural inheritance.

The FEA Plan was of special interest as a pathfinder in an uncharted field of government-sponsored educational endeavor and because the civilians trained under it were sent to Germany and Austria. Their task of civilian economic and political administration was one of current and critical importance in areas occupied in the wake of battle, destruction, and destitution. It was heavy with implications for the future. A brief summary of these FEA activities and experiences should therefore be of value to government agencies planning similar programs and to educational institutions engaged in reconstructing some of their educational processes.

The FEA German and Austrian training programs began on March 19, 1945, after extended planning and preparation, and functioned off and on during the spring and early summer of 1945 as new personnel was appointed for overseas duty. These programs were designed to help officials and employees assigned to Germany and Austria to become acquainted with their future place of work and the major problems which would confront them. The course consisted of two parts:

1. A series of lectures and group discussions which provided a picture of Germany's recent history and role in international affairs, her people and their ways of thinking and acting, her Government and administration, and the types, structure, and problems of her economic life. The general purpose was to show what Germany was actually like both before and under Hitler and "why the Germans are that way." An effort was made to point out that Germans, too, can be individuals with diverse problems as well as stereotypes and rigid patterns of behavior and reaction.

A similar course was given on Austria, emphasis being placed on both similarities and dissimilarities between these two German-language people.

A briefer course for secretaries assigned to Austria was offered on a more general basis, commensurate with the educational background and general outlook of civil service secretaries and clerks.

<sup>1</sup> See note by present writer, "Training for American AMG Officers," in this JOURNAL Vol. 38 (1944), p. 467, and item by Charles S. Hyman, "The Army's Civil Affairs Training Program," in *American Political Science Review*, Vol. XXXVIII (1944), p. 342.

A strenuous effort was made to find films on life and work in these countries. While some OSS films were helpful to a limited degree, it was discovered in general that films on foreign countries tend to be travelogues emphasizing folk dances and other striking features of little value to occupation personnel.

2. Opportunity for individual study was provided under expert guidance in specialized and technical subjects such as national and local government and administration, agriculture, power, transportation, labor unions, exports and imports, industrial structure, government control of prices, and so forth.

The Training Division studied the individual needs of German and Austrian personnel and endeavored to bring each person into contact with experts of FEA and other agencies able to help him most in the limited time available. In this way the quickest possible progress was made in his special field.

Part 1, as described, constituted the general part of the training program. It was furnished for groups of people and was given within definite time limits, according to schedule.

Part 2 provided for individual study of specialized and technical subjects under expert guidance. It was very flexible and continued until an individual received orders to leave the country.

The general material on Austria and Germany as presented in lectures and group discussion to all people going to those countries regardless of their specialty was put in syllabi. Some of these were taken over from the Civil Affairs Training School at Stanford University, where the writer had been in charge of the German and Austrian part of the training program. Others were prepared by members of the FEA staff.

Austrian and German libraries of general and reference materials were established, in part with the help of the Library of Congress. They included books and magazines as well as hand-books, guides, memoranda and other specialized material prepared by FEA, OSS and other American agencies, or, in some instances, by British authorities. This material supplemented the general lectures and in addition provided opportunities for study in technical and specialized aspects of Austrian and German situations.

The main trouble which this training program had to face was that people were pulled out of training and sent overseas before their training was finished and in many cases before they had started it. But there is no reason why special in-service training courses could not be offered in Berlin, Frankfurt, and Vienna to both old and new civilian personnel in the occupation army. They could thereby salvage, perhaps, some of the "fruits of victory" concerning which some observers despair.

JOHN BROWN MASON

*Washington, D. C.*

## JACKSON H. RALSTON

1857-1945

Jackson H. Ralston, a member of the American Society of International Law from its first Annual Meeting onward, an Honorary Vice-President of the Society at the time of his death, a frequent contributor to its JOURNAL and participant at our annual meetings, passed away after a short illness at his home in Palo Alto, California, on October 13, 1945, in his 89th year.

Mr. Ralston's career was typically American. His long life was crowded with varied and useful accomplishment in all three of the vocations from which the ranks of our Society are mainly recruited—the practice of the law, law teaching, and public service. At the age of seven the tragic death of his father, Judge James H. Ralston, who perished in the Nevada wasteland since known as the Ralston Desert, threw him largely upon his own resources. His schooling was intermittent. At the age of 14 he learned to set type and began helping with the family expenses. Jackson Ralston nevertheless graduated in law from Georgetown University at the age of nineteen in 1876. Two years later, in 1878, he began the practice of law at Quincy, Illinois. Shortly thereafter he removed to Washington, D. C., where he practiced for nearly half a century until his "retirement" to California in 1924, where the last twenty years of his life were given over to active participation in civic affairs, writing, lecturing on international law at Stanford University, to delightful association with his friends, and, last but not least, to a serene and happy home life.

Jackson Ralston was a many-sided man. He achieved real distinction as a practitioner in two very different fields of the law—labor law and international law. His interest in labor law doubtless was an outgrowth of his practical experience as a printer. It also resulted in his first service abroad as delegate to France and Italy of the International Typographical Union of North America in 1878. He was for many years the Washington attorney of the American Federation of Labor and as such he successfully conducted the seven-year fight in the *Bucks Stove and Range* case to prevent the leaders of the Federation, Messrs. Gompers, Mitchell, and Morrison, from serving jail sentences for contempt. This necessitated two successful appeals to the Supreme Court of the United States.<sup>1</sup> In this connection mention should also be made of his services as counsel in the earlier case of *Callan vs. Wilson* which established the constitutional right of trial by jury in the District of Columbia.<sup>2</sup>

<sup>1</sup> *Gompers vs. Bucks Stove and Range Co.*, 1911, 33 App D.C. 83, 516, 221 U. S. 418; Same, 1914, 40 App D.C. 293, 233 U. S. 604; See also *Buck. Stove and Range Co. vs. American Federation of Labor etc.*, 1911, 219 U. S. 581.

<sup>2</sup> *Callan vs. Wilson* (1887), 127 U. S. 540; Thayers Cases Constitutional Law, Vol. I, p. 358. It is interesting to note that two of Mr. Ralston's cases, *Callan vs. Wilson* and *Wells vs. Hyattsville*, were below selected by Professor Thayer for inclusion in his great case book on constitutional law.



But it is through Mr. Ralston's contribution to the field of international law as practitioner, judge, author, editor, and teacher that he is best known to the members of our Society. Many successful lawyers occasionally essay the practice of international law. Some of them by good fortune make large fees in one or two cases. Mr. Ralston was one of the very few men who really specialized in the practice of international law in the same sense that a man may specialize in corporation law or as Mr. Ralston himself specialized in the constitutional aspects of labor law. Aside from many less known cases involving only private practice or private claims, he appeared in several cases of public importance. He was counsel for Felipe Agoncillo, the representative of the Philippine Republic in Washington in 1899 before the Philippine Insurrection broke out. As Agent of the United States and one of the counsel in the case of the Pious Fund of the Californias against Mexico, the first case to be submitted to The Hague Court, he had the unique opportunity of helping as Agent and Counsel to work out with the Court the broad lines of procedure which have since been followed by that tribunal and which underlie the rules of the Court of International Justice. His successful conduct of this case, in which he obtained recognition of the doctrine of *res adjudicata* in international law and obtained a substantial award in favor of the United States, led to his appointment by the Government of the United States as Umpire of the Italian-Venezuelan Commission of 1903, under which claims amounting to some \$8,000,000 were adjudicated. There were eleven mixed claims commissions sitting in Caracas in 1903. Some were ably conducted, some not so ably. Mr. Ralston as an Umpire was outstanding—a real international judge. His opinions were models in their just disposition of the instant case and valuable to the profession for their able and broad-minded treatment of questions of principle.

His service at The Hague and Caracas directly led to his greatest contribution to the science of international law and to his profession. This was, first, his scholarly edition of the Proceedings of the Venezuela Commissions of 1903, as well as the French-Venezuelan Commission of 1902. A mine of useful precedents was thus made available to the profession. His editorial work on these volumes gave Mr. Ralston an intimate knowledge of many authorities on the little known subject of international arbitral procedure, and doubtless suggested his work on *International Arbitral Law and Procedure*, 1909; subsequently expanded into his *Law and Procedure of International Tribunals*, 1926, with supplement in 1936. This is one of the most useful works in the hands of the practitioner of international law, particularly in the actual trial of cases before international courts. It is an outstanding example of a book (like Hall's *International Law*) which a practicing international lawyer cannot afford to do without as against the flood of theoretical books which any interesting and developing subject like international law naturally and legitimately evokes. That Mr. Ralston was at home in the discussion of the theory and history of international law suffi-

ciently appears from his works on these subjects: *Democracy's International Law*, 1922, *International Arbitration from Athens to Locarno*, 1929, and *A Quest for International Order*, 1941. He was at work on a new edition of *Athens to Locarno* at the time of his death. It is not known whether his notes are in shape to be completed by another.

No estimate of Mr. Ralston would be complete which failed to take note of his deep civic interest. He was a reformer—some would say a radical reformer—in his objectives, but always reasonable and constructive in his methods, always tolerant and respectful of those who differed from him. The writer recalls many lively arguments on all sorts of subjects with Mr. Ralston over many years, but not a suggestion of irritation because of any difference of opinion.

Mr. Ralston's interest in taxation and direct legislation left its mark on the constitutional history of California, where he was born and died, and in Maryland, state of his adoption. In 1892, as President of the Board of Commissioners of Hyattsville, Maryland, he endeavored to put the single tax into operation in that municipality.<sup>3</sup> In 1936, in the evening of his life, he strove manfully albeit again unsuccessfully to secure by direct legislation the adoption of a single tax amendment to the Constitution of California. His publications *What's Wrong with Taxation?* and *Confronting the Land Question* deal with the single tax. Although he failed to secure a real trial of the single tax in either Maryland or California, he did write a tax amendment and was co-author of a referendum amendment adopted by Maryland.

These activities inevitably took him into politics. He served as a delegate to the Democratic National Convention in 1903, was a candidate for Congress in the Fifth Maryland District in 1916, and served as Presidential elector in California in 1932.

Frugal in his habits and unostentatious in his way of life, he was generous to a fault when his interest was aroused in what he deemed a matter of principle. He made a personal contribution of \$25,000 to the single tax campaign in California.

Mr. Ralston lived a long, active, useful life. As lawyer, author, editor, and public-spirited citizen he served his community. As a kindly, humorous intensely human man he was at home alike in the Cosmos Club in Washington and the Commonwealth Club in San Francisco. He had the respect of all who knew him, and the affection of those who knew him best.

WILLIAM C. DENNIS

*Vice President of the Society*

<sup>3</sup> See *Wells vs. Hyattsville* (1893), 77 Maryland 125. Thayer's *Cases on Constitutional Law*, Vol. II, p. 1191. See also Note 2, above.

## CHRONICLE OF INTERNATIONAL EVENTS

FOR THE PERIOD AUGUST 16–NOVEMBER 15, 1945

(Including earlier events not previously noted)

### WITH REFERENCES

Abbreviations: *B. I. N.*, Bulletin of International News; *C. I. E. D.*, Chronology of International Events and Documents, Royal Institute of International Affairs; *C. S. Monitor*, Christian Science Monitor; *Cmd.*, Great Britain Parliamentary Papers by Command; *Cong. Rec.*, Congressional Record; *D. S. B.*, Department of State Bulletin; *Ex. Agr. Ser.*, U. S. Executive Agreement Series; *G. B. M. S.*, Great Britain Miscellaneous Series; *G. B. T. S.*, Great Britain Treaty Series; *P. A. U.*, Pan American Union Bulletin; *U. S. T. S.*, U. S. Treaty Series.

### September, 1943

3–February 24, 1945 **ARMISTICE** (Italian). Texts of Military Armistice signed Sept. 3, 1943; Additional Conditions signed Sept. 29, 1943 as modified by the Protocol of Nov. 9, 1943; letter from General Eisenhower to Marshal Badoglio of Sept. 29, 1943, etc.: *Cong. Rec.* (daily) Nov. 6, 1945, pp. 45081–5086; *D. S. B.*, Nov. 11, 1945, pp. 748–761. Texts of documents as published by the British Foreign Office: *Italy* No. 1 (1945), *Cmd.* 6693.

### January, 1945

27 **ICELAND—UNITED STATES.** Effected agreement by exchange of notes at Reykjavik, regarding air transport services. Text: *Ex. Agr. Ser.* No. 463.

### March, 1945

10/April 5 **PALESTINE.** Secretary of State Byrnes made public Oct. 18 a letter dated March 10, from the King of Saudi Arabia to President Roosevelt, and the latter's reply of April 5, stating that the United States would reach no decision on the basic situation in Palestine without consulting both Jews and Arabs. Texts: *N. Y. Times*, Oct. 19, 1945, p. 4. Text of Secretary Byrnes' statement: p. 4. Text of the statement and President Roosevelt's letter: *D. S. B.*, Oct. 21, 1945, p. 623.

### August, 1945

10–October 11 **TANGIER.** Representatives of Great Britain, France, Russia and the United States met in Paris August 10–31 to consider reestablishment of the international régime in Tangier. The Final Act of the meeting, embodying nine resolutions, was signed August 31. Text: *D. S. B.*, Oct. 21, 1945, pp. 613–616; *Morocco* No. 1 (1945), *Cmd.* 6678. Great Britain and France also signed an agreement on the same subject. Text: *D. S. B.*, Oct. 21, 1945, pp. 616–618. Communiqué of Sept. 4 announced that Spain had been ordered to evacuate its troops from the international zone. Text: *N. Y. Times*, Sept. 5, 1945, p. 15; *London Times*, Sept. 5, 1945, p. 4. Spain presented an oral note Sept. 18 to British and French officials. The text was not made public. *N. Y. Times*, Sept. 23, 1945, p. 11; *London Times*, Sept. 20, 1945, p. 4. The International Control Commission met Sept. 25. M. Le Fur was reinstated as administrator Sept. 26. Spain withdrew its occupying forces and turned over administration of the international zone to the Commission on Oct. 11. *C. I. E. D.*, Sept. 24/Oct. 7, 1945, p. 158.

15–September 9 **WORLD WAR.** Two messages were addressed August 15 to the Tokyo Government by General MacArthur, previously designated to direct the surrender negotiations. The first demanded establishment of radio communications, and

the second the dispatch of an official Japanese emissary. *N. Y. Times*, Aug. 16, 1945, p. 1. Texts: *D. S. B.*, Aug. 19, 1945, pp. 257-258. Texts of Japanese messages of August 16 and General MacArthur's reply: *N. Y. Times*, Aug. 17, 1945, p. 3; *D. S. B.*, Aug. 19, 1945, pp. 258-259. On August 16 the Emperor issued a rescript ordering Japanese troops to cease fighting. *D. S. B.*, Aug. 19, 1945, p. 258. Text: *D. S. B.*, Sept. 9, 1945, p. 362. On August 17 the Japanese Premier-War Minister ordered obedience to the rescript. *N. Y. Times*, Aug. 18, 1945, p. 1. Text: p. 2. The Japanese delegation arrived at Manila August 19 to arrange an early signature of surrender terms. *N. Y. Times*, Aug. 20, 1945, pp. 1, 3. Text of statement issued August 20 by General MacArthur at conclusion of the conference: *N. Y. Times*, Aug. 21, 1945, p. 1. Text of General MacArthur's announcement of August 22 on surrender terms: *N. Y. Times*, Aug. 23, 1945, p. 2. Premier Stalin proclaimed complete victory over Japan August 23. *N. Y. Times*, Aug. 24, 1945, p. 2. U. S. Third Fleet entered on August 26 Sagami Bay, 30 miles south of Tokyo. *N. Y. Times*, Aug. 26, 1945, p. 1. The first occupation forces of the United States landed in Japan on August 23. *N. Y. Times*, Aug. 28, 1945, p. 1. Preliminary peace agreements for southeast Asia were signed August 28 at Rangoon. *N. Y. Times*, Aug. 28, 1945, p. 6. Japan signed Articles of Surrender Sept. 2 on board the *U.S.S. Missouri* in Tokyo Bay. *N. Y. Times*, Sept. 2, 1945, p. 1. Texts of documents and statements: p. 3. Text of President Truman's address proclaiming V-J Day: p. 4; *D. S. B.*, Sept. 2, 1945, pp. 299-300. Texts of documents and President Truman's address proclaiming V-J Day and address to the troops: *Cong. Rec.* (daily) Sept. 6, 1945, pp. 8488-8491. General Yamashita surrendered in the Philippines Sept. 3. *N. Y. Times*, Sept. 3, 1945, p. 1. Japanese Premier urged the people to maintain order. Text of statement: p. 2. Premier Stalin made radio address Sept. 2. Text: p. 5. The formal surrender in China took place at Nanking on Sept. 9. Excerpts from articles: *London Times*, Sept. 10, 1945, p. 4. Credentials of Japanese delegates and facsimile of Instrument of Surrender: *D. S. B.*, Sept. 9, 1945, pp. 363-365. Text of Instrument of Surrender: *This JOURNAL*, Vol. 39 (1945) Supplement, p. 274.

- 16 DENMARK—GREAT BRITAIN. Signed 5-year monetary agreement in London. *London Times*, Aug. 17, 1945, p. 3. The agreement came into force August 20. Text: *G. B. T. S. No. 4* (1945), *Cmd.* 6371.
- 16 POLAND (National Unity Govt.)—SOVIET RUSSIA. Signed treaty in Moscow for the delimitation of the Polish-Soviet frontier and reparations to Poland for damages caused by German occupation. *N. Y. Times*, Aug. 17, 1945, p. 1. Definition of boundary and summary of reparations provisions: p. 7. Map: *N. Y. Times*, Aug. 18, 1945, p. 5; *London Times*, Aug. 18, 1945, p. 3.
- 16 THAILAND. Issued official statement of the Government's decision to restore "good and friendly" relations with the United Nations. *C. I. E. D.*, Aug. 6/26, 1945, p. 94.
- 16-October 27 UNITED NATIONS PREPARATORY COMMISSION. First meeting of the Executive Committee opened in London on August 16. E. R. Stettinius, Jr., represented the United States. *D. S. B.*, Sept. 23, 1945, p. 437. Adopted proposal Aug. 17 to rotate the chairmanship every two weeks. *N. Y. Times*, Aug. 18, 1945, p. 7. Announced Aug. 27 the appointment of 13 subcommittees. *N. Y. Times*, Aug. 28, 1945, p. 12. Voted to bar help from the League of Nations. *N. Y. Times*, Aug. 29, 1945, p. 10. Adopted resolution Sept. 10 calling for invitations for nomination of candidates for Judges of the International Court of Justice. *London Times*, Sept. 10, 1945, p. 2. Adopted resolution Oct. 11 that its observations on relationship between specialized agencies and the United Nations be submitted to the Preparatory Commission. *D. S. B.*, Oct. 28, 1945, pp. 680-681; *London*

- Times*, Oct. 12, 1945, p. 2. Recommended a temporary trusteeship committee to administer territory taken from enemy nations. *N. Y. Times*, Oct. 19, 1945, p. 6. Completed its work Oct. 27 after approving recommendation that the home of the United Nations be located in the United States, provided the site met necessary conditions. Selected Nov. 23 for the opening date of the full Preparatory Commission. *N. Y. Times*, Oct. 28, 1945, p. 15; *C. I. E. D.*, Oct. 22/Nov. 4, 1945, p. 190. Summary of the Committee's report: p. 191.
- 17-30 INTERNATIONAL CIVIL AVIATION ORGANIZATION (Provisional). Elected Edward Warner as President on Aug. 17. *N. Y. Times*, Aug. 19, 1945, p. 18. It was announced August 21 that the report on annexes to the Chicago conference agreements prepared by the U. S. was presented at the opening session on August 15. *N. Y. Times*, Aug. 22, 1945, p. 11. On August 22 Gerald B. Brophy was named U. S. representative on the Interim Council of the Organization. *N. Y. Times*, Aug. 23, 1945, p. 16; *D. S. B.*, Aug. 26, 1945, p. 290. Closed 16-day session on August 30, to reconvene Oct. 15. *N. Y. Times*, Aug. 31, 1945, p. 9.
- 18/25 BULGARIAN ELECTION. Statement by Secretary of State Byrnes with respect to the election and the conclusion of a peace treaty with a recognized democratic government in Bulgaria: *D. S. B.*, Aug. 19, 1945, p. 274. The elections were postponed August 25. *D. S. B.*, Aug. 26, 1945, p. 283; *C. I. E. D.*, Aug. 6/26, 1945, p. 82.
- 18-24 U.N.R.R.A. COUNCIL. Adopted resolution to let the matter of displaced persons go over to the next meeting of the Council. *N. Y. Times*, Aug. 19, 1945, p. 20. The 3d session closed on August 24. It was voted to seek additional funds from member nations. *N. Y. Times*, Aug. 25, 1945, p. 9. Text of resolutions adopted: *G. B. M. S. No. 12* (1945), *Cmd. 6682*.
- 19-November 9 REPARATIONS (German). Announcement was made August 19 of a note from the Dutch Government to Great Britain, United States, Soviet Russia and France, claiming reparations from Germany. *C. I. E. D.*, Aug. 6/26, 1945, p. 93. Text of statement of August 30 by Edwin A. Pauley, head of American delegation to the Allied Commission on Reparations: *D. S. B.*, Sept. 2, 1945, pp. 308-309. James W. Angell was appointed American representative on the Commission Oct. 23, since Edwin Pauley, his predecessor, was devoting his full time to the problem of Japanese reparations. *D. S. B.*, Oct. 28, 1945, p. 688. Representatives of 14 nations to meet in Paris on Nov. 9 to determine percentage of reparations to be allotted. *N. Y. Times*, Nov. 9, 1945, p. 6.
- 20 POLAND (National Unity Govt.)—SWEDEN. Signed trade agreement in Warsaw. *N. Y. Times*, Aug. 21, 1945, p. 11.
- 20 THAILAND—UNITED STATES. The United States announced Thailand's repudiation dated August 16, 1945, of its declaration of war against the United States. *N. Y. Times*, Aug. 20, 1945, p. 4; *D. S. B.*, Aug. 19, 1945, pp. 261-262.
- 20/September 19 GREEK ELECTIONS. France and Great Britain announced missions would be sent to Greece to secure a plebiscite and free elections. *N. Y. Times*, Aug. 21, 1945, p. 11. Statement by U. S. Department of State in regard to American observers: *D. S. B.*, Aug. 26, 1945, p. 283. Text of joint statement issued by the French, British and American Governments regarding agreement to send observers: *D. S. B.*, Sept. 23, 1945, p. 429. The elections are to be held Jan. 10, 1946. *N. Y. Times*, Oct. 6, 1945, p. 7.
- 21/24 LEND-LEASE. President Truman issued order August 21 ending lend-lease aid. *N. Y. Times*, Aug. 22, 1945, pp. 1, 4. Statements of August 24 by Prime Minister Attlee and Mr. Churchill: *N. Y. Times*, Aug. 25, 1945, p. 5.

- 21-25 AIR NAVIGATION. 28th Session of the International Commission for Air Navigation met in London. *C. I. E. D.*, Aug. 6/26, 1945, p. 88; *D. S. B.*, Aug. 26, 1945, p. 294. The 29th session will be held in June, 1946, at Madrid or in Ireland. *London Times*, Aug. 27, 1945, p. 2.
- 21-October 10 SPAIN (in Exile). Señor Diego Martínez Barrio was installed as acting President of the Republican government in exile at Mexico City on Aug. 21. Dr. José Giral, former Premier of Spain, was named Premier on Aug. 22. *N. Y. Times*, Aug. 23, 1945, p. 8; *London Times*, Aug. 23, 1945, p. 3. Mexico recognized the government of Señor Giral on August 28. *N. Y. Times*, Aug. 29, 1945, p. 9; *London Times*, Aug. 31, 1945, p. 4. The Spanish Embassy in Mexico City was handed over to the Republican government on Oct. 10. *London Times*, Oct. 11, 1945, p. 3.
- 22-September 20 ITALY—UNITED STATES. Text of exchange of correspondence between President Truman, Secretary of State Byrnes, the Italian President of the Council of Ministers and the Italian Foreign Minister concerning the future Italian peace treaty: *D. S. B.*, Nov. 11, 1945, pp. 761-765.
- 29 FRANCE (Provisional Government)—GREAT BRITAIN. Signed agreement in London, relating to money and property located in France and Great Britain, which have been subjected to special measures in consequence of the enemy occupation of France. Text: *G. B. T. S.*, no. 6 (1945). *Cm.* 6675.
- 30 EMERGENCY ECONOMIC COMMITTEE FOR EUROPE. Issued statement listing its members and outlining its functions. Text: *D. S. B.*, Sept. 2, 1945, pp. 305-306.
- 30 FINLAND—UNITED STATES. U. S. Department of State announced resumption of relations. *N. Y. Times*, Aug. 31, 1945, p. 10; *London Times*, Aug. 31, 1945, p. 4; *D. S. B.*, Sept. 2, 1945, p. 339.
- 30 PEARL HARBOR REPORT. Text of report issued by Army and Navy Boards: *N. Y. Times*, Aug. 30, 1945, pp. 1S-15S.
- 31/November 13 PALESTINE. Texts of President Truman's letter to Prime Minister Attlee of Aug. 31 and his statement of Nov. 13 on the Jewish question and the establishment of a joint Anglo-American Committee of Inquiry. *N. Y. Times*, Nov. 14, 1945, p. 12; *D. S. B.*, Nov. 18, 1945, pp. 790-791.
- September, 1945
- 3-14 PAN AMERICAN COFFEE CONFERENCE. Was held at Mexico City, with delegates present from 14 countries, and observers from France, The Netherlands, Portugal and United States. Texts of resolutions, etc.: *P. A. U. Congress and Conference Ser. No. 50*.
- 3-27 RADIO CONFERENCE. Third Inter-American Radiocommunications Conference opened at Rio de Janeiro on Sept. 3. *N. Y. Times*, Sept. 4, 1945, p. 8. U. S. delegates: *D. S. B.*, Aug. 26, 1945, p. 293. The plenary session of Sept. 25 approved several resolutions. *N. Y. Times*, Sept. 26, 1945, p. 14. Discussions concluded Sept. 25 and on Sept. 27 a telecommunication convention was signed. Summary of the conference: *D. S. B.*, Nov. 4, 1945, pp. 735-737.
- 4 PRISONERS OF WAR. Department of State released report on its activities on behalf of prisoners of war and civilian internees, held by Japan. Text: *N. Y. Times*, Sept. 6, 1945, pp. 16-17; *Cong. Rec. (daily)* Sept. 6, 1945, pp. A4074-4081; *D. S. B.*, Sept. 9, 1945, pp. 343-357.
- 5/8 ETHIOPIA—FRANCE (Provisional Government). Signed agreement Sept. 5, restoring to France rights over the railway from Jibuti to Addis Ababa as set forth in the Concession of 1908. *C. I. E. D.*, Sept. 10/25, 1945, p. 13. Announced Sept. 8

- an agreement on demarcation of the border between Ethiopia and French Somaliland. *N. Y. Times*, Sept. 10, 1945, p. 7.
- 7 GREAT BRITAIN—THE NETHERLANDS. Signed exchange agreement in London. *N. Y. Times*, Sept. 8, 1945, p. 5; *London Times*, Sept. 8, 1945, p. 4, *G. B. T. S. No. 7* (1945), *Cmd.* 6681.
- 10 SIAM. Chargé d'Affaires *ad interim* in Washington made public the decision of the Council of Ministers of his country to discard the use of the terms "Thailand" and "Thais." The term "Thai" as applied to the language, will continue to be used. *D. S. B.*, Sept. 23, 1945, p. 436.
- 10-October 2 COUNCIL OF FOREIGN MINISTERS. Met in London. U. S. delegation: *D. S. B.*, Sept. 9, 1945, p. 376. Principal members of delegations: *London Times*, Sept. 11, 1945, p. 4. Excerpts from Yugoslav memorandum of Sept. 18, concerning territorial claims against Italy: *N. Y. Times*, Sept. 17, 1945, p. 2. Summary: *London Times*, Sept. 18, 1945, p. 4. Announcement was made of U. S. proposals for a treaty with Italy. Text of proposals: *N. Y. Times*, Sept. 23, 1945, p. 12. Russia proposed on Sept. 24 the formation of an Allied council to govern Japan. *N. Y. Times*, Sept. 26, 1945, p. 1. Secretary General of the Arab League sent a letter to the Council Sept. 28, demanding an independent Libya, with an *ad interim* administration by the United Nations. *N. Y. Times*, Oct. 5, 1945, p. 2. The conference closed Oct. 2, in a deadlock over procedural matters. No joint communiqué was issued. *London Times*, Oct. 3, 1945, p. 4; *N. Y. Times*, Oct. 3, 1945, p. 1. Text of Secretary Byrnes' statement: p. 2; *D. S. B.*, Oct. 7, 1945, p. 513; Text of Secretary Byrnes' report by radio: *D. S. B.*, Oct. 7, 1945, pp. 507-512; *N. Y. Times*, Oct. 6, 1945, p. 8. Text of statement by John Foster Dulles on the meeting: *N. Y. Times*, Oct. 7, 1945, p. 20. Text of Foreign Secretary Bevin's report of Oct. 9 to the House of Commons: *N. Y. Times*, Oct. 10, 1945, p. 6. Texts of communiqués from Sept. 12-October 2: *D. S. B.*, Oct. 14, 1945, pp. 564-567.
- 11 AUSTRIAN OCCUPATION. Allied Council for Austria issued proclamation assuming supreme authority in all matters affecting Austria as a whole. *London Times*, Sept. 13, 1945, p. 3.
- 11-26 JAPAN—SIAM. Siamese note of Sept. 14 to the United States stated that the Siamese Government officially notified the Japanese Government on Sept. 11 that the Pact of Alliance, concluded in 1941, and all treaties and agreements accessory thereto had been abrogated. *D. S. B.*, Sept. 30, 1945, p. 498. On Sept. 26 the Siamese Minister of Foreign Affairs announced to Japanese Foreign Minister the termination of certain agreements, including those of June 12, 1940 and May 9, 1941. *D. S. B.*, Oct. 7, 1945, p. 521.
- 13-October 5 HEALTH ORGANIZATION. Brazilian and Chinese officials sent notes of Sept. 13 and 14 to the United States, requesting coöperation of the United States in the convening, at an early date, of a conference to create an international health organization. Texts, with reply of the Acting Secretary of State: *D. S. B.*, Oct. 21, 1945, pp. 638-639.
- 14/16 POLAND (National Unity Govt.)—VATICAN. Poland denounced the Concordat, signed Feb. 10, 1925. *N. Y. Times*, Sept. 15, 1945, pp. 1, 9; *C. I. E. D.*, Sept. 10/23, 1945, p. 141. The Vatican announced Sept. 16 no official confirmation of the denunciation had been received. *London Times*, Sept. 17, 1945, p. 3.
- 14-October 25 JAPANESE OCCUPATION. Text of General MacArthur's statement of U. S. occupation policies as applied to Japan: *N. Y. Times*, Sept. 15, 1945, p. 4. Text of General MacArthur's announcement of full demobilization of Japan's army and navy [Oct. 15]: *N. Y. Times*, Oct. 16, 1945, p. 2. "At the direction of the Allied powers"

- General MacArthur ordered on Oct. 25 transfer of all Japanese diplomatic and consular property, archives, etc. and recall of its diplomatic and consular representatives in neutral countries. *N. Y. Times*, Oct. 25, 1945, p. 1. A directive from General MacArthur regarding political, civil and religious liberties and discrimination on grounds of race, nationality, creed, or political opinion was issued Oct. 4. Text: *D. S. B.*, Nov. 4, 1945, pp. 730-732.
- 19 **KOREA.** United States occupation forces revoked six Japanese laws which denied free religious worship, speech and freedom of the press. *N. Y. Times*, Sept. 20, 1945, p. 2.
- 22 **JAPANESE OCCUPATION.** White House released on Sept. 23 a statement of U. S. initial post-surrender policy for Japan, prepared jointly by the State, War and Navy Departments. Text: *D. S. B.*, Sept. 23, 1945, pp. 423-427; *Cong. Rec.* (daily), Sept. 24, 1945, pp. 9029-9030; *N. Y. Times*, Sept. 23, 1945, p. 3.
- 24 **GREAT BRITAIN—UNITED STATES.** Signed agreement in London, providing equal access to the world's oil resources. *N. Y. Times*, Sept. 25, 1945, p. 1. Text: p. 17; *London Times*, Sept. 25, 1945, p. 3; *D. S. B.*, Sept. 30, 1945, pp. 481-483; *Cong. Rec.* (daily), Nov. 2, 1945, pp. 10481-10482; *United States* No. 3 (1945), *Cmd.* 6683.
- 24-23 **WAR CRIMES.** President Truman appointed on Sept. 24 Francis Biddle and John J. Parker (alternate) as representatives on the International Military Tribunal to try German war criminals. *N. Y. Times*, Sept. 25, 1945, p. 12. Staff of technical advisers: *D. S. B.*, Sept. 30, 1945, p. 483. Great Britain named Sir Geoffrey Lawrence, Lord Justice of the Court of Appeals, as its member. Maj. Gen. I. T. Nikitchenko and Henri Donnedieu de Vabres are the Russian and French members. *N. Y. Times*, Sept. 29, 1945, p. 8; *London Times*, Sept. 29, 1945, p. 4.
- 25 **WAR CRIMES.** President Osmeña signed the bill creating a people's court to hear Philippine war crimes cases. *N. Y. Times*, Sept. 26, 1945, p. 14.
- 25-October 3 **WORLD TRADE UNION CONGRESS.** Opened Sept. 25 in Paris. *London Times*, Sept. 26, 1945, p. 4. Conference adopted on Oct. 3 the constitution establishing the World Federation of Trade Unions and on that day converted itself into the first meeting of the Federation. *Trade Union World* (London), Sept./Oct. 1945, p. 1.
- 25-November 4 **GERMAN OCCUPATION.** The Allied Control Council for Germany reached agreement legalizing Allies' control of all phases of German life and ordered the abolition of all German armed forces, the S. E., the S. A., Gestapo, their organizations, staffs, etc. *N. Y. Times*, Sept. 26, 1945, p. 1. Summary of agreement: p. 12. Text: *D. S. B.*, Oct. 7, 1945, pp. 515-521. Approved on Oct. 10 a law ending and liquidating all Nazi organizations of every form. Text of law was to be published Oct. 12. *N. Y. Times*, Oct. 11, 1945, p. 3. The Council made decisions concerning restoration of inland transport and coastwise shipping, relaxation of restrictions on normal inter-zone trading, and recall of certain German officials and nationals in various countries. *C. I. E. D.*, Sept. 10/23, 1945, p. 132. Proclaimed Oct. 22 that a new judicial system would be established. *C. I. E. D.*, Oct. 22/Nov. 4, 1945, pp. 188-189. Agreed Oct. 30 on formula for claims and evaluation of goods. *N. Y. Times*, Oct. 31, 1945, p. 11. The text of a law providing for assumption of control over all German property and assets outside Germany was published in Berlin on Nov. 4. *C. I. E. D.*, Oct. 22/Nov. 4, 1945, p. 190.
- 28 **UNITED STATES.** President Truman issued two proclamations asserting U. S. jurisdiction over the oil and other resources of the continental shelf under the high seas, and the right to establish fish conservation zones. *N. Y. Times*, Sept. 29, 1945, p. 2. Texts: *D. S. B.*, Sept. 30, 1945, pp. 485-486.



29-October 8 REFUGEES. United States issued on Sept. 29 the report of Earl G. Harrison, sent to Europe to study conditions among refugees in western Europe and in the SHAEF areas of Germany with particular reference to Jews. Text: *N. Y. Times*, Sept. 30, 1945, p. 38; *Cong. Rec.* (daily), Oct. 2, 1945, pp. 9371-9374. Letter to General Eisenhower from President Truman on condition of Jews in Europe: pp. 9374-9375. Texts of report and letter: *D. S. B.*, Sept. 30, 1945, pp. 455-463. General Eisenhower's letter of Oct. 8 to President Truman defended his handling of German Jews. Excerpts: *N. Y. Times*, Oct. 17, 1945, p. 8. Text: *D. S. B.*, Oct. 21, 1945, pp. 607-609.

29-November 28 FAR EASTERN ADVISORY COMMISSION. Text of Secretary of State Byrnes' statement of Sept. 29 on the establishment of a Commission to discuss Japanese control policies to meet in Washington: *D. S. B.*, Oct. 7, 1945, p. 545. Invitations were sent to Great Britain, China, France, Netherlands, Philippine Commonwealth, Canada, Australia, New Zealand and Russia. *F. Y. Times*, Oct. 11, 1945, p. 1. Text of "terms of reference," defining the membership and powers of the proposed Commission: p. 2; *D. S. B.*, Oct. 14, 1945, pp. 567, 580. The Commission met on Oct. 30 and adjourned to Nov. 6. *N. Y. Times*, Oct. 31, 1945, p. 3. Members of delegations: *N. Y. Times*, Oct. 30, 1945, p. 3. Text of Secretary Byrnes' statement at opening session: *D. S. B.*, Nov. 4, 1945, pp. 728-729. Adjourned Nov. 7 for two days. *N. Y. Times*, Nov. 8, 1945, p. 7. Adjourned Nov. 9 until Nov. 16, after setting up two working committees, one to study basic policies and objectives; the other, to study the war criminals question as it applies to Japan. *N. Y. Times*, Nov. 10, 1945, p. 4. Announcement was made Nov. 28 that the Commission will recommend that General MacArthur shall at all times have "reserve power" as Supreme Commander. *N. Y. Times*, Nov. 29, 1945, pp. 1, 2.

#### October, 1945

1/20 AUSTRIAN RECOGNITION (Provisional Government). On Oct. first the Allied Council for Austria adopted resolution, recommending that the authority of the Provisional Government be extended to the whole of Austria, subject to the guidance and control of the Council. *D. S. B.*, Oct. 21, 1945, p. 612. The Council recognized *de facto* the Provisional Government of Karl Renner, with the proviso that free elections be held not later than Dec. 31, 1945. *N. Y. Times*, Oct. 21, 1945, pp. 1, 9; *London Times*, Oct. 22, 1945, p. 4.

3 CANADA-UNITED STATES. Signed protocol at Ottawa, annexed to and forming a part of the Treaty for the Extradition of Criminals, signed at Washington, Apr. 29, 1942. Text of treaty and protocol: *Canada Treaty Ser.* 1945, No. 12. Text of protocol: *Cong. Rec.* (daily), Nov. 16, 1945, p. 10342.

3-8 WORLD FEDERATION OF TRADE UNIONS. Formation was proclaimed on Oct. 3. *N. Y. Times*, Oct. 4, 1945, p. 11. Sir Walter Citrine was elected president on Oct. 6. *C. I. E. D.*, Sept. 24/Oct. 7, 1945, p. 149. The Conference closed October 8, after adopting resolutions demanding labor representation in world peace councils, protection of democratic rights of workers, condemnation of General Franco of Spain, Vice President Perón of Argentina, etc. Headquarters of the new World Federation will be in Paris. *N. Y. Times*, Oct. 9, 1945, p. 4. 56 nations were represented. *London Times*, Oct. 9, 1945, p. 3.

3/8 ATOMIC ENERGY. President Truman sent message to Congress Oct. 3 on use of atomic energy. Text: *N. Y. Times*, Oct. 4, 1945, p. 4; *Cong. Rec.* (daily) Oct. 3, 1945, pp. 9478-9479. On Oct. 8 President Truman announced United States had no intention of sharing with any other nation the industrial secret of the atomic bomb. *N. Y. Times*, Oct. 9, 1945, p. 1.

- 3/12 PALESTINE. Government of Iraq released text of a note to the United States opposing Jewish influx without Arab consent. Partial text: *N. Y. Times*, Oct. 4, 1945, p. 4. Representatives of four Arab states handed to Secretary Byrnes on Oct. 12 a memorandum warning of war in the Middle East if an independent Jewish political state were set up in Palestine. Text: *N. Y. Times*, Oct. 21, 1945, p. 25.
- 6 NORWAY—UNITED STATES. Effected agreement by exchange of notes in Washington, regarding reciprocal civil air transport of passengers, cargo and mail. *N. Y. Times*, Oct. 7, 1945, p. 16. Text: *D. S. B.*, Oct. 7, 1945, pp. 550-552.
- 9 FRANCE (Provisional Government)—GREAT BRITAIN. Signed agreement in London on recognition of French sovereignty in British-occupied areas of Indo-China. *N. Y. Times*, Oct. 11, 1945, p. 3.
- 11 CHINA. Joint communiqué was issued in Chungking outlining the extent of political agreement reached by Generalissimo Chiang Kai-shek and General Mao Tze-tung, leader of the Communist group in Yenian. *N. Y. Times*, Oct. 12, 1945, p. 1. Summary and extracts: p. 3.
- 12-17 ARGENTINA. Following ejection of Vice President Col. Juan Perón, from the Government on the 9th, President Farrell accepted the resignations of all Ministers and Secretaries of State except Minister of War General Avalos. Col. Perón was placed under arrest. *N. Y. Times*, Oct. 13, 1945, p. 1. On Oct. 17 Col. Perón returned to power and swept out of office the Cabinet just formed by Attorney General Alvarez. *N. Y. Times*, Oct. 18, 1945, pp. 1, 10. New Cabinet: *N. Y. Times*, Oct. 21, 1945, p. 27.
- 15 LAVAL, PIERRE. After attempting to poison himself the former Premier was shot by a firing squad as a traitor. *N. Y. Times*, Oct. 16, 1945, p. 1.
- 15-November 6 INTERNATIONAL LABOR ORGANIZATION. 27th conference opened in Paris Oct. 15, with 39 nations represented. Renewed invitation to Russia to join. *N. Y. Times*, Oct. 16, 1945, p. 8; *London Times*, Oct. 16, 1945, p. 3. Empowered the Governing Body to open negotiations to secure control of I. L. O. properties and assets held on its behalf by the League of Nations. *London Times*, Oct. 25, 1945, p. 3. U. S. delegation: *D. S. B.*, Sept. 30, 1945, p. 470. Admitted Iceland to membership and readmitted Italy and Guatemala on Oct. 19. Voted to exclude Argentine workers' and employers' delegations and on Nov. 1 elected Governing Body to serve three years. *London Times*, Nov. 2, 1945, p. 3, and Nov. 5, p. 3. The conference closed Nov. 5. The Governing Body elected Nov. 6 as its chairman Guildhaume Myrddin-Evans. *N. Y. Times*, Nov. 7, 1945, p. 15.
- 16-November 1 FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS. Delegates from 41 nations opened conference at Quebec Oct. 16. *Cong. Rec.* (daily), Nov. 6, 1945, p. 10584. U. S. delegations: *D. S. B.*, Oct. 7, 1945, p. 522. Delegates of 30 nations signed the constitution establishing the Organization at the opening session. *D. S. B.*, Oct. 21, 1945, pp. 619-620. Text of President Truman's message to the conference: *N. Y. Times*, Oct. 18, 1945, p. 10. Brazil, Poland, Cuba and Ecuador signed the constitution on Oct. 22. *D. S. B.*, Oct. 28, 1945, p. 686. Voted that the city selected as headquarters for the United Nations should also serve the F.A.O. *N. Y. Times*, Oct. 23, 1945, p. 4. Sir John Boyd Orr was elected Director General on Oct. 27. Syria and Lebanon were elected to membership, becoming the 36th and 37th countries. Executive Committee members: *N. Y. Times*, Oct. 28, 1945, p. 14. The Conference closed Nov. 1. *N. Y. Times*, Nov. 2, 1945, p. 4; *D. S. B.*, Nov. 4, 1945, p. 726.

- 17 PERMANENT COURT OF ARBITRATION. British Foreign Office announced reappointment of Sir Cecil Hurst, and the appointments of Lord Justice du Parcq and Sir Arnold McNair as members of the Court. *London Times*, Oct. 18, 1945, p. 4.
- 17 SOVIET RUSSIA—UNITED STATES. Announcement was made of the signature in Washington of a credit agreement for more than \$350,000,000 worth of goods, delivery of which was halted on V-J day. *C. & Monitor*, Oct. 17, 1945, p. 11; *N. Y. Times*, Oct. 18, 1945, p. 4.
- 17-November 4 GERMAN OCCUPATION. Department of State made public Oct. 17 the text of a directive sent to General Eisenhower, setting forth U. S. policy with reference to military occupation of Germany. It was originally issued in April, 1945. Text: *D. S. B.*, Oct. 21, 1945, pp. 596-607; *N. Y. Times*, Oct. 18, 1945, pp. 12-13. Allies proclaimed equality of all before the law, revoking penalties under Nazis. Excerpts from proclamation: *N. Y. Times*, Oct. 23, 1945, p. 1. Control Council published Nov. 4 a law regarding German external assets. *London Times*, Nov. 5, 1945, p. 3.
- 18 INTERNATIONAL MILITARY TRIBUNAL. On Oct. 13th the 25,000-word indictment against 24 leading Nazis was handed down by the commission to draw up the document. Text: *N. Y. Times*, Oct. 19, 1945, pp. 11-14. The Russian member of the Tribunal presided. *London Times*, Oct. 15, 1945, p. 4. Summary of the indictment: pp. 5, 8.
- 19 BELGIUM—UNITED STATES. Issued joint statement announcing conclusion of arrangements regarding financial and supply problems created by the termination of lend-lease aid to Belgium. Text of statement: *D. S. B.*, Oct. 21, 1945, pp. 610-611.
- 19 FRANCE (Provisional Government)—GREAT BRITAIN. Signed agreement for relief from double taxation in certain circumstances of individuals and companies. Text: *France No. 3* (1945), *Cmd.* 6692.
- 20 WAR CRIMES. Mr. Justice R. H. Jackson stated that the question of the legality of retroactive laws to fit war crimes had been answered fully by provisions of the Charter establishing the International Military Tribunal and in his Report to President Truman. *N. Y. Times*, Oct. 21, 1945, p. 13.
- 21/November 2 FRANCE (Provisional Government). Held first postwar election Oct. 21, in which the proposal for a new constitution was approved. *N. Y. Times*, Oct. 22, 1945, p. 1. The final meeting of the Cabinet was held Nov. 2. *N. Y. Times*, Nov. 3, 1945, p. 3; *London Times*, Nov. 3, 1945, p. 3.
- 21-30 VENEZUELA. Following a two-day clash of forces backing President Medina and rebels, a junta, headed by Romulo Betancourt, assumed control of the country. *N. Y. Times*, Oct. 22, 1945, p. 1. Provisional Cabinet: *N. Y. Times*, Oct. 23, 1945, p. 8. Cuba, Ecuador and Paraguay recognized the Government Oct. 25. *N. Y. Times*, Oct. 26, 1945, p. 8. Great Britain, United States and Brazil granted recognition Oct. 30. Other nations which had previously recognized the new regime: Guatemala, Uruguay, Bolivia and Mexico. *N. Y. Times*, Oct. 31, 1945, p. 10.
- 24 CZECHOSLOVAKIA. President Beneš signed decree, nationalizing key industries and banks. *N. Y. Times*, Oct. 25, 1945, p. 7; *London Times*, Oct. 29, 1945, p. 3.
- 24 FINLAND—SOVIET RUSSIA. Announcement of Russian demand for increase in reparations to 79 million dollars, from the 50 millions of the Armistice terms, to be paid during 1946. *N. Y. Times*, Oct. 25, 1945, p. 8.
- 25 BELGIUM—FRANCE (Provisional Government). Signed cultural and short-term commercial agreements in Paris. *N. Y. Times*, Oct. 26, 1945, p. 5; *London Times*, Oct. 27, 1945, p. 3.

- 26 FINLAND—SOVIET RUSSIA. Joint Russo-Finnish Commission for the demarcation of the frontier near Petsamo, signed an agreement on that border, and also signed, with a representative of Norway, a protocol defining the point of contact of the frontiers of the three countries. *London Times*, Oct. 30, 1945, p. 3.
- 26 GERMAN OCCUPATION. General Eisenhower's letter to President Truman urged turning over the government of Germany to Allied civil authorities, as soon as possible. Text: *N. Y. Times*, Nov. 1, 1945, p. 8; *D. S. B.*, Nov. 4, 1945, p. 711.
- 26 POLISH RECOGNITION (National Unity Government). Mexico granted recognition. *N. Y. Times*, Oct. 27, 1945, p. 6.
- 27 UNITED STATES FOREIGN POLICY. Text of President Truman's address in New York on Navy Day: *N. Y. Times*, Oct. 28, 1945, p. 33; *D. S. B.*, Oct. 28, 1945, pp. 653-656.
- 28 CZECHOSLOVAKIA. President Beneš announced his signature of a decree, confiscating all German and Hungarian property in the country. *N. Y. Times*, Oct. 29, 1945, p. 5. Parliament met for the first time since Dec. 16, 1938. *C. I. E. D.*, Oct. 22/Nov. 4, 1945, p. 187.
- 29 WAR CRIMES. First war crimes trial in the Pacific area, that of General Yamashita, opened in Manila. *N. Y. Times*, Oct. 29, 1945, p. 1.
- 30 BRAZIL. Resignation announced of President Getulio Vargas and assumption of office by Supreme Court Judge José Linhares. *N. Y. Times*, Oct. 31, 1945, p. 1.
- 30 MEXICO. President Avila Camacho issued a proclamation claiming sovereignty for Mexico over all resources in the off-shore territory, known as the continental shelf. This proclamation, with another dealing with fishing zones off the coast, was similar to those issued Sept. 28 by President Truman on the same subjects. *N. Y. Times*, Oct. 31, 1945, p. 10.
- 30 PERMANENT COURT OF INTERNATIONAL JUSTICE. For the first time since the war the Court met at The Hague, with eight of the fifteen judges present. *C. S. Monitor*, Oct. 30, 1945, p. 2.
- 31 ARAB LEAGUE. Second ordinary session of the Council opened in Cairo with seven states represented. *N. Y. Times*, Nov. 1, 1945, p. 6.

#### November, 1945

- 1 CZECHOSLOVAKIA—GREAT BRITAIN. Signed monetary agreement in London. Text: *G. B. T. S.* No. 8 (1945), *Cmd.* 6694.
- 1 CZECHOSLOVAKIA—GREAT BRITAIN. Signed agreement in London relating to money and property situated in Czechoslovakia and the United Kingdom, which have been subjected to special measures in consequence of the enemy occupation of Czechoslovakia. Text: *G. B. T. S.* No. 9 (1945), *Cmd.* 6695.
- 1 REPARATIONS (Japanese). President Truman announced members of the mission which will develop a program for exacting reparations from Japan. *D. S. B.*, Nov. 4, 1945, p. 729.
- 1-16 EDUCATIONAL CONFERENCE. United Nations Educational and Cultural Conference convened in London Nov. 1. *London Times*, Nov. 2, 1945, p. 7. Text of invitation and list of U. S. delegates: *D. S. B.*, Oct. 21, 1945, pp. 624-625. 43 nations sent delegates and one nation an observer. *D. S. B.*, Nov. 18, 1945, p. 801. At closing session a constitution was adopted, establishing a world educational organization to be known as the United Nations Educational, Scientific and Cultural Organization. *N. Y. Times*, Nov. 17, 1945, p. 6, *London Times*, Nov. 17, 1945, p.

5. English text of Constitution and Final Act: *D. S. B.*, Nov. 18, 1945, pp. 801-806; *Cong. Rec.* (daily) Nov. 26, 1945, pp. 11181-11184; *G. B. M. S.* No. 16 (1945), *Cmd.* 6711. The seat of the Organization will be in Paris. Department of State issued a brief report of the Conference. Text: *D. S. B.*, Nov. 18, 1945, pp. 798-800.
- 2 HUNGARIAN RECOGNITION (Provisional Government). Switzerland and the United States granted recognition. *N. Y. Times*, Nov. 2, 1945, p. 3, and Nov. 3, p. 3.
- 4/13 HUNGARY (Provisional Government). Elections were held Nov. 4, with the conservative Small Landholders party polling the most votes. *N. Y. Times*, Nov. 6, 1945, p. 1. The new Cabinet was announced Nov. 13. Members: *N. Y. Times*, Nov. 14, 1945, p. 10.
- 6 MOLOTOV, VLADIMIR. Text of Foreign Commissar's address, relative to a review of the war and the peacetime program of Russia: *N. Y. Times*, Nov. 7, 1945, p. 14; Russian Embassy. *Information Bulletin* (Washington) Nov. 27, 1945, no. 123.
- 6-13 FRANCE. Newly-elected Constituent Assembly met and accepted the resignation of the wartime Provisional Government on Nov. 3. *N. Y. Times*, Nov. 7, 1945, p. 16; *London Times*, Nov. 7, 1945, p. 4. Felix Gouin was elected President of the Assembly Nov. 8. *N. Y. Times*, Nov. 9, 1945, p. 6. On Nov. 13 the Assembly elected General de Gaulle interim President while a new constitution is being drafted. *N. Y. Times*, Nov. 14, 1945, p. 1; *London Times*, Nov. 14, 1945, p. 4.
- 7 DARDANELLES. Secretary of State Byrnes announced that the United States had made a proposal to Turkey which would give freer passage of the Straits to the Black Sea powers. Outline of points: *N. Y. Times*, Nov. 8, 1945, p. 2; *D. S. B.*, Nov. 11, 1945, p. 766.
- 8 GREAT BRITAIN—NORWAY. Signed monetary agreement in London. Text: *G. B. T. S.* No. 10 (1945), *Cmd.* 6697.
- 8 MEXICO—UNITED STATES. Exchanged ratifications Nov. 8 at Washington of the water treaty, signed Feb. 3, 1944, and supplementary protocol, signed Nov. 14, 1944. The treaty entered into force on exchange of ratifications. *D. S. B.*, Nov. 11, 1945, pp. 770-772. President Truman signed proclamation of the Treaty and Protocol of Feb. 3 and Nov. 14, 1944. *D. S. B.*, Dec. 2, 1945, p. 901.
- 10 ALBANIAN RECOGNITION. United States notified the Provisional Government of its readiness to accord recognition under certain conditions. Great Britain sent a similar notice and the Russian radio announced the decision to establish diplomatic relations. Text of United States note: *N. Y. Times*, Nov. 11, 1945, p. 16; *D. S. B.*, Nov. 11, 1945, p. 767. Summary of British note: *London Times*, Nov. 12, 1945, p. 3.
- 12/15 NOBEL PRIZES. Nobel Committee of the Norwegian Parliament announced award of the 1944 peace prize to the International Red Cross, and that for 1945 to Cordell Hull. *N. Y. Times*, Nov. 13, 1945, p. 1. Other awards: *N. Y. Times*, Nov. 16, 1945, p. 21.
- 13 ATTLEE, CLEMENT. Prime Minister addressed joint session of Congress. Text of address: *Cong. Rec.* (daily) Nov. 13, 1945, pp. 10787-10789; *N. Y. Times*, Nov. 14, 1945, p. 4; *London Times*, Nov. 14, 1945, pp. 4, 3.
- 15 ATOMIC ENERGY. Following conferences by President Truman, Prime Ministers Attlee of Great Britain and Mackenzie King of Canada, an Agreed Declaration was issued. Text: *Cong. Rec.* (daily) Nov. 15, 1945, p. 10879; *N. Y. Times*, Nov. 16, 1945, p. 3; *London Times*, Nov. 16, 1945, p. 4; *Canada Treaty Ser.* 1945, No. 13; *D. S. B.*, Nov. 18, 1945, pp. 781-782.

## MULTIPARTITE CONVENTIONS

**AIR SERVICES TRANSIT AGREEMENT.** Chicago, Dec. 7, 1944.

Acceptances:

Australia. Aug. 25, 1945.

Greece. July 9, 1945.

Spain. July 27, 1945. *D. S. B.*, Oct. 14, 1945, p. 584.

**AIR TRANSPORT AGREEMENT.** Chicago, Dec. 7, 1944.

Reservation relinquished:

The Netherlands. Sept. 21, 1945. *D. S. B.*, Oct. 14, 1945, p. 584.

**AVIATION. Interim Agreement.** Chicago, Dec. 7, 1944.

Acceptances:

Greece (effective Sept. 21, 1945).

Spain (effective Aug. 2, 1945). *D. S. B.*, Oct. 14, 1945, p. 584.

**EUROPEAN INLAND TRANSPORT.** London, Sept. 27, 1945.

Signatures:

United States, Soviet Russia, Great Britain, France, Poland, Czechoslovakia, The Netherlands, Belgium, Luxembourg, Norway, Yugoslavia and Greece.

To be in force two years, subject to prolongation. *London Times*, Sept. 28, 1945, p. 4.

Text: *G. B. M. S.* No. 13 (1945), *Cmd.* 6685; below, Supplement, p. 31.

**SHIPPING.** London, August 5, 1944.

Accession:

Denmark (effective Aug. 8, 1945). *D. S. B.*, Aug. 26, 1945, p. 295.

**UNITED NATIONS CHARTER.** San Francisco, June 25, 1945.

Promulgation:

United States. Oct. 31, 1945. *D. S. E.*, Nov. 18, 1945, p. 817.

Ratifications deposited as of Nov. 16, 1945: *D. S. B.*, Nov. 18, 1945, p. 818.

Signature:

Poland. Oct. 15, 1945. *D. S. B.*, Oct. 21, 1945, p. 627.

Table showing action taken on the Charter: *D. S. B.*, Nov. 18, 1945, p. 818.

Secretary of State Byrnes signed Oct. 24, 1945, a protocol attesting the fact that the Charter had come into force. *N. Y. Times*, Oct. 25, 1945, p. 1. Text of protocol: p. 7; *D. S. B.*, Oct. 28, 1945, pp. 679-680.

**WHALING. Supplementary Protocol.** London, Oct. 5, 1945.

Signatures:

Canada, Great Britain, Mexico, New Zealand, Norway and United States.

Text: *Cong. Rec.* (daily) Nov. 26, 1945, p. 11161; 79th Cong., 1st sess. *Exec. J.*

The purpose of the Protocol is to bring into force the Protocol of Feb. 7, 1944 without awaiting the accession of Ireland, all other signatory governments having deposited ratifications or accessions. *D. S. B.*, Nov. 25, 1945, p. 872.

DOROTHY R. DART

## JUDICIAL DECISIONS

### FIELDS v. PREDIONICA I TKANICA

NEW YORK SUPREME COURT, APPELLATE DIVISION\*

[November 13, 1942]

One sovereign may function in territory of another with latter's consent; courts will not inquire into validity of seizure made by another government outside the territory of their own state; immunity of property owned by foreign sovereign.

CALLAHAN, J. Plaintiff, having obtained an attachment against the property of the defendant, caused a levy to be made thereunder on July 14, 1941, on 963 bales of cotton, which were part of the cargo of the SS *Bosiljka*, then in the Port of New York.

The Royal Yugoslav Government, appearing specially pursuant to permission granted by this court (See 263 App. Div. 155), moved to vacate the levy. It asserts the ownership of the cotton, claiming to have requisitioned it prior to the date of the levy. Plaintiff disputes the existence of any governmental requisition, and questions the validity thereof, if one was attempted.

Service of process in this action was made on the defendant by publication. Defendant has defaulted. The officers of defendant are in Yugoslavia. That country was occupied by the enemy armies of Germany and Italy before the publication of the summons. Under the circumstances, it can be readily understood that defendant's officers, or other Yugoslav claimants, have had no opportunity to appear in this suit. In fact, the Yugoslav Minister states that it has been impossible to ascertain the whereabouts of the officers of the defendant corporation.

On the motion to vacate the attachment, Special Term appointed a referee to hear and report on the following questions: (1) whether the Royal Yugoslav Government, acting through its Minister, attempted to requisition the vessel, the steamship *Bosiljka*, and/or its cargo, and attempted to vest title to the 963 bales of cotton in the Yugoslav Government; and (2) if there was a purported requisition, whether it was in accordance with Yugoslav law?

The referee reported against the contentions of the Yugoslav Government, answering both questions in the negative.

The present appeal is from an order confirming the referee's report, and denying the motion to vacate the attachment.

Upon the hearing before the referee, no witnesses were called. The record consists of stipulations concerning some of the facts, and documentary

\* 265 A.D. 132. See also same case on earlier hearing 263 A.D. 155, where it was held that the Yugoslav Government was entitled to an order permitting it to appear to assert sovereign rights where its duly authorized agent had asserted ownership of property, absence of any representation from U. S. Executive Department being no bar to same.

proof. By consent of the parties affidavits were submitted by both sides from persons claiming to be experts as to the law of Yugoslavia.

Plaintiff is the assignee for collection of one Ernest Zucker, a resident and citizen of the Argentine Republic. Defendant is a corporation organized under the laws of Yugoslavia and having places of business in that country and elsewhere. Plaintiff's action is for breach of contract. He claims that defendant owed Zucker a large sum of money under an agreement made and to be performed outside of this State, whereby defendant promised to pay Zucker a certain sum as the purchase price of a business sold by Zucker to defendant corporation.

No issue as to the rights of domestic creditors is involved herein.

The events leading up to and in connection with the alleged requisition may be summarized as follows: On March 16, 1941, prior to the existence of a state of war between Yugoslavia and Germany, the steamship *Bosiljka*, then owned by Alceau Steamship Company, a corporation of the Kingdom of Yugoslavia, sailed from New York under the Yugoslav flag. The vessel had been loaded in the Port of New York with cargo destined for Istanbul, via the Suez Canal in transit to Yugoslavia. Eighty per centum of the cargo consisted of goods consigned to the Yugoslav Government; the remaining twenty per centum was shipped to private consignees. In the latter category were 963 bales of cotton consigned to the defendant. At the time of the invasion of Yugoslavia by Germany and Italy, which occurred on April 6, 1941, the steamship *Bosiljka* was on the high seas. Learning of the invasion of its home country, it put into the Port of Recife, Pernambuco, Brazil. There it remained for several weeks during which time many messages were exchanged between the captain of the vessel, the Royal Yugoslav Ambassador to the United States, and the British authorities in Brazil. Eventually, and at the request of the Yugoslav Minister, the vessel was seized by the representatives of the British Government, with the co-operation of representatives of the American and Brazilian Governments. This seizure was caused by the fact that the captain of the vessel had refused to either proceed with his journey, or to return with the vessel to the United States. Instead, he had consulted with representatives of the Italian Government, a nation with which Yugoslavia was then at war. Acting on the directions of the Home Ministry of the Yugoslav Government, which directed that the steamship *Bosiljka* be sent to the United States and the cargo sold, a British crew was placed on the vessel, and it was returned to New York. Upon arrival the Yugoslavian Minister took charge, and placed a Yugoslav master in command. Permission was obtained by the Yugoslav Government from the United States Government to unload the vessel. Application was made to the United States Treasury Department for a license to sell the cargo, including the cotton. A limited license was issued which required further application before any specific item might be sold. While the vessel was being unloaded, the attachment herein was levied.



During the occurrence of these events, the Yugoslav Government had been in flight from Yugoslavia to Greece, and thence to Palestine and London. It has since been in exile in the latter city, and is functioning there as a friendly sovereign power. The Government of the United States continues to recognize the government that is temporarily established in London as the Royal Yugoslav Government. The diplomatic and consular officers of said government in the United States are recognized by our government in the full exercise of their functions in this country. However, no representation has been made to this court by the executive branch of our government as to the merits of the claim of requisition. Accordingly, this question remains open for judicial determination.

The present controversy as to whether defendant had an attachable interest in the cotton arises because of the fact that different inferences may be drawn concerning the intention of the Yugoslav Government as to the disposition of the steamship *Bosiljka* and her cargo. The question at issue is whether the Yugoslav Government intended to take title to the vessel and its cargo, or merely to take temporary protective custody, permitting title and to remain in the former owners.

The referee held that there had been no attempt or intent on the part of the government to requisition either the vessel or the cargo so as to vest title thereto in the Yugoslav Government. We interpret the documents and other evidence in this case differently.

Distinguishing for a moment between the vessel and her cargo, we find that the record overwhelmingly indicates that it was the intention of the representatives of Yugoslavia to requisition the vessel itself for military purposes. Whether this involved a vesting of title to the vessel, or merely a requisition of its use, is immaterial to the present inquiry. The representatives of that government have stated under oath that the vessel was requisitioned. There appears to be no basis for the referee's finding that the Yugoslav Government merely assumed temporary protective custody. It appears clear that the initial purpose in seizing the vessel was to prevent it from falling into the hands of the country's enemies. Danger of this eventuality was then immediate and impending, for the captain of the vessel had consulted the representatives of an enemy country. Having requisitioned the vessel and brought it here, the Yugoslav Government proceeded to use it in assisting its allies in waging war against Germany and Italy. The vessel was chartered to Great Britain for that purpose.

Some mention is made by the referee in his report that in connection with this charter a certificate referred to as an "on-survey" report was signed by the Yugoslav master who was in charge of the vessel, and that this document designated the Alceau Steamship Company, the former corporate owner, as the owner of the vessel. This, the referee held, indicated an acknowledgment of the continuation of private ownership. Though this recital, standing alone, might justify the inference indicated by the referee,

other portions of the exhibit referred to negative that inference. The document recites that it was being made "Prior to service under Government Liner Requisition Scheme." It stated that the Government was being represented by a surveyor attached to Lloyd's Register of Shipping, and the owner by the master, who was the representative of the Yugoslav Government in charge of the ship. It further stated that the object of the "on-survey" report was "to provide an agreed basis showing the condition of the ship at the time of survey and so assist in determining the extent of the re-instatement and re-conditioning, if any, for which Government may be liable on the discharge of the ship from H. M. Service." It is quite likely that the "government" thus referred to was the British Government which was chartering the vessel. Therefore, the document indicates that the Yugoslav Government was acting as owner in chartering the steamship *Bosiljka*. The very act of chartering indicated that the Yugoslav Government deemed it had the right to exercise the functions of one either having title to the vessel or the right to dispose of its use. This act of chartering certainly did not indicate that the vessel had been seized merely for temporary protective custody, as held by the referee.

Considering now the cargo, as distinguished from the vessel, we have already pointed out that this cargo consisted of two groups of merchandise: (1) that owned by the Yugoslav Government itself, and (2) the balance consigned to private concerns in Yugoslavia. Of course, there can be no doubt that the Yugoslav Government intended to repossess itself of the eighty per centum of the cargo representing its own property. The only doubt that may exist is whether it was the intention of the government to vest title in itself as to the remaining twenty per centum of the cargo which had been consigned to private consignees. It would seem significant that, with the single exception of a statement made in an application for a license from the United States Treasury Department concerning the disposition of the proceeds of the sale, all action taken concerning the twenty per centum of the cargo of the vessel after its seizure was identical with that taken with respect to the eighty per centum thereof. The documents show that the Yugoslav Government first attempted to have the whole cargo delivered to a port designated by it. When this became impossible, it directed a seizure and sale of all of the cargo. Up to the time the cargo was about to be sold, no differentiation was made between the two classes of cargo. Then the following statement was made in the application to the United States Treasury Department to sell the whole of the cargo: "The Yugoslav Legation proposes to discharge the cargo in New York, to warehouse it there and then to sell it, depositing the proceeds of the property owned by the Yugoslav Government in an account (hereinafter referred to as 'Account No. 1') to the credit of that government and depositing the proceeds of the cargo consigned to private firms in Yugoslavia in an account (hereinafter referred to as 'Account No. 2') for the benefit of whom it may concern. The Yugoslav

Government proposes, at the conclusion of the war, or when the rightful owners of the funds deposited in 'Account No. 2' can be ascertained, and their wishes free from any coercion determined, to pay over such funds to such rightful owners after deducting the necessary expenses in connection therewith." In construing this statement, we must not overlook the fact that the Royal Yugoslav Government proposed the sale of all of the cargo. This was clearly an exercise of dominion indicating a claim of title. Unless the government was selling as agent for the true owners, it must have been acting under a claim of ownership. No proof was introduced to show that it ever intended to act as agent of the owner, or other than in its governmental capacity. In fact, the true owners were in no position to appoint agents.

In addition, the statements in the application for a license show an intention to hold the proceeds of the sale until the conclusion of the war. It indicates the desire of Yugoslavia to permit its nationals to express their wishes free from coercion. This was another precaution to prevent its enemies from obtaining any part of the proceeds—a military purpose. Thus, an analysis of the statement in the application for a license, so largely relied on by plaintiff, was not indicative of an intention to permit title of the proceeds of the sale to remain in the consignee.

Plaintiff also points to a further statement in an affidavit of the Yugoslav Minister to the effect that it was the intention of his government "to retain title" to the cotton, and other property requisitioned, only until such time as the rightful owner thereof could be determined. This expression of the intention "to retain title" must be read in connection with its context. So read, there can be no doubt but that it was the proceeds of the sale, and not the "title" to the cargo, that was to be retained for the benefit of the true owner. The mere expression of intention on the part of the Royal Yugoslav Government to create a fund for the protection of its nationals did not mean that the former consignees would have an attachable interest in such fund. The fund to be created was the property of a sovereign power destined for a public purpose. It thus had sovereign immunity. (*The Parlement Belge*, L. R. 5 P. D. 197.) That public purpose was two-fold in nature: (1) to see that the fund did not get into enemy hands; and (2) to protect its nationals who were not presently in a position to protect themselves. The first is a military purpose, and the second a step in the fundamental duty of a nation to protect its citizens and their property.

In determining the question of intention as to vesting of title, we must take into consideration not only the statements made after the seizure, but the actions and immediate objective of the Royal Yugoslav Government at the time of the seizure. Undoubtedly at that time it acted to prevent the goods from falling into enemy hands. The power to requisition for such a purpose is a necessary attribute of sovereignty. (*Mitchell v. Harmony*, 54 U. S. 115.) While plaintiff concedes the existence of the inherent sover-

ign power to requisition within the territorial limits of a nation, it disputes its existence outside such limits, and in the circumstances attendant here. This contention seems to be based on the assumption that the seizure made in a port in Brazil was a forcible one which violated the sovereignty of Brazil. Plaintiff points to the rules of international law that prevent one sovereign from authorizing its agents to perform any sovereign function within the domain of another, without the latter's consent. (See *United States v. Deutsches Kalisyndikat Gesellschaft*, 31 Fed. Rep. [2d] 199.) This argument rests on a false premise, for here the steps taken in Brazil appear not only to have proceeded with the consent of the Brazilian authorities, but with their assistance. Claimant so alleges, and there is no averment disputing this statement. We have, therefore, a situation where no forcible or disorderly seizure took place but one in which the nation in whose jurisdiction the seizure occurred acquiesced.

In *Ervin v. Quintanilla* (99 Fed. Rep. [2d] 935, at p. 940) it was stated: "No case has been cited, none can be found in any jurisdiction, holding that possession of a ship, taken by a friendly foreign power in the waters of another government, peaceably and without the exercise of force, involving neither breach of its peace nor other violation of the municipal laws of that government, is ineffective to support the foreign government's immunity.

"It is of course true that no foreign government may, in breach of our laws, or against our consent, exercise any act of sovereignty here. It is not true that a foreign government may not peaceably, and without breach of any of our laws, take physical possession of a ship of one of its nationals while in one of our ports" (p. 940).

In any event, when the steamship *Bosiljka* reached the high seas it was freed from any restraint concerning the exercise of sovereign power. (*The Navemar*, 102 Fed. Rep. [2d] 444.)

It is to be noted, therefore, that the property to which title is claimed by Yugoslavia was reduced to its possession outside of our jurisdiction, and without violation of the laws of nations or of those of the country where the seizure took place. Under these circumstances, it would seem that the seizure should have the same force and effect as if it had been accomplished within the territorial limits of a nation. Our courts have refused to inquire into the legality or propriety of such seizures. (See *Oetjen v. Central Leather Co.*, 246 U. S. 297; *Salimoff & Co. v. Standard Oil Co.*, 262 N. Y. 220.)

But, even if we assume that, because the requisition took place in Brazil, the Yugoslav Government must show that it acted in conformity with law, we think that this requirement has been satisfied. The law applicable would be the rules of international law relating to the sovereign powers of governments, not any particular statutory authority of Yugoslavia.

Having determined that a valid requisition for a proper military objective took place, we fail to see why the expressed intention made thereafter of preserving any fund which might be collected from the sale of the property,

would deprive Yugoslavia of title to the requisitioned property, or create any attachable interest in a former owner.

The parties concede that under the fundamental law of Yugoslavia that government became liable to pay adequate compensation for the requisitioned property. In view of this liability, any method which the sovereign adopted to secure equitable adjustments of all claims might well be for the purpose of protecting that government from the possibility of double liability.

In the hands of a private person, the expressed intention of preserving the proceeds of the sale for the benefit of claimants might, at most, create a trust for that purpose. Assuming that the Royal Yugoslav Government would be deemed such a trustee, we think that its sovereign immunity would protect it from any action by our courts to enforce such a trust, or to require the application of its property for a particular purpose. It has been held that a contract of a sovereign that its property shall be applied on a particular debt cannot be enforced by our courts, for such an agreement was said to amount to nothing more than an engagement of honor. (*Lamont v. Travelers Ins. Co.*, 281 N. Y. 362.) The intention of the government as to the fulfillment of a public purpose is not to be hindered by the claims of attaching creditors.

We might well rest here but for the fact that the claim of the government has been placed to some extent on the existence of a statute of Yugoslavia, which it claims vested title in it of all the property of its nationals. It appears that in 1931 a statute was passed in Yugoslavia known as "The Law Concerning the Organization of the Army and Navy." Among other provisions of this law was one which read as follows: "In emergency, mobilization and war statuses for the defense of the country and the conduct of the war, the military authorities have at their disposal the whole military strength, the entire nation and all financial, economic, industrial and all other material resources of the country and of its citizens. Details relating to the matters herein mentioned are subject to regulation by royal decree."

Concededly, a status of war existed at the time of the present seizure. It would seem clear, therefore, that at said time all material resources of Yugoslav nationals were at the disposal of the government. But, even if we deem that this statute is not self-executory in so far as vesting title of the property of nationals in the government is concerned, we think that this is immaterial, because the claim here is one of requisition and not the vesting of title pursuant to a foreign decree. In this respect the case differs somewhat from *Anderson v. N. V. Transandine*, 289 N. Y. 9. There the question involved was the effect of a foreign decree which in and of itself vested title in a friendly sovereign power to the property of its nationals wherever situated. The decision in the *Anderson* case (*supra*) is a precedent here, however, to the extent that it holds that recognition of title legally conferred on a foreign government pursuant to recognized rules of International Law will

not offend our public policy as to property having a situs here. If this is so as to title acquired by foreign decree, it would seem to apply with greater force to property requisitioned and in the actual possession of the foreign government, if at least such property was acquired in accordance with the recognized law of nations. (Hyde on *International Law*, § 256; *The Attualita*, 238 Fed. Rep. 909.)

Plaintiff points out, however, that if this be a case of requisition, certain requirements of the Requisition Law adopted in Yugoslavia on December 28, 1939, were not complied with. The statute referred to contains numerous provisions concerning the details of steps to be taken in connection with requisitions to be made by the Yugoslav Government. We think that the law referred to was primarily intended to apply to requisitions taking place within the territorial limits of Yugoslavia. It is to be remembered further that at the time of the present requisition the Royal Yugoslav Government was in flight, and, thus, it was difficult, if not impossible, for some of the statutory requirements to be met. A reading of the statute would indicate that it was not intended to apply to seizures in foreign ports, for undoubtedly it was recognized that International Law would apply in such cases.

As we have heretofore pointed out, the failure to comply with the requirements of any of its own internal statutes may not be used by the municipal courts of another country as the basis for questioning the propriety of the actions of a sovereign power. Assuming, however, that we are in error in this regard, it is clear that this statute did not deprive the Royal Yugoslav Government of its inherent prerogative to requisition a vessel flying its flag, with its cargo, in order to prevent them from falling into the hands of the enemy.

In view of our finding that a valid requisition took place, which vested title to the 963 bales of cotton in the Yugoslav Government, we feel bound by the rules of comity applicable to the property of a friendly nation, to hold that this cotton is free from attachment.

The order should be reversed upon questions of fact and of law with twenty dollars costs and disbursements to the appellant and the motion to vacate the levy under the attachment granted.

MARTIN, P. J. and GLENNON, J., concur; TOWNLEY and COHN, JJ., dissent and vote to affirm.

Ordered accordingly.

UNITED STATES OF MEXICO *et al.* v. SCHMUCK, *et al.*

COURT OF APPEALS OF NEW YORK \*

[May 24, 1945]

Court must follow political department of government in recognizing immunity of a foreign state without passing upon same itself but may determine any matter left open by political department such as alleged consent of foreign state to action against its agency and/or property.

Appeal from Supreme Court, Appellate Division, First Department.

Proceeding in the Matter of the United States of Mexico and another against Peter Schmuck, a Justice of the Supreme Court of the State of New York and others. From an order of the Appellate Division, 267 App. Div. 167, 45 N.Y.S. 2d 5, which unanimously granted an application for an order under Civil Practice Act, § 1283 *et seq.*, directing that appellants refrain from taking further proceedings in an action instituted in the Supreme Court wherein Associated Metals and Minerals Corporation was plaintiff and Petroleos Mexicanos was defendant and from enforcing any order therein and vacating and otherwise directing with respect to certain orders and other proceedings in the action, respondents appeal by permission. The Appellate Division denied a cross motion to dismiss the petition.

Order of appellate division modified in accordance with opinion and, as modified, affirmed.

A motion for reargument of the appeal was granted. See 293 N. Y. 768, 57 N. E. 2d 845.

For former opinion, see 293 N. Y. 264, 56 N. E. 2d 577.

LEHMAN, Chief Judge.

Upon its complaint, alleging that the defendant Petroleos Mexicanos is "an entity created under and by virtue of the laws of the Republic of Mexico," Associated Metals and Minerals Corporation obtained an order of attachment and the Sheriff of New York County made a levy thereunder on moneys or property belonging to Petroleos Mexicanos. Property upon which a levy is made pursuant to process of a court issued according to law is in the custody of the law and the court has jurisdiction over such property. So long as it remains in its custody, the court can render a judgment which will subject that property to the demand of the plaintiff in the action in which the attachment was issued. *Cooper v. Reynolds*, 77 U. S. 308, 19 L. Ed. 931.

After the levy, United States of Mexico and Petroleos Mexicanos appeared specially in the action and moved for an order dismissing the action and vacating the warrant of attachment on the ground that Petroleos Mexicanos is an agent and instrumentality of the Mexican Government and property and moneys standing in the name of Petroleos Mexicanos belong to the Mexican Government in its sovereign capacity and are not subject to the

jurisdiction or judgment of the court. The court, upon that motion, was officially advised that United States of Mexico had informed the Secretary of State that moneys standing in the name of Petroleos Mexicanos had been seized under a warrant of attachment in the pending action, and that Petroleos Mexicanos is an "agent and instrumentality of the Mexican Government created, organized and existing for the sovereign and governmental purposes" of that government. A letter from the State Department of the United States, signed by the Secretary of State and submitted to the court by direction of the Attorney-General, states that "the Department accepts as true the statements . . . to the effect that 'Petroleos Mexicanos' is a public Agency or instrumentality of the Sovereign State of Mexico" and the Department "*in the absence of evidence . . . in the present instance*" of consent to be sued by the sovereign foreign State "recognizes and allows the claim of the Government of Mexico that 'Petroleos Mexicanos' is immune from suit and its property from attachment." In spite of the official suggestion based upon that letter and submitted to the court, that "the claim of immunity made on behalf of said Petroleos Mexicanos and recognized and allowed by the State Department be given full force and effect by this Court; that the said Petroleos Mexicanos and its property be declared immune from the jurisdiction and process of this court," the court, upon the motion to dismiss, referred four "questions of fact arising out of the papers submitted on this motion" to a referee, "to try such questions of fact and to report his findings to this court for its further action." The referee has not yet tried such questions and the *motion of United States of Mexico for an order dismissing the action brought against Petroleos Mexicanos and vacating the warrant of attachment has not been decided* because, after the order of the reference was made, the Appellate Division upon the application of United States of Mexico, made an order prohibiting the judges and officers of the Supreme Court of the State from taking any further steps and proceedings in the actions brought against Petroleos Mexicanos and from enforcing any order or decision in such action.

The first three "questions of fact" formulated in the order of reference relate to the claim of United States of Mexico that Petroleos Mexicanos is a public agency of the sovereign State of United States of Mexico and that as such it is immune from suit and its property from attachment. Upon certification to the court that the claim of sovereign immunity was recognized and allowed by the Department of State, it became the duty of the judicial department of the government to follow the action of the political branch and to decline an antagonistic jurisdiction to determine independently the claim of immunity. A sovereign State cannot be required to sustain in court a claim, which has been allowed by the Department of State, that it is immune from suit and that property which has been attached belongs to it and is not subject to attachment. Accordingly, upon the argument of this appeal we agreed with the decision of the Appellate Division prohibiting the referee



and the court from hearing or deciding any question relating to the claim of United States of Mexico to immunity, so far as that claim had been recognized and allowed by the Department of State. But since the Department had recognized the claim of immunity of United States of Mexico only in "the absence of evidence . . . in this instance" of consent to be sued, we held that the courts were bound to pass upon the effect of evidence which might be offered on that point, and we modified the order of the Appellate Division insofar as it prohibited judicial consideration and determination of that question. *United States of Mexico v. Schmuck*, 293 N. Y. 264, 56 N. E. 2d 577.

After that decision was rendered we granted an application of United States of Mexico for a reargument. 293 N. Y. 768, 57 N. E. 2d 845. Jurisdiction of the person of a nonresident defendant is not obtained by attachment of the defendant's property, and United States of Mexico now urges that, even assuming *arguendo* that the court might find that United States of Mexico had consented that its agency *Petroleos Mexicanos* be sued in the courts of New York, consent of a foreign sovereign to be sued is not to be construed as a waiver of immunity of the property of the sovereign from attachment; and that therefore, by the levy upon such property under a warrant of attachment, the court did not in this case acquire jurisdiction of the property or the person of the defendant.

That argument may be appropriately presented upon the application made by United States of Mexico to dismiss the action and to vacate the warrant of attachment and the levy thereunder. Now we are reviewing an order which prohibits the judges and officers of the Supreme Court of the State from taking any further steps or proceedings in the action. Pending decision by the Supreme Court of the application made to it to dismiss the action, it does not appear that any "steps or proceedings" are contemplated by that court other than to try and determine issues which, in the opinion of that court, have been raised by the papers submitted to it upon that application; and the only question which we may consider and decide, upon this appeal, is whether the Supreme Court may pass upon such issues. Denial to the court of jurisdiction to determine the issues of fact or law involved in the application made by United States of Mexico to vacate the process of the court and to dismiss the action which the plaintiff has commenced, or has attempted to commence, by seizure of property of the defendant, is in effect a denial to the court of jurisdiction to decide that application. Whether a court by service of process has acquired jurisdiction of the person of a defendant is a judicial question to be decided by the court in which a challenge of its jurisdiction is made. So, too, the question whether a court shall decline jurisdiction must be decided, at least in the first instance, by the court whose judicial powers have been invoked, and ordinarily every issue of fact or of law must be decided in that court.

Though a court may have jurisdiction to determine every issue of fact or

of law involved in litigation brought to it, yet the court, in the exercise of such jurisdiction, must follow established rules of law and of procedure. Some issues of fact or law may have been conclusively determined by prior decision of a judicial tribunal. Then the court will not again try these issues, but must base its decision upon such conclusive determination of some or all of these issues. Even then, however, it weighs the scope and effect of the prior determination, and if other issues remain it must determine those issues. The court may err in the exercise of its judicial functions but ordinarily it cannot by order in the nature of mandamus or of prohibition be commanded or advised in advance to exercise such functions in a prescribed manner.

An extraordinary situation calling for extraordinary remedy may be presented however, when a court assumes to try issues which are beyond its competency or to exercise a jurisdiction which, in accordance with well established rules of policy which have the force of law, it should decline to exercise. *Ex parte Republic of Peru*, 318 U. S. 578, 63 S. Ct. 793, 87 L. Ed. 1014; *Baltimore Mail S. S. Co. v. Favcett*, 269 N. Y. 379, 199 N. E. 628, 104 A.L.R. 1068. Judicial inquiry may be precluded of claims of immunity previously determined by a competent political branch of the Government upon the request of a foreign sovereign State. In such cases, as the courts have frequently pointed out, the courts "follow the action of the political branch, and will not embarrass the latter by assuming an antagonistic jurisdiction." *United States v. Lee*, 106 U. S. 196, 209, 1 S. Ct. 240, 251, 27 L. Ed. 171. Then judges who assume a jurisdiction which may embarrass the Department of State in the conduct of foreign relations may be commanded to relinquish jurisdiction upon the request or suggestion of the political branch of the Government.

Nonetheless, a party may not be refused access to the courts for the determination of judicial questions except insofar as the claim of the foreign sovereign has been recognized and allowed by the Department of State and the court has been so advised. "In the absence of recognition of the claimed immunity by the political branch of the government, the courts may decide for themselves, whether all the requisites of immunity exist. . . . Recognition by the courts of an immunity upon principles which the political department of government had not sanctioned may be equally embarrassing to it in securing the protection of our national interests and their recognition by other nations." *Republic of Mexico et al. v. Hoffman*, 323 U. S.—, 65 S. Ct. 530, 532. We followed that principle in our decision upon the original argument. 293 N. Y. 264, 56 N. E. 2d 577. We construed the communication of the Department of State as intended to leave open for judicial determination whether in this case the evidence shows that the United States of Mexico through its agent consented to be sued; and when that question is determined, the Supreme Court still has jurisdiction to decide whether the warrant of attachment should be vacated and the action should be dismissed. We see no reason to change that decision.

We emphasize here that in holding that the court has jurisdiction to decide whether the warrant of attachment should be vacated and the action dismissed, we are not impliedly suggesting that in our opinion there is substance to the claim of the plaintiff that there has been any consent to be sued by the defendant or any waiver of its claimed right of immunity of its property from seizure. We hold only that these are judicial questions which must be decided in the court where they have been presented, even if upon examination of these questions it should appear plainly, and as matter of law, that the claim of immunity of United States of Mexico is sound and that the action should be dismissed. It would be anomalous if the Supreme Court of this State should, upon the application of United States of Mexico, be prohibited from determining the issues of fact or of law presented upon the motion to dismiss which United States of Mexico has itself made in that court, except insofar as questions there involved have been authoritatively decided by the Department of State.

Without attempting in this opinion to analyze in detail the relevant decisions of the Supreme Court of the United States and of this court, we state our conclusion that these decisions establish the following general principles. The question whether a court has acquired jurisdiction over the person of a defendant or the subject matter of an action, and the question whether a court should relinquish jurisdiction, are judicial questions which ordinarily must be decided by the court whose jurisdiction is challenged. Where such challenge is made by a foreign sovereign State claiming for itself and its property immunity from process of the court, the court must relinquish a jurisdiction based upon service of such process when it appears that the claim of immunity has been recognized and allowed by a competent political branch of the government, and a "suggestion" has been properly presented to the court that the judicial branch of government should follow the action of the political branch; but the judicial branch, even in such case, retains jurisdiction to determine any question left open by the political branch of our government for decision by the judicial branch. Applying these general principles, we find that, in this case, though the Supreme Court of the State must relinquish its jurisdiction to determine those questions which have been authoritatively determined by the Department of State, the court still retains a jurisdiction limited to the determination of the question, left open by the Department of State, whether the sovereign State of Mexico, has consented that its agency Petroleos Mexicanos may be sued in this State and by such consent has made its property subject to process of the courts of this State. The court cannot be prohibited from exercising that limited jurisdiction. We repeat that the arguments made by the United States of Mexico in support of its application may be appropriately made when the Supreme Court exercises its jurisdiction. We may not consider them now.

The plaintiffs upon the reargument attack the decision of this court upon

the original argument on the ground, among others, that in proceedings brought under article 78 of the Civil Practice Act a court may not issue an order of prohibition limited to particular issues but must either dismiss the application for such an order or prohibit the judicial tribunal from assuming any jurisdiction in the matter. The power of the court to make an order of prohibition is not so limited. The remedy of the writ or order of prohibition, though ordinarily employed to restrain a subordinate tribunal from entertaining a cause or proceeding over which it has no jurisdiction, "may be exercised also to enjoin a lower court from exceeding its authorized powers in a proceeding over which it has jurisdiction." *Culver Contracting Corporation v. Humphrey*, 268 N. Y. 26, 39, 196 N. E. 627, 631.

No reason has been presented upon the reargument which persuades us that the decision rendered upon the original argument should be changed.

The order of the Appellate Division should be modified to the extent that the order of prohibition is confined, in accordance with this opinion, to the first three questions in the order of reference, and, as so modified, affirmed, without costs.

LOUGHRAN, LEWIS, CONWAY, DESMOND, THACHER and DYE, JJ., concur.  
Ordered accordingly.

## REX v. JOYCE

GREAT BRITAIN, COURT OF CRIMINAL APPEAL\*

[November 7, 1945]

A person owing allegiance to the Crown as an alien resident is not divested of that allegiance by the act of leaving England when he has made application for and been granted a renewal of a British passport: the Court had jurisdiction to try him notwithstanding that he was an alien and he was rightly convicted of high treason.

The Lord Chief Justice delivered the following judgment of the Court: William Joyce, the appellant in this case, was convicted at the Central Criminal Court of the crime of high treason in that he on September 18, 1939, and between that date and July 2, 1940, being a person owing allegiance to our Lord the King traitorously adhered to and gave aid and comfort to the King's enemies without the realm of England—namely, in the realm of Germany—by broadcasting to the King's subjects propaganda on behalf of the said enemies. The indictment contained two other counts charging the crime of high treason, but alleging that the appellant was a British subject. On those counts the appellant was acquitted with the approval of the presiding Judge, Mr. Justice Tucker, and of the Attorney-General representing the Crown, as the evidence showed clearly that he

\* 62 *Times Law Reports* 57. Appeal was denied in the House of Lords on December 18, 1945, without opinion: *The Times*, London, December 19, 1945, p. 2; see also same December 13, p. 7, and December 14, p. 2.

never has been a British subject. In those circumstances the count of the indictment on which the conviction took place may be treated as a count charging the appellant that he, not being a British subject but being a person owing allegiance, did adhere to the King's enemies as aforesaid. The jury, on evidence amply sufficient for the purpose, found that the appellant did adhere to and aid and comfort the King's enemies without the realm of England—namely, in the realm of Germany as alleged—and the Judge held as a matter of law that at that time the appellant was a person owing allegiance to his Majesty. It is against that decision in law that this appeal is brought, and it is common ground that, if that decision was wrong, the conviction cannot stand.

The material facts appear to be as follows. The appellant was born in the United States of America in 1906, the son of a naturalized American citizen, and thereby became himself a natural born American citizen. When about three years of age the appellant was brought to Ireland, where he stayed until about 1921, when he came to England. He stayed in England until 1939, being then 33 years of age. He was, therefore, brought up, educated, and settled within the King's dominions. On July 4, 1933, he made application for a British passport, describing himself as a British subject by birth, having been born in Galway, the passport being asked for for the purpose of holiday touring in Belgium, France, Germany Switzerland, Italy, and Austria. He was granted the passport, as such British subject by birth, for a period of five years. On September 24, 1938, the appellant applied for a renewal of that passport for a further period of one year, again describing himself as a British subject by birth who had not lost that national status. That application was granted. On August 24, 1939, he made a further application for the further renewal for one year of that passport, again describing himself as a British subject by birth who had not lost that national status, and the passport was again renewed, to expire on July 1, 1940. On his arrest there was found in the possession of the appellant a document showing that he had been engaged by the German Radio Company of Berlin-Charlottenburg as from September 18, 1939, as an announcer of English news.

On those facts it is clear beyond dispute that the appellant, at least up to August 24, 1939, owed allegiance to the Crown as an alien "resident," whatever that word may mean, in this country, who was here under the protection of the Crown. The grounds on which that duty is based have not always been stated by Judges in the same terms, but it cannot be doubted that any Court which is called on to decide the question whether a person, not being a British subject, is guilty of treason committed beyond the realm is bound to have regard to the evidence as to his being resident in the King's dominions, and to the evidence as to his being at the material time under the protection of the Crown. We do not doubt that such a person may by his acts be shown to have withdrawn himself from that protection and to have ceased to be

resident in England, with the result that the duty of allegiance is no longer owed by him. Each case must be decided on its own facts. We are not called on to lay down, and have no intention of laying down, the law applicable to every case of treason beyond the realm charged to have been committed by an alien. We have to look at the evidence in this case, and on that evidence to decide whether the trial Judge was right or wrong in holding as a matter of law that on September 18, 1939, and between that date and July 2, 1940, the appellant did owe allegiance to the King.

We agree with Mr. Justice Tucker that the proper way of approaching that question is to see whether anything had happened between August 24 and September 18 to divest the appellant of that duty of allegiance which he unquestionably owed at the earlier of those dates. The one and only fact relied on by counsel on his behalf is that he left England at some date after August 24 and travelled to Germany. The argument was that the act of leaving England, whatever may have been the circumstances, rendered the appellant incapable of committing the offense charged, since the physical presence in the King's dominions of the appellant is and was essential to the commission by him, being an alien, of the crime of high treason. If that argument is sound, no alien can ever be guilty of that form of high treason which consists of adhering to the King's enemies without the realm. It is a startling proposition and one which, after mature consideration, this Court is quite unable to accept. It appears to be based to a great extent on the language of Sir William Blackstone in his *Commentaries* (bk. 1, ch. 10, p. 370): "Local allegiance is such as is due from an alien, or stranger born, for so long time as he continues within the King's dominion and protection; and it ceases the instant such stranger transfers himself from this kingdom to another." Lower down he says: "As therefore the prince is always under a constant tie to protect his natural-born subjects, at all times and in all countries, for this reason their allegiance due to him is equally universal and permanent. But, on the other hand, as the prince affords his protection to an alien only during his residence in this realm, the allegiance of an alien is confined (in point of time) to the duration of such his residence, and (in point of locality) to the dominions of the British Empire."

That statement of the law may be accepted as perfectly correct so far as it goes, and it is in accord with the writings of all the great masters of the common law, but it is not exhaustive, for it omits something which must, we think, have been known to Sir William Blackstone lecturing and writing in the middle of the 18th century. His *Commentaries* were first published in 1765. We find nothing in that passage to indicate that, in the opinion of the writer, the residence so much insisted on by him would be broken by a mere temporary absence on business or pleasure. The writer makes no attempt to define the word "residence" or explain what he means, leaving the word to be construed in its ordinary meaning. The reason for the omission may be that Blackstone's *Commentaries* form, to use the language of

the Earl of Birkenhead in his short *Life of Blackstone* (p. 203), "an elementary text book for students and must be judged as such." However that may be, Sir Michael Foster in his book on *Crown Law*, first published in 1762, having in section 1, p. 183, of the *Introduction to the Discourse on High Treason* (3rd ed.) dealt with the case of natural-born subjects, deals in sections 2 and 3 with aliens whose Sovereign is either in amity with or at enmity with the Crown of England, and lays down the law with regard to such persons in much the same language as is used by Blackstone. He then observes in section 4: "And if such alien, seeking the protection of the Crown, and having a family and effects here should during a war with his native country go thither and there adhere to the King's enemies for purposes of hostility, he might be dealt with as a traitor. For he came and settled here under the protection of the Crown; and though his person was removed for a time, his effects and family continued still under the same protection. This rule was laid down by all the Judges assembled at the Queen's Command January 12, 1707."

In 1803 East published his work on the *Pleas of the Crown* and refers (at p. 52) in similar terms to that resolution of the Judges and, after discussing the circumstances in which the resolution came to be passed, appears to treat it as settled law. Serjeant Hawkins, in the first edition of his book on the *Pleas of the Crown*, published in 1716, makes no reference to the resolution of the Judges, but in later editions of his work (see 1824 ed., p. 8, note (2)) he sets out the resolution in the same terms as the other writers, as do all other text book writers, and we have not been referred to any work of authority or to the judgment of any Court disapproving of the law as there stated. Criticisms have been made by Mr. Slade on the practice of the Judges holding such meetings, and those criticisms may be well founded, but the law as stated and accepted by Foster and others has stood unchallenged, as Mr. Slade admits, for nearly 250 years, and we cannot now hold that we are not bound by it.

The importance of the matter in the decision of the present case is twofold. If the law as stated by Foster is correct, it is clear that Mr. Slade has put his case much too high in claiming, as he does, that the appellant could not in law be guilty of high treason committed abroad because he was not a British subject; and, secondly, it seems to negative a further proposition based on want of jurisdiction to be referred to later in this judgment. It does not purport to show that the present appellant was guilty of the crime charged, since the case put does not apply here, there being no evidence that the appellant on going abroad left his wife or effects behind him. It still remains for the Crown to show that on the proved facts of this case he did owe the duty of allegiance to his Majesty. If there was no other evidence on the subject than the proved fact of his departure from England after August 24 the Crown might be in a great difficulty, and we express no opinion what would have been the proper course to adopt, beyond observing that it might have

been necessary to leave further matters to the jury, since the jury alone can draw inferences of fact from such evidence as they accept.

But in our judgment the facts relating to the application for, and the granting and the renewal of, the passport in this case make it clear that as a matter of law the appellant was still owing allegiance to the Crown when he began to adhere to the King's enemies by broadcasting, as alleged in the indictment and found by the jury. We cannot agree with Mr. Slade that the case of the appellant is to be treated as precisely the same as that of a foreigner who had once in his life paid a visit to this country of a few hours' duration. Blackstone seems to require "residence," Foster speaks of a person "settled" here. We were much pressed by the appellant's counsel with a number of cases in which there are *cic-a* appearing to be in favour of the appellant's contention. The high-water mark of these cases is, perhaps, to be found in *Johnstone v. Pedlar* [37 *Times* L. R. 870; [1921] 2 A. C. p. 262). One quotation will suffice. Lord Sumner said (at pages 877 and 292 of the respective reports): "The matter which he (Lord Coke) had in hand is the contrast between *ligeantia localis*, which begins no earlier than and continues no longer than the presence of the alien *army* within the realm, and the lasting allegiance of the subject born." That passage does not touch the question which we have to consider. It certainly does not define the offense of treason. The only point argued in that case was whether the defendant could rely on a plea that the plaintiff was an alien, and that his money had been detained by direction of the Crown as an act of State. It was held that the plea was bad.

On his arrest the appellant made a statement, put in evidence at the trial, which contained these passages: "We (that is, his parents and himself) left America in 1909 when I was three years old. We were generally counted as British subjects during our stay in Ireland and England. I was in Ireland from 1909 till 1921, when I came to England. We were always treated as British during the period of my stay in England, whether we were or not." It was further proved that in 1922 the appellant wrote a letter asking to be admitted as a member of the Officers' Training Corps attached to the University of London stating that he had been born in America but of British parents, that he left America when two years of age, that he had not returned since to America and did not propose to return there, that he had been informed at the Brigade Headquarters in Ireland that he possessed the same rights and privileges as he would if he had been of natural British birth, and added that he could obtain testimonials as to his loyalty to the Crown. Following on that came the application for the passport and the two renewals of the passport, the last being, as stated, on August 24, 1939, so that on the very eve of war the appellant had taken every step in his power to safeguard his right of re-entry into England, and meanwhile to insure his treatment in any foreign country as a British citizen.

A British passport is something more than a means of identification. As



was stated by Lord Alverstone, C.J., in *Rex v. Bradsford* (21 *Times* L. R. 727, at p. 729; [1905] 2 K. B. 730, at p. 745), it is a document of high public importance, and that "It will be well to consider what a passport really is. It is a document issued in the name of the Sovereign on the responsibility of a Minister of the Crown to a named individual, intended to be presented to the Governments of foreign nations and to be used for that individual's protection as a British subject in foreign countries, and it depends for its validity upon the fact that the Foreign Office in an official document vouches the respectability of the person named. Passports have been known and recognized as official documents for more than three centuries, and in the event of war breaking out become documents which may be necessary for the protection of the bearer, if the subject of a neutral State, as against the officials of the belligerents, and in time of peace in some countries, as in Russia, they are required to be carried by all travellers."

The form of passport issued in the present case requests the foreign Government, and requires the diplomatic and consular representatives of his Majesty in foreign countries, in the name of his Majesty to allow the bearer to pass freely without let or hindrance and to afford him every assistance and protection of which he may stand in need, and the possession of such a document clearly entitles the holder to return to the country which has issued the passport. It is, therefore, plainly a protection in every sense of that word to the holder while he is absent from the King's realm. We entertain no doubt that if it is possible for a foreigner to owe the duty of allegiance to the British Crown, although not at the moment within the British realm, as we think it is, the appellant at the time when he adhered to the King's enemies did owe that allegiance.

The next point made by counsel for the appellant was one which he expressed as being a point raising the question of jurisdiction. The point as stated by counsel was this. Assuming that the appellant was proved to have been a person owing allegiance to the King at the time when he did adhere to the King's enemies in the realm of Germany, nevertheless he cannot be tried for that offense by any Court in England. We experience some difficulty in understanding precisely the grounds on which this submission was made. It is said to be complementary to the other submission that, because the appellant was an alien, he could not commit the offense charged against him in the indictment, and therefore could not be tried for it. But on the footing that an alien may commit, and that this appellant did commit, the crime charged in the indictment, we find it difficult to understand why he cannot be tried for that crime. It is quite true to say that the statute of 1351 creating the offense does not refer in terms to the trial anywhere of a person offending against the statute, and the point was one which troubled, as the books show, the minds of lawyers in many cases and for many years. Indeed, it was for the reason that there was no clear pronouncement by Parliament as to where and by whom a person ought to be tried who of-

fended abroad against the statute of 1351 that Parliament in 1548 passed the Act of 35 Henry 8, c. 2: "An Act for the trial of treasons committed out of the King's dominions. Section 11. Venue for treasons committed abroad. Forasmuch as some doubts and questions have been moved that certain kinds of treasons . . . done perpetrated or committed out of the King's Majesty's realm of England . . . cannot by the common laws of this realm be inquired of heard and determined within this his said realm of England: for a plain remedy . . . be it enacted . . . that all manner of offenses being already made or declared or hereafter to be made or declared by any of the laws and statutes of this realm to be treasons . . . and done perpetrated or committed or hereafter to be done perpetrated or committed by any person or persons out of this realm of England shall be from henceforth inquired of heard and determined before the King's justices of his bench for pleas to be holden before himself by good and lawful men of the same shire where the said bench shall sit and be kept . . . in like manner and form to all intents and purposes as if such treasons . . . had been done perpetrated and committed within the same shire where they shall be so inquired of heard and determined as is aforesaid." The shire referred to in the section has been generally understood as Middlesex.

It appears to us that the only point of jurisdiction which can possibly arise on the terms of this statute depends on the assumption that the words "any person or persons out of this realm of England" do not include an alien owing allegiance to his Majesty the King.

In 1916 the Court of Criminal Appeal dealt with the appeal of Roger David Casement, who had been convicted of high treason by adhering to the King's enemies without the realm, and in that case no question was raised on the appeal other than the question whether the matter described in the indictment was any offense against the Treason Act, 1351. In giving the judgment of the Court of five Judges dismissing the appeal Mr. Justice Darling observed as follows (32 *Times* L. R., at p. 670; [1917] 1 K. B., at p. 138): "The statute 35 Hen. 8, c. 2, was passed 'for the trial of treasons committed out of the King's Dominions.' The only question dealt with was how such treasons were to be tried. Under such statute the present trial had rightly been taken before the King's Bench, provided that what was done by the appellant amounted to treason under the Act of 1351. If it was such a treason, it was rightly tried."

We say the same thing in this case. We can find no justification for holding that, because the appellant in this case is not a British subject, therefore, although he can commit the crime alleged in the indictment of being a person who has adhered to the King's enemies while owing allegiance to the King, no Court has power to try him because he is an alien. It is right to add that Mr. Slade agreed that, if the appellant was triable in this country as the result of the statute of Henry 8, he was properly so tried at the Central Criminal Court.

A further point was taken by Mr. Slade that, assuming that the Court was against him on his first two points, there was no evidence that the renewal of the appellant's passport afforded him or was capable of affording him any protection, or that the appellant ever availed himself or had any intention of availing himself of any such protection, and that if there was any such evidence the issue was one for the jury and the Judge failed to direct them thereon. It is true that no direct evidence was called in respect of the effect of the passport, but the document speaks for itself, and we have already dealt with its effect in the earlier part of this judgment. In our view the passport was capable of affording the appellant protection, none the less because it was obtained by a misrepresentation, and it is quite immaterial whether he availed himself of that protection or not, as he had sought such protection and it was available for his use.

For these reasons we find ourselves in complete agreement with the decision of the trial Judge and substantially for the same reasons.

The appeal is dismissed.

## BOOK REVIEWS AND NOTES

*The Outlook for International Law.* By J. L. Brierly. Oxford: Oxford University Press; 1944. Pp. iv, 142. \$2.00.

Professor Brierly's little book, written before the Conferences of Dumbarton Oaks and San Francisco but not published in the United States until September, 1945, is full of meat. Each of its eight chapters (The Present System; War and the Law; Vital Interests; War and Vital Interests Inside the State; Progress under the Covenant; International Order; Law and Welfare; International Disputes) will repay careful reading and re-reading. This review, consisting chiefly of quotations and paraphrases, is twice as long as might be expected for a book of less than 150 pages. It should be longer still but for the reviewer's confidence that the book will soon be in the hands of many of the readers of the Journal.

The function of international law is and will continue to be "both by its customary rules and by treaties, to mark out the sphere within which each state may exercise its governmental powers without trespassing on the sphere of other states" (p. 12). It is "almost self-evident . . . that law should set limits to the liberty of states to resort to war" (p. 19). It must be acknowledged, however, that states "still have certain interests or policies which they consider so 'vital' that they intend to be free to assert them, if necessary, whatever the law . . . may say about them" (p. 34). International law must, somehow or other, find means "of satisfying the vital interests of states so far as they are reasonable" and "of securing . . . that those shall not be pressed which are spurious or unreasonable" (p. 38). "The first step towards a solution of the problem of vital interests lies in realizing its intimate relation to . . . wider problems of international order" (p. 44).

"Order cannot be had," either within or between states, "without organization" (p. 51). The Covenant of the League of Nations was "a real attempt to provide the society of states with Machiavelli's two foundations, 'good laws and good arms.' But 'good arms,' as he has told us, come first, and the League did not succeed in providing them" (p. 61). The main difficulty in the establishment of international order "in a constitutional form" arises from "the fact that the power upon which any system of collective security must depend can only come from those who have power to give" (p. 88). We may be sure, however, that "anything like an irresponsible hegemony of the Great Powers will not be tolerated" and also that such a hegemony "would not be adequate to the task" (p. 88). All states, great and small, must be recognized, in the words of the British Commonwealth Declaration of 1926, as "autonomous communities, equal in status, in no way subordinate to one another in any aspect of their domestic or external affairs," but it must also be recognized, in the words of the same Declaration,

that "the principles of equality and similarity, appropriate to status, do not extend to function" (p. 89). A mere alliance between the United States, Soviet Russia, and the British Commonwealth "would have no chance of enduring if they failed to adopt a liberal policy towards other nations, unless in short they sought to maintain liberty through law" (p. 90).

The fabric of international order, once it has been established, may be underpinned by law (p. 95). As an instrument for promoting the general welfare of states, international law is seriously handicapped by the rule of unanimity (p. 99). The procedural obstacles to international reforms are, however, only the outward sign of deep psychological factors in the problem (p. 106). "The use that we make in the future of international law as an instrument of social welfare will depend more than on anything else on the creation of an informed public opinion alive to the opportunities that it opens out" (p. 107).

In his concluding chapter Professor Brierly gives us a salutary warning as to the limitations upon judicial settlement of international disputes. "It is not the case that all disputes are decided by courts of law within a state; . . . many disputes between states are of a type to which states normally apply [within their own territories] methods of settlement which are essentially political and not legal" (p. 121). "The most difficult disputes, those that endanger international peace, are never likely to be settled by courts; the disputes which endanger civil peace inside the state are not settled in that way either" (p. 124). "In many, perhaps in most, of those differences between states which arise out of the dissatisfaction of one of the parties with things as they are there is no single solution which can be called 'just' . . . , and even more rarely any which both the parties concerned are likely to consider just" (p. 127). "The only kind of procedure of peaceful change that is likely to be practicable in any future with which we need concern ourselves is one in which third states may be able to influence, but not to decide, the manner in which a demand for a change in legal rights is to be dealt with" (p. 137). "A procedure of peaceful change will itself depend absolutely for its working on a prior assurance of a stable order, and like all other proposals for the better development of international law, it leads us back to the fundamental question of security. Without a solution of that problem, whatever we build will be built on the sand" (p. 130).

The manuscript of Professor Brierly's book was presumably available, before the United Nations Conferences, to the British Foreign Office, to which he has long been an adviser. His views coincide to a very large extent with those set forth in the nearest American equivalent, "The International Law of the Future," the work of Judge Hudson and some two hundred other North Americans, published in the Supplement to this JOURNAL for April, 1944.

EDGAR TURLINGTON

*Of the Board of Editors*

*Private International Law.* By Martin Wolff. New York: Oxford University Press; 1945. Pp. xlv, 637. Index. \$10.00.

Dr. Martin Wolff was one of the foremost authorities in pre-Hitler Germany on the subject of the conflict of laws and on comparative law. Transplanted from Berlin to Oxford by the political whirlwinds of the past decade, he now reappears as the author of this exhaustive textbook on the conflict of laws from the standpoint of English law.

Workable solutions to practical questions are Dr. Wolff's main objective. In this pragmatic attitude, which is not inconsistent with a slight inclination toward conceptualism, he reveals himself as a disciple of Story. His introductory remarks on the jurisprudential foundations of the conflict of laws are characterized by a refreshing aversion to abstract disquisition. This succinct review of leading schools of thought omits, however, any mention of the vested rights doctrine (American variety) and of our local law theory.

Before coming to the heart of the subject, Dr. Wolff gives a lucid exposition of the jurisdiction of English courts. To those who think about a revision of our own rules concerning jurisdiction, the corresponding rules of the English law, often more liberal than ours, are a matter of natural interest. This interest is further enhanced by Dr. Wolff's treatment of the topic, which contrasts the English system with those prevailing on the European Continent.

An analysis of general principles, and four subdivisions on specific choice of law situations form the main body of the book. The admirably clear survey of the English *renvoi* cases in the general part of the treatise deserves particular attention in this country, where we are still short of decisions on this controversial issue. On the other hand, the problem of classification remains as unsettled in England as it is with us. Dr. Wolff is a staunch advocate of classification according to the *lex causae*. However, he concedes that departures from this formula may become necessary to avoid absurd results such as the legal vacuity which seemingly arises in the now famous instance where the applicable foreign law labels its statute of limitations as "remedial" while that of the forum is catalogued as "substantive." The comment on this situation (§ 152 of the book) discloses Dr. Wolff's awareness of recent warnings against the indiscriminate use in the conflict of laws of principles of classification devised for purely domestic purposes. Yet Dr. Wolff does not seem to have fully heeded these warnings himself (§§ 132, 146). The fundamental trouble with his thesis is that the *lex causae* is not concerned at all with the development of classifications appropriate for use by foreign courts. Dr. Wolff's discussion of the public policy concept is based on the tacit assumption that it operates as an exclusionary rule of choice of law. Whether this view, which prevails on the European Continent, is supported by actual decisions of English courts appears questionable. Prior English publications have leaned to the opposite theory, treating

public policy as a limitation upon access to courts or upon the enforcement of foreign rights.

Following an outline inspired by civil law tradition, the remainder of the book is devoted to specific rules on the choice of law with respect to persons and family relations, obligations, property and succession upon death. In this domain, where we deal with essentially practical questions, Dr. Wolff is at his best. His analysis of English decisions, generally supplemented by references to their counterpart in France, Germany, and Italy and to opinions expressed in textbooks and legal periodicals, leads frequently to new insights. Moreover, a systematic scrutiny of many institutions of common and civil law yields an amazing number of possible conflict questions which have not yet been the subject of judicial determination and on which Dr. Wolff presents his carefully reasoned views. The completeness of coverage in this sense is one of the most interesting features of the book. In the part devoted to contracts, Dr. Wolff puts more emphasis upon the intention of the parties than have other writers on English law; but he seems to be supported by judicial pronouncements. Recent cases giving effect to the vesting by Governments-in-Exile of property in England of their nationals are rationalized as establishing a general choice of law rule on expropriation for a legitimate public purpose. It is a surprising, but certainly justified, innovation to treat confiscation and expropriation as permanent components of the law of property.

According to his preface, Dr. Wolff intended to write only on English law and contemplated resort to other systems merely for the purpose of filling in gaps or removing doubts left by English decisions. Actually, he has done both more and less than this. More, because he supplies a wealth of information on Continental law which, as a welcome by-product, adds to the treatment of his main topic an almost complete study in comparative law. Less, because the very authorities to which English courts are most prone to look in the absence of domestic precedent, our own decisions, are not adequately presented. Indeed, American sources beyond the Restatement and leading textbooks seem to have been scarcely consulted. This deficiency, however, does not affect the value of the treatise as a guide to English doctrine and decisions and as a gold mine of provocative suggestions for the analysis of novel questions. Moreover, Dr. Wolff has made a major contribution to the knowledge in Anglo-Saxon countries of Continental systems of conflict of laws and to the integration of common law and civilian thinking.

WALTER HERZFELD

*New York City*

*Indemnifications and Reparations, Jewish Aspects.* By Nehemiah Robinson. New York: Institute of Jewish Affairs of the American Jewish Congress and World Congress; 1944. Pp. 302. \$2.50.

*Jewish Post-War Claims.* By Siegfried Moses. Tel Aviv: Irgun Olej Merkaz Europa; 1944. Pp. 89.

*Vergeltung und Wiedergutmachung in Deutschland.* By Louis C. Bial. Havana: Editorial Lex; 1945. Pp. 83. \$1.25.

*Problemas de Post-Guerra en el Transcurso de los Tiempos.* By Herbert Dorn. Havana: Revista de Derecho Internacional; 1944. Pp. 39.

Dr. Herbert Dorn, former President of the highest German court for financial questions (Reichsfinanzhof), writes in Spanish in Cuba; Dr. Louis C. Bial, a lawyer of Frankfurt-am-Main, in German on the same island; Siegfried Moses, a lawyer from Berlin, in English in Palestine; and Nehemia Robinson in English in New York under the auspices of Jacob Robinson, a lawyer from Kowno, now director of the Institute of Jewish Affairs in New York. All four men, victims themselves of the cataclysm, write in different languages and under different skies but all moved by the same sentiment: That the torts and damages inflicted upon the Jews, first in Germany and then in Nazi-occupied countries, entitle them to reparations, for which the legal basis must be established.

Dr. Dorn, in a philosophical and historical essay, treats the problems of post-war periods as they have appeared in world history in a lecture first published in the *Revista de Derecho Internacional* in September 1944, in Havana. The pamphlet is dedicated to the internationalization of human liberties. The religious character of the Thirty Years War created refugees in the modern sense of the term. For their reintegration and the restitution of their expropriated assets, an agreement was reached in the Peace of Westphalia of 1648, which even today must be considered as a very good formula:

All civil and military persons, from the highest to the lowest, their children and heirs, without exception, shall in respect to their persons and property, be reinstated by both sides in the same condition of life and reputation, of honor, of conscience of liberty, rights and prerogatives, which they actually held before the disturbances or which they might rightfully have held.

Dorn considers the internationalization of human liberties as the basic problem of the Second World War.

In his *Vergeltung und Wiedergutmachung in Deutschland*, Dr. Louis C. Bial makes a contribution to the question of the punishment of war criminals and of the rehabilitation of Nazi victims. Much of what is said in this little book wears a different aspect since the end of the European war and the measures taken by the occupying powers. Bial considers the Nazi legislation in general as valid, "even in so far as it was promulgated against the Constitution of Weimar." But those laws of the Nazis which are against "the eternal principles of human morality are null and void." The Allies will prosecute only those Nazi crimes "which were directed against themselves and their nationals. The German prosecuting authorities will, there-



fore, find a large field in the prosecution of crimes which have been committed against Germans and nationals of countries allied with Germany." Bial gives an affirmative answer to the question whether the world war, which the Nazis started, was a crime which can be punished under existing laws. The Constitution of Weimar declared that international law, which had been accepted by Germany, was to be considered a part of German law.

So-called "voluntary sales" of property were made under duress. But according to Bial they are only to be considered void if the purchaser has not paid a just consideration. Needless to say, many jurists will not agree with Bial, who wants to leave it to the decision of the (German?) courts whether a just consideration has been paid. The same exception applies against the theory that a right of restitution shall be given against the actual owner only if he has not acted in good faith.<sup>1</sup> This whole matter cannot be decided under domestic German civil law, the special procedures of which, like injunction (*Einstweilige Verfügung*) and attachment (*Arrestbefehl*), the author would like to see applied. The American Military Government for occupied Germany has found a more appropriate solution in the rule that "except as duly licensed, any transaction . . . is prohibited" with respect to "any property located in Germany, owned or controlled directly or indirectly, in whole or in part, by any person outside Germany." There is, furthermore, prohibited any transaction with respect to "property, wherever situated, if the transaction involved any person in Germany and any person outside Germany." These rules give protection against any change in property rights and interests inside Germany which have been taken by the Nazis from rightful owners who now live outside Germany.

Siegfried Moses, as the title of his book shows, intends to treat only *Jewish Post-War Claims*. This small book is intended much more as a program than a juridical thesis. And it is a program regarding only the Jews, and especially Jews from Germany. It would correspond more with the general feeling on these matters today to give—if any differentiation has to be admitted—the first right to claim reparation to those who in the liberated countries have been members of the resistance and underground movements, or who, in Germany, are the surviving inmates of concentration camps and the scattered remnants of the half million Jews who lived there before Hitler came into power. But Moses reverses this order. He gives limited rights to those Jews who have been or may still be found inside Germany and he gives a privileged position to those who migrated from Germany and among these a special place to those who emigrated to Palestine. This reasoning is not convincing in view of the terrible sufferings and losses which most of the belligerent peoples have had to bear.

Moses rightly observes that the old concepts of international law are not sufficient to cover the very complicated reparation questions. International

<sup>1</sup> There was no good faith in acquiring looted or confiscated goods inside and outside of Germany.

law is "changeable and flexible by nature." And he is quite right in stating that the recognition of demands for reparation and "the degree of such recognition depends upon factors which have nothing to do with the concepts of jurisprudence underlying international law." He calls it a political principle and not a submission of legal grounds when he presents the formula: "Jews who have migrated to Palestine and other countries should be recognized as nationals of a nation that has been at war with Germany since 1933." A tragic situation has indeed been created in many belligerent countries by the fact that those who were the first victims of Hitler's persecution have been considered as "enemy aliens." In some countries, as in the United States, the consequences were mostly and finally limited to technicalities, and even the right to citizenship was granted to this category of Nazi victims. In other countries even the small belongings of such people residing in these countries have been submitted to the restrictions imposed upon Axis nationals: freezing, blocking, and sometimes even liquidating; in so far as the Western Hemisphere is concerned this is not in accordance with Recommendation No. V of the Rio de Janeiro Conference (1942).

In the future settlement of the reparation question Moses believes that factual characteristics for recognition of claims should be sufficient.

In principle the nationality of those entitled to make claims should be entirely irrelevant. . . . The conditions of peace are scarcely likely to provide persons who are German nationals, and who have remained in Germany or returned to that country, with the same rights against Germany as those who have already emigrated or will emigrate, are, or will become, entitled to possess. . . . The demand that the Jewish claims irrespective of nationality shall be recognized as valid in international law, must be regarded and treated as an issue of particular importance. But it cannot be extended to Jews who have remained in Germany or returned to that country.

Even by defending this Jewish solution of the reparation problem Moses has to recognize that "the rights of English Jews will be represented by England and those of American Jews by the United States, but also the claims of Palestine nationals, residents of Palestine, will be represented by Palestine." The Jews of the Allied and United Nations who have participated in the bitter fight in the ranks of their countrymen, Americans and English, French and Dutch, Belgians and Yugoslavs, and certainly Russians, consider themselves, notwithstanding their Jewish feeling, as nationals of their respective countries. Therefore the whole argumentation of Moses if applied at all could only be applied to the ever smaller group of Jews from Germany and other Central European countries who had emigrated but did not yet become citizens of their new countries. And what of the Jews who have emigrated to Palestine and who became Palestinian nationals? How much the representation by Palestine will signify, as Moses himself says, "can, it is true, not be forecast with any certainty." He proposes an inter-

nationally recognized institution "which will be entitled to assume charge of the interests of those who have any claim but who are neither of Allied nationality nor live in an Allied state."

The book by Dr. Nehemiah Robinson is an excellent survey on indemnification and reparation limited to its Jewish aspects. With the help of the Institute of Jewish Affairs all material available has been used and systematically grouped. The general problem of incemnification is the same for all groups.

But the Jews (says Dr. Jacob Robinson in his Preface) were singled out by the Nazis and their followers for total extermination and total spoilation. . . . There is a certain resemblance between the fate of the Jews and that of other nations in that the losses indicated above were suffered by Jews and Gentiles alike. But those of the latter were, so to speak, incidental, whereas the losses suffered by the Jews were comprehensive and total. That is, almost all Jews were despoiled, while only a part of the Gentile population suffered this fate.

It is hard to see the difference between people who have been "incidentally" killed, murdered or looted and others who have been "comprehensively and totally" treated in this way. More than two-thirds of world Jewry have shared, and proudly shared, the fate and the sacrifices made by all citizens of the belligerent countries. The terrible special sufferings of most of the European Jews are beyond imagination. But to base an argument of a very well written book upon the thesis that "all Jews were despoiled" is damaging a good cause by exaggeration.

Part I of the book gives the Jewish losses, the extent of the dispossession of the Jews, the process and methods by which the spoilation, robbery, seizure, expropriation of Jewish property, rights and interests were executed by the Nazis and the Nazi-ruled governments. Estimates of Jewish wealth and losses given in the book are admitted as not "absolutely exact." And, certainly, there can only be an approximate evaluation. The author arrives at the result that in 18 Axis or Axis-dominated countries in Europe the probable Jewish wealth was between 8,230 and 8,620 billion dollars. The biggest share was, surprisingly, in Poland, with 2.1 billions, followed by Germany with 2 billions and Rumania with 1 billion; the western European democracies follow with smaller figures. The Economic and Social Council of the United Nations Organization "should undertake as one of its first investigations a survey of the fortunes of the different countries and groups in belligerent and occupied countries before the war, the destruction and change of property during occupation and war, and a statistic of the remaining assets."

In Part II of Robinson's book the existing legal provisions for indemnification are extensively studied. The differences in the international law of war between occupied countries and Axis nations are exactly defined. Hague Conventions and municipal law, Kellogg-Briand Pact and Minority Treaties, the United Nations' warning of January 5, 1943, are all systematically

treated. For the first time the legislation of the governments in exile is examined comparatively, and the general impression from this part of the study is that the governments after the liberation of their countries have a long way to go for the fulfillment of their promises during their exile. Indemnification takes the form first of restitution and secondly of compensation. Compared with the history of indemnification after the Treaty of Versailles, it seems that restitution takes on a more important role than after 1919. The practical difficulties have even become greater since the book was finished in 1944. One may only remember that 40,000 purchasers of Jewish property in France tried to form associations to prevent the restitution of the Jewish expropriated goods to their rightful owners and that the de Gaulle Government encounters many difficulties in trying to effect the restitution. In many other countries the situation is even worse.

Among the writers who treat the Jewish aspects of the problem the question of an individual versus a collective solution of the problems is much discussed. Moses is more inclined to a collective solution. Robinson says on one side: "It is true that the laws of the country and the need to punish those who personally committed injustices against the Jews require the application of the method of personal claims whenever possible." But on the other side he says: "The exclusive method of private claims appears to be fully irrational." State intervention "would be totally superfluous . . . in cases of restitution where the property may be restored immediately" and "in cases of private compensation some friendly arrangement might be possible." Therefore Dr. Robinson regards as "the most effective way to leave the choice to the claimant," but he recognizes himself that "the problem of choosing between private and state indemnification is greatly complicated by the possibility that only parts of the losses may be repaid by the state."

As a specific problem the question of the nationality of the claimant is discussed. The Department of State of the United States does not admit claims for losses or injuries which occurred before the claimant became an American citizen. Robinson seems to be sound when he argues: "From the viewpoint of international law there seems to be no reason why diplomatic protection should not be extended to all citizens regardless of the time of injury if the states in question wish to do so." The reviewer has before him the correspondence of a naturalized American citizen who inquired in June, 1945, about his real estate in Frankfurt-am-Main. The Department of State refused him protection. He answered that on one side the discriminatory laws by which he was deprived of this real estate were abolished by the laws of the military government and that therefore he continued to be the rightful owner of his house even after having acquired American citizenship, and that, furthermore, as no Government existed in Germany and all administrative power was exercised by the Allied Military Government, the question of "diplomatic protection" could even not be raised.

Robinson argues that the United Nations must accept a principle that in

the question of claims against the Axis the territorial and not the national principle is to be applied. He asks for:

- "a—a common law of indemnification with special priorities for the Jews since they have suffered the greatest damage;
- "b—specific provisions for the implementation of these principles according to the law of the country concerned and the specific economic and social situation there."

The principle embodied in most legislations, that ultimately the state or the town where the property is situated is universal heir of defunct physical persons, is considered as "a great injustice to the Jewish people." The idea of the "Jewish Agency for Reconstruction," to which large juridical and factual authority would have to be given, and which would have to administer in many countries of the world large funds, and defend the interests of many people all over the world, is a very striking one. For many reasons many Jews and many non-Jews will not be ready to accept it. In view of the situation among the Jews themselves, whose opinions in all of these matters are strongly divided, there is no organization possible which can represent such a large section of the Jews of the world that such a tremendous power and wealth could be conferred upon it. Furthermore, in most capitalistically organized countries there would be a strong resentment against disposing of the assets of individuals, against existing international and domestic laws in favor of whatever collectivity could be created or exists.

BRUNO WEIL

*New York City*

*Les Précurseurs de l'Organisation Internationale.* By Dr. László Ledermann. Neuchâtel (Switzerland): Editions de la Baconnière; 1945. Pp. 178. 6 fr.

In this elegant little volume Dr. Ledermann, of the University of Geneva, examines the evolution of the concept of international organization from early times to the present, with particular reference to certain leading thinkers of early modern times—Dubois, Bodin, Machiavelli, Poděbrad, Crucé, Sully, Penn, Saint-Pierre, Rousseau, Bentham, Kant. The result is an interesting, even entertaining, and at the same time informing *mélange* of the history of thought and personal biography. There are added touches of the history of institutions although this element is very distinctly left undeveloped.

It is just here that the most serious question might be raised concerning Dr. Ledermann's treatment of his subject. The issue emerges in the very title of the work. How can an institution, or type of institution, which is an impersonal thing, have precursors (as in *Die Vorläufer des Hugo Grotius*), who are personal? Should one not rather study the prototypes or antecedents of the institution in question? The answer, of course—whether one

agrees or not—is that Dr. Ledermann conceives of international organization, at least in this little volume, as the product of thought and human endeavor rather than as the mechanical result of institutional evolution. The fact remains that there seems to appear a considerable hiatus between the thoughts of the personalities in question in the fourteenth to the eighteenth centuries, and the full proliferation of international organization at the end of nineteenth century and during the past twenty-five years.

On the other hand Dr. Ledermann does for us what had not previously been done with respect to these precursors. A number of collections of the earlier projects of international organization have been published since 1914, and they all add to our picture of the historical background of contemporary institutions. Hardly any of the compilers and editors of these collections have tried very hard, however, or indeed have been competent, to give us an understanding analysis, in terms of philosophical and sociological ideas, of the various projects. This Dr. Ledermann has done, in brief compass, and he has thereby thrown much light on the problem of international organization itself, if not on its strictly chronological evolution. It is a distinct contribution to international political science.

PITMAN B. POTTER

### *Managing Editor*

*The International Secretariat.* By Egon F. Ranshofen Wertheimer. Washington: Carnegie Endowment for International Peace; 1945. Pp. xxviii, 500. Charts. Appendix. Index. \$4.50.

The founders of the United Nations determined not to create an international government but a confederation of states. Only in respect to one aspect of the security functions of the new organization did they approach the granting of executive authority and this was carefully circumscribed to protect the national sovereignty of the Great Powers. They thus committed the world to the perpetuation of nation-based policy determination and administration of the affairs which the Charter recognized affect the world as a whole.

Whether the United Nations will be able to rise above purely national views of problems of world concern will depend largely upon two factors: 1) the degree to which national foreign offices will instruct their delegates to see beyond the confining vision of purely national aspirations, and 2) the degree to which a world tone can be given to the Organization by its Secretariat.

The first of these depends upon national politics and administration and the way in which the political bodies of the UN function. The second depends upon the position and organization of the Secretariat.

*The International Secretariat*, by a distinguished former member of the League of Nations Secretariat, is an invaluable contribution to understanding the importance of the Secretariat in international organization and the requisites for making of the Secretariat an organ that will indeed be able to

contribute the elements indicated above toward the success of the UN. Both because of its timeliness, when the world is laying out the blueprint for the new international Secretariat, and because of the excellence of its analysis, the author and the Carnegie Endowment have performed an important public service in preparing and publishing this volume.

In briefest summary this monograph is an analysis of the record of the League of Nations Secretariat with a view to extracting from its experience the lessons which will help in the building of the Secretariat of the future. So far as this reviewer is aware it is the only comprehensive study of that experience by one who was himself a participant in the work of the League of Nations. Other studies by outside students, or studies of specific phases of the Secretariat have, of course, been made. A brief summary of League of Nations experience was also published by a group of former League of Nations officials by the Royal Institute of International Affairs. The present volume is peculiarly useful as it is organized to highlight the issues presently faced by the UN.

One is struck by the similarity of problems faced by the UN today and the League of Nations 25 years earlier in organizing its Secretariat. The issues under discussion during meetings of the Preparatory Commission, and previously at San Francisco, regarding the character of the Secretariat, its Chief, and its staff had really all been faced previously by the framers and administrators of the League of Nations. A vast body of pioneer work was done in establishing the principles of international administration and in fashioning staff and human relations on an international basis. Upon this foundation the UN can build with considerable assurance.

This is not to say that the time for pioneering has passed. The very weaknesses of the Covenant and international action under its obligations present a challenge that will be answered in part through new administrative patterns and procedures. In addition the different character of the new organization—its greater emphasis upon executive authority in the field of security, the special tasks of the Economic and Social Council and the Trusteeship Council, the existence of several dynamic specialized agencies in fields heretofore relatively untouched by international activity, and the inclusion from the start of the United States and the Union of Soviet Socialist Republics as full-fledged participants—all of these are factors which demand clearer concepts regarding the role of the Secretary General and the organization of the Secretariat. It is already evident that the new Secretary General is expected to be a much more positive person whose functions will clearly enter the political as well as administrative fields. Greater safeguards for the international character of the staff and for the operations of the organization are being set up. The whole attitude toward the personnel of the international Secretariat seems to have changed from one of friendly skepticism toward missionaries in a good cause to one of deep concern that the new staff shall be adequate to conduct the world's governmental busi-

ness. The size of the staff will be larger, salaries will be higher, and the status of its personnel will be greatly enhanced. The influence of divergent national administrative practices and terminology upon the problem of getting agreement on principles or organization is also noticeable in discussions which now include the USSR and the US. Both countries bring new concepts based on national practices and the impact of both is potent in any discussion.

It is unnecessary to enumerate here the contents of this volume. It is enough to say that in presenting a detailed staff-view of the League Secretariat, which is both critical where necessary and complimentary where deserved, its author has provided an invaluable guide to those who are constructing the Secretariat of the future.

WALTER H. C. LAVES

*Bureau of the Budget*

*A Guide to the Practice of International Conferences.* By Vladimir D. Pastuhov. Washington: Carnegie Endowment for International Peace; 1945. Pp. xii, 275. Index. \$2.50.

Between 1925 and 1927 a Sub-Committee of the Committee of Experts for the Progressive Codification of International Law of the League of Nations elaborated a Report on the codification of the procedure of international conferences and the procedure for the conclusion and crafting of treaties. This report led to no results but the progress made in this matter since the Paris Peace Conference renders the question again timely. The little volume under review tries to sum up that experience and, indeed, does so very successfully.

The book covers the whole field of international conferences. Particular emphasis is placed on the Assembly, Council, and Committee meetings of the Geneva League. There is a good reason for that, as it was here and in the conferences of the I.L.O. that the greatest progress was made and a clear-cut tendency toward simplification, clarity, and efficiency was shown. The book also devotes a detailed study to the Pan-American Conferences, which recently have been strongly influenced in their technique by the development of the League and the meetings of the UNRRA.

The author starts with the problem of classification. Legally very important is the distinction between international conferences *stricto sensu* which take place in the field of general international law and those international gatherings which take place under an international Constitution; the latter are, strictly speaking, meetings of an international organ. The International Conferences of American States, it seems, are still international conferences *stricto sensu*; it remains to be seen whether the pending reorganization of the Inter-American System will render them meetings of an international organ.

International conferences (or congresses) are either public, semi-public or private, with many interrelationships between these different types.



The first part of the volume deals with the planning, staffing, and budgeting of international conferences; these are, however, important problems, as careful planning and preparation may sometimes determine success or failure of a conference.

The second and third parts deal with the manifold problems of organizing, directing, and coördinating an international conference. The last part treats the problems of recording, reviewing, and editing. Here a detailed guide for the drafting of treaties is given. Seventeen appendices (pp. 195-262) of fully reprinted documents serve as illustrations, followed by a very good bibliography.

The author has wholly excluded historical and political problems, and only slightly touched upon legal issues. The book deals primarily with the technical, administrative, and secretarial aspects of the subject.

The author, as a former member of the League Secretariat, now an official of the UNRRA, writes from a vast personal experience, coupled with the study of the corresponding literature and excellent theoretical knowledge of his subject. His experience, study, legal training and his comprehensive treatment, make the book an interesting, instructive, valuable, and authoritative handbook.

JOSEF L. KUNZ

*Of the Board of Editors*

*La Perte de la Qualité de Membre de la Société des Nations.* By Cajo Enrico Balossini. Geneva: *Etudes Juridiques et Politiques*; 1945. Pp. 102. 5 francs.

This is a brief review of the application of the provisions of the Covenant of the League of Nations with respect to the loss of membership. No state ceased to be member by the operation of Article 26, some 16 to 18 states lost membership by voluntary withdrawal in conformity with Article 1, paragraph 3, and one state was deprived of membership in virtue of Article 16, paragraph 4. The latter case, involving Russia, and the intended withdrawal of France are of some interest.

Contrary to the action taken by the Supervisory Commission of the League, the author doubts the legal validity of the communications of Generals Giraud and de Gaulle, of April 1943, requesting the President of the Commission to accept the view that the notice of withdrawal given by the Vichy Government on April 19, 1941, could not produce results because given under foreign pressure and that France should continue to be regarded as member of the League. He prefers to argue that following the total occupation of France by the enemy in November, 1942, the notice of withdrawal became suspended because from that moment on there existed in France no independent authority capable of manifesting a continued intent to withdraw at the time when the two year period was due to expire.

The procedure followed in the Russian case is criticised on the ground that the Council alone was competent to apply Article 16, paragraph 4. It alone

could decide that Russia had violated a covenant of the League and declare that it was no longer a member of the League. In actual fact the first decision was made by a committee of the Assembly, which the latter then adopted. The Council merely associated itself with the findings of the Assembly. There is, furthermore, no basis in the Covenant for the statement of the Council that Russia had placed herself outside the League and thus ceased to be a member. This criticism, pertinent though it is, by no means exhausts all the points from which the procedure of the League might be questioned.

Discussing the possible procedures for terminating the existence of the League, the author voices a preference for an orderly liquidation in accordance with the amendment procedure of Article 26, which requires ratification by the members of the Council and a majority of the other members. Otherwise a unanimous decision of all the members would be needed.

This is on the whole a useful contribution to a little known aspect of the League of Nations.

LEO GROSS

*Fletcher School of Law and Diplomacy*

*Peace and Security After the Second World War.* By various authors. Uppsala: Swedish Institute of International Affairs; 1945. Pp. 190. Swedish crowns 3.75.

This volume, written between the Dumbarton Oaks and San Francisco Conferences, contains the opinions and conclusions of a study group composed of a dozen prominent Swedish experts and statesmen. Five different aspects of the world peace and security problem were examined in the light of experiences gained mainly through participation in the activities of the League of Nations, while taking into account authoritative proposals worked out during World War II, official as well as semi-official, up to and including the Dumbarton Oaks drafts. Whereas a basic community of views prevailed within the group, dissenting opinions were expressed on certain points. For each aspect of the problem a *rapporteur* was appointed; their reports were discussed and approved by the group. They are as follows: *The Structure of International Organization*, by Herbert Tingsten, Professor of Political Science, University of Stockholm; *Coercive Measures to Maintain or Restore Peace and Security*, by Nils Herlitz, Professor of Constitutional, Administrative, and International Law, University of Stockholm; *The Procedure of Conciliation and Mediation*, by Östen Undén, Chancellor of Swedish Universities (now Minister of Foreign Affairs); *The Permanent International Court*, by Torsten Gihl, Assistant Professor of International Law, University of Stockholm; *Relation of Specialized Agencies in the Economic and Social Field*, by Gunnar Myrdal, Professor of Economics, University of Stockholm (now Minister of Commerce).

The principle guiding the experts was to determine how a world organiza-

tion should be constituted to achieve "its general, expressly stipulated or tacitly understood purposes." While primarily conceived to maintain peace, it was assumed that the Organization "will develop into a real organization for justice" and bring about "an increasingly strong and intimate union between the peoples of the world," the ultimate goal being "a world federation."

In respect of the Organization's structure, the Swedish group favored a greater degree of differentiation between the States Members than was envisaged at Dumbarton Oaks, through "gradation of their influence in the Assembly"; the experts underlined the pronounced concentration of authority in the Security Council which makes for more effective leadership than in the League of Nations; expressed doubts concerning the "rotation principle" as applied to the non-permanent Members of the Council, lest it be used to elect States which "are in fact entirely dependent on certain Great Powers"; stressed that the most marked difference between the League and the Organization outlined at Dumbarton Oaks is that in the latter "an absolute or qualified majority can make decisions binding on all Members of the Organization." They considered that as between the relative powers of the Council and the Assembly, the latter should have the right to formulate general principles "whether these bear on questions being dealt with by the Council or not", and should be entitled to "adopt resolutions and publish recommendations concerning the activities of the Council and related matters." The group approved of the principle that Members should not be at liberty to withdraw from the Organization. The absence of any definition of the prerequisites for and nature of the coercive measures contemplated was deemed a serious *lacuna*, and the advisability of abandoning the "sound basic idea behind the Covenant: that certain acts of aggression should be countered by coercive measures" was questioned. Whereas the principle that even a threat to peace can cause the application of coercive measures was hailed with satisfaction, the group regretted that the sole objective was to be "to maintain and restore peace and security", without concern for "the interests of international justice." To the basic question whether the coercive machinery should be applied to the Great Powers also, the experts unanimously replied in the affirmative. The majority considered that the State against which coercive action is contemplated should under no circumstances be entitled to vote.

In the field of conciliation and mediation, a series of substantial amendments to the Dumbarton Oaks draft were suggested with a view to strengthening and extending the functions of the Council, particularly in respect of disputes not covered by the procedure contemplated but falling within the scope of Art. 11 of the League Covenant.

The International Court of Justice was discussed on the basis of the Dumbarton Oaks proposal and the memorandum of the Committee of Jurists which met in London in February, 1944. The majority of the Swedish ex-

perts favored the separation of the Court from the political Organization. Should the Court, however, become part of that body, it should in their opinion nevertheless be accessible to all States, Members and non-Members. Its jurisdiction should be compulsory and provision should be made for the execution of its awards. The Court's functions should include advisory opinions, upon requests from the Organization and its agencies.

The chapter on the relation between the Security Organization and the specialized agencies is a plea for freedom from power politics in the economic and social sphere. This could be achieved by granting as much autonomy as possible to the relevant agencies so as to allow them to base their activities on "objective economic factors." It was felt that their chances of succeeding in long range planning, promotion of international collaboration, and education of the public might easily be crippled and diverted if they were intimately connected with and subordinated to the central Organization which would be mainly political in character. While it was recognized that economic policies of nations can lead to frictions and disputes, and that the Security Organization will need expert advice on economic matters, the hope was expressed that such considerations would not be allowed to determine the structure of the specialized agencies.

*Peace and Security After the Second World War* is a scholarly, statesman-like, and progressive contribution to the discussion of world security problems by a group of prominent Swedes many of whom would undoubtedly have represented their country at San Francisco had Sweden been invited to the Conference. Some of their *desiderata* were met by decisions taken there, others seem to have little chance of realization in the present circumstances, whereas a third part may prove useful at future stages of planning. Although it is less comprehensive and exhaustive than studies such as those produced by various agencies in this country, the work of the Swedish group ranks beside them in quality by virtue of the expert knowledge, constructive thinking, and long-range vision of its authors.

ESSY KEY-RASMUSSEN

*O.W.I. Regional Specialist for Sweden*

*War and Its Causes.* By L. L. Bernard. New York: Holt; 1944. Pp. x, 479. Index. \$4.25.

It is a comfort to a mere international lawyer to find out that even sociologists seem to know no more about the causes of war and their cure than he does. For this sociological study of war reveals no cause that has not been discussed before and suggests no remedy that has not already occurred to politicians or lawyers. In fact it draws heavily on the investigation of the complex problem of war led by an international lawyer, namely Professor Quincy Wright's work "A Study of War." While the author makes no original contribution to the understanding of war, and perhaps did not intend to do so, he has succeeded remarkably well in presenting a readable account of the manifold aspects of war.

The subject is treated in three parts. In the first the author discusses war as a social institution, its different types, militarism, attitudes toward and ideologies of war, and methods for predicting wars. In the second part he analyzes and classifies the causes of war, and in the third part he reviews some methods for abolishing war. Of chief interest is the second part. The causes of war are divided into "departmentalized" causes, that is "causes differentiated and classified according to the types or phases of human behavior involved in bringing about the war," and into "particularized" causes which he defines as "causes distinguished and arranged according to their functional significance in producing armed strife regardless of the aspects of behavior from which they spring." This terminology may not be quite clear to the uninitiated. However, the reader will find familiar faces in each of these major classifications. Among the departmentalized causes are the following: biological, psychological, economic, political, social or cultural, religious, moral and metaphysical. The particularized causes are indicated in pairs such as: incidental and fundamental, accidental and purposive, temporary and persistent, immediate and proximate, efficient and final, initial and ultimate, etc. The more important of these causes, particularly the departmentalized causes, are examined in some detail and illustrations are given. This survey reveals that in the author's view the psychological causes are not of fundamental importance. This distinction seems to be attributed to the economic causes and particularly to imperialism in its various forms. The treatment of this subject, however, is not as thorough as one would wish it to be and important students of the problem like Lenin, Langer, and Schumpeter are not even mentioned.

The analysis of the causes of war prompts the author to the somewhat trivial conclusion that "it is not possible to abolish or regulate war merely by wishing to do so." He accordingly proceeds in a very brief final chapter to discuss various means, used in the past, for resolving international controversies and to examine seven ways for establishing peace in the future. Among the latter he includes the Atlantic Charter and the "Four Freedoms," the proposals for a United States of Europe, a strong league of nations, "Union Now" with Great Britain, a *pax Americana*, a rather radical change in the existing economic system, and finally the consolidation of peace in a world empire through conquest. The author definitely eliminates the last mentioned method but leaves it to the reader to make his choice among the first six alternatives. The author's preference seems to be divided between the Atlantic Charter and the "Four Freedoms" which would ensure peace if both of them were "accepted by all nations" and "written into their laws" and an economic system which would ensure greater prosperity and self-sufficiency for all nations. This leaves the problem of international organization unsolved and the reader somewhat sceptical.

LEO GROSS

*Fletcher School of Law and Diplomacy*

*The Anatomy of Peace.* By Emery Reves. New York: Harper; 1945. Pp. 275. \$2.00.

The thesis of this brief but highly challenging volume is not a new one. The sovereignty of the state has long been regarded by an increasing number of jurists as an anomaly in a world of interdependent states whose security and economic prosperity can be assured only by mutual coöperation. The only question which has troubled them would ask how far it is actually feasible to go in view of the diversities of national tradition and other practical obstacles to world federation.

Mr. Reves, urged on by an almost passionate conviction of the necessity of giving immediate application to his thesis, presents it in a series of categorical statements. He is not inhibited by problems of ways and means or by the existing state of public opinion. Sovereignty is the cause of international anarchy and war; the nation-state is the antithesis of a world of law and order. The San Francisco "league" is no more able to open the way to peaceful collaboration than was the League of Nations before it, for the Charter like the Covenant leaves intact the system of sovereign states. Internationalism is a futile remedy, for internationalism "recognizes as supreme the sovereign nation-state institutions and prevents the integration of peoples into a supra-national society."

"What is needed is—universalism," by which the author means a legal order between men beyond and above the existing nation-state structure. This would mean not the loss of liberty, but rather its protection. For the universal legal order would leave to the various local communities control over their local interests; its functions would be limited to the establishment of general rules of law in the fields where existing national interests clash; it would merely transfer to "universal institutions" the keeping of these interests which, if unregulated, inevitably bring nations into conflict. Paradoxically enough, the author is so strongly convinced of the ultimate remedial effects of unification that he is ready, if common consent and democratic methods can not attain it, to precipitate it "by conquest."

Now that the principle of the "sovereign equality" of states has been written into the Charter of the United Nations, students of international law will find much food for thought in the author's challenge to accepted traditions. For the thesis is basically sound, even if its immediate applicability is debatable.

CHARLES G. FENWICK

*Of the Board of Editors*

*The Control of Germany and Japan.* By Harold G. Moulton and Louis Marlio. Washington: The Brookings Institution; 1944. Pp. xi, 116. Index. \$2.00.

At a time when the retention in peacetime of the margin of military advantage gained by the arms and the diplomatic strategy of the United

Nations is a major consideration in every Allied chancellery this book has a genuine contribution to make. Written shortly after D-day, when victory was not even in sight, it presents the reader with an objective analysis of the nature of control measures and their immediate and ultimate incidence. Starting from the premise that the military and economic controls established at the close of World War I were both insufficient in their scope and inefficient in their enforcement, the authors reject as "hopelessly inadequate" the conception of war prevention by retaliatory measures after the fact of aggression, and concentrate their quest on feasible measures—"i.e., relatively easy to enforce"—to prevent the development of patent or latent war potential without throttling the economic life of the areas involved. Further, focussing attention on strategic industries rather than on strategic raw materials, the authors endeavor to determine—Marlio for Germany, Moulton for Japan—what measures will most effectually reduce war potential and draw the industrial fangs of our late enemies.

Marlio successively rejects the partition of Germany, or the creation of an independent Rhineland, or the isolation of Prussia as unlikely to be enduring or economically viable solutions, but he admits that the separation of East Prussia—now an accomplished fact—would be politically useful and advantageous, but ineffective in reducing industrial war-making power. After examining various means of exercising economic controls such as the reduction of Germany to an agricultural status or, conversely, forcing her to depend on foreign food imports, all of which have vital shortcomings from the economic point of view, Marlio turns to the problem of controls over minerals. In an expert analysis, he reveals the multiple sources of supply, the difficulty of preventing smuggling, the ease of substitution, and the amazing facilities for stock-piling. In short, he concludes that "it would be folly to rely upon the control of minerals as a permanent means of safeguarding the peace." While rigid surveillance of certain metallurgical industries is essential, particularly at the ingot manufacturing stage, Marlio places his principal reliance, in a technological age, on the control of the electric power industry, without whose work no substantial rearmament can take place.

In the second part of the work Moulton, after an initial survey of Japan's world position, discovers that during the decade from 1930 to 1940 Japan vastly increased her domestic plants and developed the necessary war potential in her colonies and in areas of China successively occupied. While Formosa was useful chiefly as a source of additional foodstuffs, Korea was heavily industrialized and Sakhalin developed as a source of fuels. Major reliance for the Greater East Asia campaigns was placed on the resources of North China and Manchuria, which were caught up with Japan's colonial possessions in the comprehensive four-year plan of 1938. It was the industrialization and not mere possession of these areas that gave Japan strength as a warring power.

Computing the consequences of a reduction of Japan to the pre-imperial status announced in the Declaration of Cairo, Moulton finds that without colonial or foreign supplies, Japan could not be a strong military power and, in particular, would not possess strategic metals or the bases for an important iron industry. Notwithstanding this, he concludes that Japan's economic position "will not be seriously jeopardized" by the loss of her colonies, holding that Japan's progress will depend in no small degree upon creative chemistry.

To say that the authors view with alarm a protracted continuance of economic controls, even if efficient, would be understatement. They fear that "a general system of economic control would work strongly against private enterprise"; would create "a new type of cartelization dominated by governments"; and would "inevitably exert a powerful influence in the direction of government domination of business, both in the international and the domestic fields" (96). Far preferable to them are military controls, with economic measures distinctly ancillary—and preferably "invisible." In the last analysis, the authors, though fearing the encroachment by the state on business enterprise under a system of economic sanctions, contemplate with even greater aversion the controls which a nationalist and autarchical program of defense would involve. Perhaps it is this comparative indication of their chagrin under either regime which causes this reviewer to chuckle a bit when scanning for a second time the reasons for the untrammelled commercial internationalism whose colors the authors have hardily nailed to their masthead.

MALBONE W. GRAHAM

*Of the Board of Editors*

*America's Place in the Peace.* By Nathaniel Peffer. New York: Viking; 1945. Pp. 227. Index. \$2.75.

*America: Partner in World Rule.* By William H. Chamberlin. New York: Vanguard; 1945. Pp. 304. Index. \$3.00.

These two volumes defining America's present position in the evolution of world organization express a common conviction that the United States now must make its power count in the movement which alone can avoid another war. Professor Peffer urges "big" adolescent America to be "adult," to be "politically intelligent." He sees no hope in an international system divided into senior and junior members according to a pattern where a small group decides everything and is safe from interference and the large one acts as a "kind of Greek chorus." Because a "polarization originating in mass and power forces America into every major war," Peffer thinks that from now on America must very consciously formulate its foreign policies. His volume tells the history of American foreign experience with emphasis on the inevitability of participation in workable plans for world organization.

Because Chamberlin feels that America's political success in the War is not



equal to the quality of the nation's military victory, he finds the lines of great power domination more pronounced than ever with huge power vacuums in Europe and East Asia. He sees two possible causes for war: (1) Soviet policy of unlimited expansion beyond its recognized frontiers, and (2) coalition of Asiatic peoples against western white imperialism. Like a good journalist Chamberlin blueprints an American foreign policy in which freedom of communication would transfer the "present harsh partnership in world rule into the more satisfactory status of a world community built on justice, equality, and order."

Both volumes are tracts for the times; they both suggest that in the international game it is now America's move.

PAUL F. DOUGLASS

*The American University*

*The Constitution and World Organization.* By Edward S. Corwin. Princeton: Princeton University Press; 1944. Pp. xiv, 64. \$1.00.

Mr. Corwin, Professor of Jurisprudence at Princeton, has long been known for his studies in those fields of Constitutional law which touch upon foreign relations. In this little volume he deals with alleged Constitutional obstacles to United States' active participation in an international organization. To a casual reader of newspapers the question might seem to be one devoid of interest since the approval of the Charter of the United Nations by the American Senate. But those who have listened to the Charter debate or have read carefully the transcript of the debate in both the Committee on Foreign Relations and the plenary session of the Senate must have noted the constant arguments over the Constitutional character of different measures necessary to supplement the Charter. While Mr. Corwin seems to have written his book mainly to show the possibility of bypassing the Senate in case of the latter's refusal to approve the United States' entry into the new organization, the principles of this book may apply as well to the issues still outstanding.

In discussing "sovereignty," Mr. Corwin points out that the greatest infringement of United States' sovereignty happened when she was forced to wage a total war. Any sacrifices of sovereignty that are necessary to limit the right of states to wage war upon one another will in the long run prove to be gains rather than losses.

Mr. Corwin does not believe that the Constitutional doctrines of "enumerated powers," of "separation of powers" and of "private rights" limit in any respect the powers of the national government in the field of foreign relations. In dealing with the Senate, he stresses the fact that it was intended to collaborate as a council with the President throughout the entire process of treaty-making, but that it preferred instead to split the treaty-making process in two parts: the Presidential function of formulating and negotiating the treaty and the Senatorial function of criticizing, amending,

and even rejecting. The success of the Charter in the Senate was in part due to what amounted to reverting to the original conception of collaboration between the Senate and the Executive and to assuring to the leaders of the Senate a major share in the process of formulating the treaty. Mr. Corwin's strictures on the diminishing role of the Senate in the conduct of American foreign relations have been contradicted by succeeding events. As long as the collaboration continues, it will not be necessary to resort to any drastic measures such as transfer by Constitutional amendment of the power to approve treaties from two-thirds of the Senate to the majority of both Houses of Congress. The legislative powers of the Congress provide in most instances alternative means for adopting international agreements if and when the Senate proves again recalcitrant.

The cause of peace abroad and the cause of democracy at home are, says Mr. Corwin, allied causes. Democracy is not safe in countries which are under the necessity not only of conducting their foreign relations but also of planning their domestic economies in the shadow of a threat of war. "When total war is the price of total sovereignty, the price is too high." Until war is effectively abolished, no people can have that freedom of decision and action which constitutes the substance of national independence.

The book under review is an effective plea for collaboration both in the national and in the international sphere. The smooth exposition is not impaired by the crusading zeal of the author. Though it is full of precedents it would appeal not only to lawyers but also to laymen. While not as exhaustive and detailed as some other monographs on the subject, it provides a good summary of the principal points involved.

LOUIS B. SOHN

Cambridge

*Documents on American Foreign Relations, July 1943-June 1944.* Edited by Leland M. Goodrich and Marie J. Carroll. Boston: World Peace Foundation; 1945. Pp. xxx, 725. Index \$3.75.

Documents concerning American foreign relations show a decided trend toward international organization in the sixth volume of this very useful series. This trend is not the result of selection on the part of the editors; it is imposed by the increased activity in that field. The book is a measure of the extent to which the United States has become interested in international organization; though it deals with the foreign relations of the United States it will be as useful to the internationalist as to the student of national affairs. The editors are probably wondering now what changes will be necessary in the next edition, in order to care for the documents of the many organizations now being created. They must probably anticipate increase, rather than decrease, of materials dealing with enemy affairs, and similarly for inter-American affairs; in the following volume, however, they might hope to gain space in both these fields. With the departure of Mr. Nelson Rockefeller

and his too capable support of a hemispheric organization superior to the United Nations, it is to be hoped that the number of repetitious and unnecessary inter-American instruments can be reduced.

The materials in this volume are gathered under fifteen chapter headings, the first two of which (comprising some 100 pages) deal with general statements of policy and with the conduct of our foreign relations. This second chapter could be a volume in itself. It might list treaties and arguments (as well as conferences) to which the United States is a party; it might include more matters of international law; it could reveal more fully the extent to which Departments of government other than the State Department are participating in the conduct of our foreign affairs. It must be admitted, however, that not all such matters could be packed into the volume as at present conceived and the reviewer would be willing to omit very little of what is in the current volume.

Sections follow which deal with the prosecution of the war and with relations with enemy states. Chapter V is an illuminating summary of the development of the informal United Nations into coherency and coöperation—though not yet into formal organization. Following this, as explained in the Preface, are a number of new chapter headings to cover the development, out of United Nations activities, or organization in various international fields: Relief and Rehabilitation; International Peace and Security; Trade and Finance; Transportation and Communications; Agriculture and Use of Natural Resources; Labor and Social Relations; and Cultural Relations. Such headings will doubtless expand in future issues. Finally, three chapters cover relations with geographic areas: Western Hemisphere (110 pages); Eastern Asia and the Pacific Area (23 pages); and Europe, Africa and Western Asia (63 pages).

To any student of American history or of international affairs, this volume, and the whole series, is indispensable. It is well printed and reasonably priced; earlier volumes are still obtainable. Editorial comment helpfully connects the various documents, in this and in earlier volumes, and makes it possible to trace out a connected and detailed history of any one subject. It is well organized and well indexed.

CLYDE EAGLETON

*Of the Board of Editors*

#### NOTES

*Algunas Aspectos de la Doctrina del Derecho en Kant.* By Alfredo M. Egusquiza. Mendoza, Argentina: D'Accurzio; 1945. Pp. 103. \$2.50. In this small book the Argentine author seeks to "examine Kant's philosophy to discover within his critical system his thought concerning law," but to preserve unity in the study he finds it necessary to omit "consideration of the place of the Kantian point of view in the historic evolution of the philosophy of law, all investigation of the evolution of Kant's own thought to its final form, and the examination of critical commentaries upon Kant's theory of

law," so that the work comes down to an "objective exposition of the thought of the philosopher as the author understands it." Unfortunately this reduces the book to more or less accurate paraphrases of passages extracted from Kant's writings, mainly the *Metaphysical Elements of Law*, dating from 1797, when his powers were already in decline, and thought by many commentators to be but a labored and sterile schematization for the field of law of propositions and ideas already set up and discussed in other more appropriate fields. The bibliography, of Spanish and French books only, suggests that the author knows no German and had to take his knowledge of his subject already transmuted once or twice through a translator's brain; while the extensive and almost exclusive use of Wilhelm Windelband (*Historia de la Filosofía*, Tomo IV, *El Idealismo Alemán*, Spanish version, Mexico, 1942) for critical comments would indicate an unfortunate dearth of acquaintance with the more notable historians of philosophy. The book throughout demonstrates forcefully anew the difficulty of close philosophizing in Spanish, from the paucity of adequate nomenclature and the indefiniteness and ambiguity of most of the hackneyed general terms.

GORDON IRELAND

*Catholic University of America*

*Inter-American Coffee Board, 2nd Annual Report, 1942-43.* Washington: published by the Board, 1943. Pp. 95. This report follows closely the general outline of the first, reviewed in this JOURNAL, Vol. 38 (1944), p. 176, providing a description of the major activities of the Board, a summary of the minutes of its meetings, and the text of resolutions and other documents. The Board continued during its second year to adjust quotas and to allow advance shipments in order to meet the unusual conditions of the market brought about by the war. It is this flexibility of international control provided by the work of the Board that commends itself to most students of international administration. One of the most important developments during the year was the establishment of a Trade Advisory Committee consisting of seven prominent representatives of the United States coffee industry so that the Board would have the "views and sentiments" of the domestic coffee industry of this country. Looking ahead to the future the Board appointed, on July 6, 1943, a Committee on Post-War Problems which has been considering a modification of the quotas for markets outside the United States.

NORMAN HILL

*University of Nebraska*

*International Administration: A Bibliography.* Compiled by William C. Rogers. With a foreword by Quincy Wright. Chicago: Public Administration Service; 1945. Pp. vi, 32; mimeographed. \$1.00. This bibliography on international administration divides its material into two periods: prior to and subsequent to 1939; within each period books, pamphlets, and articles are separately listed. The bibliography was prepared primarily for public officials. With this purpose in view the bibliography has its merits but it will also be useful for scholars.

From a scientific point of view, however, it is insufficient. The reasons are twofold. The first reason is that the author evidently has no clear conception of "international administration." Literature on international courts, mixed claims commissions, and so on has no place in a bibliography on international administration. On the other hand some general treatises

which dedicate to the subject only a few pages are listed. The bibliography of the Inter-American System is poorly represented.

The second reason for the insufficiency is the voluntary restriction to publications in English. The author's argument that few American public officials "find it necessary to be linguistic" is true enough. But the second argument that the greatest contributions anyway have been made by the English-speaking world, is stating too much. Exactly in this field the contributions in Italian, French, and German, and, with regard to Pan-America, also in Spanish, are very important, and their inclusion would cure the meager air of this bibliography. As to the argument that foreign language publications "are frequently unavailable throughout the country," this is hardly just toward the magnificent libraries of this country. All the foreign publications listed by this reviewer in his article on international administration in the November, 1945, number of the Iowa Law Review are, for instance, available at the Harvard Law School Library.

JOSEF L. KUNZ

*Of the Board of Editors*

*A Price for Peace.* By Antonin Basch. New York: Columbia University Press; 1945. Pp. xiv, 209. Index. \$2.50. *Economic Stability in the Post-War World.* By the League of Nations Delegation on Economic Depressions (Report, Part II). Geneva: League of Nations; 1945. Pp. 319. Diagrams. Tables. Index. \$3.00. A price for peace includes, in Dr. Basch's view, the reconstruction and integration of the specialized European economy which, before World War II, was the most important factor in world trade, and the reorientation of that economy into an expanding world economy founded on the multilateral world trading system. While Dr. Basch is mainly concerned with the economy of Europe, he does not neglect the changes wrought by the war in other areas of the world, especially the United States, in depicting the scope and nature of the economic problems which confront the post war world. To this reviewer the most significant contribution of the book lies in its recognition that the success or failure of what is accomplished in Europe in the post-war years will be measured in terms of the basic objectives of the people: a high level of employment and a rising standard of living. These same objectives, it will be remembered, constituted a main plank in the political platforms of both major political parties in this country during the last presidential campaign.

Dr. Basch has produced an objective, carefully reasoned, and well documented book of about 200 pages, written in a style which will make it not only intelligible and interesting to the layman but also a source which the professional economist will examine with pleasure and profit. It is a welcome addition to an expanding literature which seeks to explain the nature of the economic world which is emerging and the direction which the economic activities of the various nations must take if the peoples of the world are to achieve their age old ambition of universal and permanent peace. The layman will find here excellent background material on which to base an intelligent evaluation of such current problems as the loan to Great Britain, the Congressional debate over the UNRRA appropriations, and post war trade relations with the USSR.

At about the same time that Dr. Basch's book appeared, Part II of the Report of the Delegation on Economic Depressions of the League of Nations was issued. It will be recalled that in October, 1937, the Assembly of the League instructed the Economic and Financial Organization of the League

to consider measures useful "for preventing or mitigating economic depressions." The Delegation appointed to prepare a report on the subject issued the first part of its Report in April, 1943. This part dealt with the "broad lines of policy which . . . governments should pursue in order to effect as smooth and as rapid a transition as possible from war to a peace economy." Part II of the Report was issued in March, 1945," and deals with the "longer term problem of securing economic stability and the fullest possible use of productive resources, once those resources have been effectively readapted to peacetime requirements."

Part II of the Report continues the high standards established in Part I. Together they form a major contribution to the technical literature dealing with the fundamental problems which confront the post-war world.

LAURENCE DE RYCKE

*Occidental College*

*Compass of the World.* Edited by Hans W. Weigert and Vilhjalmur Stefansson. New York: Macmillan; 1945. Pp. xvi, 466. Index. \$3.50. Several disciplines other than history, political science, and law have material to offer that is of vital significance to an understanding of world affairs. One of them is geography, and it is the purpose of this book to make easily available a number of essays which, implicitly at least, emphasize the relationship between geography and politics. One does not need to agree with the gross over-simplification of the editors, who claim that "history is geography set in motion," to say that the book is valuable—though its value is limited by the fact that it is a symposium, and therefore somewhat lacking in unity and coherence, and by the fact that most of the essays have appeared previously in other publications. Nor, as is pointed out in the first chapter, does one need to fear that a study of the relationship of geography to politics necessarily leads to the Nazi brand of *Geopolitik*.

"Mercator-mindedness" is an object of attack repeatedly through the book. Misapprehensions concerning the most direct routes from America to Europe and Asia, based on reliance on the Mercator projection, are set right, making apparent the wartime and peacetime significance of the Arctic and adjacent regions. There are therefore studies of these regions with regard to maritime and air transport and other economic possibilities. And, although it is not entirely attributable to Mercator, the "Myth of the Continents" is exploded by very cogent explanations of the fact that the seas are frequently more effective than land as connecting links.

Several articles, including one by Mackinder himself, revolve around the "heartland" concept and the relationship between location, climate, and power. Unfortunately, however, they contribute little that is new; in particular they make no attempt to discuss the relationship between the rise of the Soviet Union in the heartland and Mackinder's famous theory that control of the heartland means control of the world.

Some very penetrating reflections on Asia appear, particularly in the essay on the potential importance of the Sino-Russian border regions and the policies of Moscow, Chungking, and Washington as they relate to those regions. And finally, demography enters the picture in a chapter on "The Shifting Balance of Man Power."

Although few may wish to read this book from cover to cover, many will find its individual articles useful for special purposes.

VERNON VAN DYKE

*School of Advanced International Studies, Washington, D. C.*

*Our Muddled World.* Edited by Ernest Minor Patterson. Philadelphia: American Academy of Political and Social Science; 1945 (*Annals*, Vol. 420). Pp. viii, 195. Index. \$2.00. This series of addresses and papers on international problems of the highest contemporary importance during the year 1945 has the advantage not alone of timeliness and relevance, but also of real significance. It is not always certain that addresses delivered before an organization lend themselves to subsequent publication. It seems to the reviewer that the reading of these papers is more fruitful than hearing them.

Taking the intriguing title, "Our Muddled World," the conferees realize that not Britain alone, but the world must find a way to "muddle through," if some better method cannot be found. This is an attempt to seek and discover that better method. Delivered in advance of the San Francisco Conference and the German and Japanese surrenders, they serve not alone as a preview of the problems just ahead, but suggest constructive solutions to the thorny situations which they envisage.

Among the papers on "the political aspect," the one by Philip C. Nash entitled "Spring Leaves on Dumbarton Oaks" is the most suggestive and indeed the most constructive. Building on the foundations of the Dumbarton Oaks Proposals, he offered a frame of reference which, where followed, improved the ultimate Charter, and where not followed, had the opposite effect. It is the work of the student buttressed by experience and common sense.

The article by Eugene Staley on "The Economic Aspect of Stable Peace" is the best summary the reviewer has found of the conditions for sound world economy, of the obstacles to sound policy, and of the measures essential to bring about a condition of soundness. Howard S. Piquet pleads unconsciously perhaps for the superiority and greater significance of "functional international organization" over that of the universal security organization set up at San Francisco, although he looks with hope to its future achievements. Past records in the latter field he describes as not "impressive." Piquet, like Mander on the Pacific Coast, makes a strong argument which perhaps cannot be refuted. Both urge the record of non-political, technical international organizations, commissions, and unions as having lessons of the highest value for security organizations like the League of Nations and the United Nations Organization. Both are correct. However, the FAO, of which Mr. Piquet writes especially, can no more do the work of the UNO than the Department of Agriculture of the United States Government can do the work of the President, the Congress, and the Army and Navy.

Concrete problems are broken down on a regional basis. Interesting articles are included under sections on Anglo-American relations, Europe, Palestine, and Latin America. The publication has the advantage of both the topical and geographical division of subject matter.

Many publications of separate articles by different authors merely add up to the sum of their parts. This amounts to much more. No article is dull, irrelevant, or uninteresting. A few are of a high order of merit. All may be read with profit.

CHARLES E. MARTIN

*University of Washington*

*The Basis of Soviet Strength.* By George B. Creszey. New York: Whitteley House; 1945. Pp. xi, 287. Maps. Photographs. Index. \$3.00. This book is a very useful compendium of geographic and economic data presented in a very readable manner for the layman and student of the

Soviet Union. As indicated by the author, it has grown out of three visits to the Soviet Union. A considerable part of the book originally appeared in *Asia's Lands and Peoples* by the same author, but it has been extensively rewritten and new chapters have been added. All the pictures are new.

This revised treatise presents an examination of the geography, natural resources, manpower and industrial potential of the USSR. It is difficult to summarize and evaluate the book, or to single out any special phases for comment because it is mostly a collection of factual data, charts, tables, and other relevant statistics bearing on the economic geography of the USSR.

The author appears to be at home in describing climatic characteristics, natural vegetation, soil, geographic regions and geomorphic realms, distribution of population, natural resources, and geological bases. When, however, he indulges in analyzing sociological trends and political implications he obviously makes categorical statements which could be readily challenged on the basis of available published Soviet materials in this country. To illustrate: Professor Cressey states that "Eighty per cent of the people belong to the so-called white race, but in the absence of racial antagonism there is extensive intermarriage. From the standpoint of anthropology, the Russian stock is well developed and virile. If the land of Russia has not kept pace culturally with western Europe in modern centuries, it is not due to any inherent or racial shortcoming but rather to geographic and political factors" (p. 45).

Similarly, predictions of any kind are fraught with danger, especially in the fields of social sciences where we deal with so many imponderable factors. It is, therefore, surprising to note the categorical statement that "The nine million square miles of this area have an average density of but 15 per square mile, with vast areas that are essentially empty. These numbers will increase but the population-supporting capacity is low. It does not seem likely that the inhabitants of interior Asia will ever be of first rank in world importance" (p. 244).

In the chapter entitled "American Relations with the Soviet Union" the author argues that the Soviet Union will certainly produce just as much of her own things as possible and will end any unbalanced foreign trade at the earliest possible moment. According to Mr. Cressey, Russia is so anxious to industrialize that she will be willing to accept the necessary imports under any appropriate terms in order to get under way again. This conclusion is seemingly at variance with analyses recently published in economic journals in the Soviet Union and with the arguments presented by the Soviet delegates at Bretton Woods.

As Chairman of the Department of Geology and Geography at Syracuse University, Professor Cressey is one of the few competent men in the field who is qualified to discuss the basis of Soviet strength from the point of view of economic geography. It is to be regretted, therefore, that he has not made use of the massive volume entitled *Electric Power Development in the USSR* which was prepared by members of the Scientific staff of the Krzizhansky Power Institute of the Academy of Sciences of the USSR in Moscow in English and submitted to the Third World Power Conference held in Washington in 1936.

In the light of current problems in the field of Soviet-American relations, Mr. Cressey has unquestionably made a decided contribution toward a better understanding of the USSR and his book should be used widely by American college students.

CHARLES PRINCE

United States Chamber of Commerce



*These Are the Russians.* By Richard T. Lauterbach. New York: Harper; 1945. Pp. 368. \$3.00. In 1945 Russia loomed ever larger in the news and minds of the western world. Everywhere the people and statesmen felt the impact of Soviet power. A new, revolutionary power taking a new position in the world meant new strains, all the more severe because they were bound to come. The interpretations of Russian moves, unfortunately, have taken on a semi-religious character. It seems practically impossible today to discuss Russia dispassionately in the United States. To point out the mistakes of the foreign policies of Washington and London is a standard practice. But to even hint that Russia's foreign policies might be criticized means to commit hara-kiri in the eyes of the pro-Russian spokesmen who divide the American people into those who are "for" and who are "against" Soviet policies. Those who try to stand on the impartial academic sidelines are branded as "Fascists."

Lauterbach is definitely an exception to the flood of books praising or condemning Russia. As the Moscow Correspondent for *Time* and *Life* (1943-44) he traveled extensively throughout Russia and gives us a vivid picture of how the Russians live and think, the tremendous work of reconstruction that has gone on within the sound of German guns, of the advances made by Russian scientists, of the great industrial migration into the hinterland of Siberia, of German atrocities, of the changes that have gone on within the Soviet Union in the recognition of freedom of worship and revised marriage and divorce laws, and of the Soviet attitude towards her neighbors and her allies. From the standpoint of the specialist in international relations, the most valuable part of the book is Chapter 10, "The World from Moscow" (pp. 328-350), which summarizes the basic fears which keep worrying the Russians in their attempt to work smoothly with the United States and Britain.

To read this book is to catch a glimpse of what is Russia today. In fact one is pressed into superlatives in praising this dispassionate and calm description of the undercurrents which make the Russian people and their leaders tick.

JOSEPH S. ROUCEK .

*Hofstra College*

*Poland and Russia 1919-1945.* By James T. Shctwell and Max M. Laserson. New York: Carnegie Endowment for International Peace; 1945, for Carnegie Endowment for International Peace. Pp. viii, 114. Map. Appendices. \$2.25. This little volume presents the background and recent history (up to the Berlin Conference in the summer of 1945) of a live problem which has "stirred the fires of international discord" between the Great Powers and is yet unsettled. The authors believe the Polish problem is "to a large extent the first great test of the plans of the United Nations to make good their adherence to the fundamental principles adopted at San Francisco." They do not pursue this thought, but limit themselves to an exposition of the elements of the problem—the salient facts of history, the attitudes and points of view, the traditions and deals, the culture and economy of the two parties and to a degree of their important neighbors. These are discussed under the chapter headings: The Curzon Line, Poland, The Ukraine, White Russia, Soviet Union, Soviet-Polish Relations, Yalta Conference, A New Polish Government. The history of the rebirth of Poland, the Riga Line, the Curzon Line, the 1939 Line the breach of relations, the Russian advance and the rise of the new Polish Government are among

the subjects covered, together with the reactions of outsiders interested in these events. The study is objective and "does not make recommendations" or take sides.

L. H. WOOLSEY

*Of the Board of Editors*

*China's Post-War Markets.* By Chih Tsang. New York: Macmillan; 1945. Pp. xi, 239. Appendix. Index. \$3.50. Mr. Chih Tsang is an experienced Chinese businessman with a taste for economic analysis and the gift of writing simply and clearly. In consequence his approach to his subject is admirable, and what he has to say packed with common sense. His book should go a long way toward deflating some of the inflated nonsense that has characterized too much of our current thinking with respect to China's post-war trade potentials.

Naturally, the author bases his analyses upon certain assumptions which take up the whole of Chapter I, and in general they may be said to be reasonable. His assurance, however, of China's early achievement of political unity and fiscal stability is the expression of the hope of his people, rather than an examination of the factors involved. Japan's sudden surrender, moreover, leaving China's occupied territories economically and industrially intact, unquestionably modifies some of Mr. Tsang's assumptions with respect to China's immediate needs.

The author greatly simplifies his study for the reader by dividing it into chapters dealing consecutively with Post-war China as a market for capital goods, for producers' goods, and for consumers' goods; he summarizes the whole in a sound and objective discussion of what China should be able to buy in the immediate post-war years. His estimate (p. 116) that the total value of China's purchases in the immediate post-war period will probably run around U. S. \$374,700,000 per year, an increase of more than 25 per cent over the average import value of the pre-war years 1935-1937, is sufficiently conservative to be "on the safe side," and much below that of other prognosticators. In arriving at this figure, however, the author has not taken into account the rising price level in terms of United States currency during the war years, and he suggests that a rise of 30 per cent over pre-war price levels would raise the annual value of China's total post-war purchases to \$487,110,000, an increase of 62 per cent over the immediate pre-war level.

Mr. Tsang's discussion of post-war prospects for China's export trade is equally conservative, and his conclusion (p. 149) that "The total value of post-war Chinese exports may be estimated at around \$178,600,000 a year," is certainly reasonable. Should, however, the price level of Chinese exports be increased by 30 per cent of their pre-war levels for instance, says the author, their total value during this period would amount to about \$232,000,000 a year.

These figures would leave an excess in value of imports over exports of approximately \$255,110,000 annually.

One of the most interesting chapters in the book is that in which Mr. Tsang discusses China's means of payment. To overcome the country's trade deficit of more than \$250,000,000 annually he proposes, as one means, reparations from the enemy. Under another heading he discusses in detail China's unused credits abroad, remittances from its citizens in foreign lands, and funds from UNRRA. Loans from foreigners or foreign nations, new investments from the same source, and foreign ownership of foreign enterprises, or properties, in China are given appropriate consideration—though

there are some phases of these subjects upon which Mr. Tsang is discreetly silent.

All in all the author has devoted to his subject a realistic and timely study, which will be read with keen interest everywhere by students of the international economic position of China. What he has said is based upon justifiable assumptions or factual evidence, no doubt: it is what he has not said that is disturbing. Nowhere in his study does Mr. Tsang produce evidence that China's present government will set up a code of commercial laws, or a judicial system, which will guarantee to western investment in China the attractive *sine qua non*—security and profit. Finally, but most important in the view of many, he practically ignores the subject of agricultural reform without which China cannot absorb the great industrialization dreamed up for it, because the purchasing power of its agricultural population, the market for most of what it produces industrially, must depend upon the size of the surpluses produced on its farms.

CHARLES K. MOSER

*United States Department of Commerce*

*The Netherlands and the United States.* By B. H. M. Vlekke. Boston: World Peace Foundation; 1945. Pp. vi, 96. \$50. Dr. Vlekke has packed a great deal of historical, political and economic information into a small pamphlet. He offers a short historical survey of the relations of the Netherlands and the United States, a description of the structure of the Netherlands Kingdom itself, as well as of its overseas territories, and a suggestive study of the post-war problems of both.

There is very little literature on the Netherlands although Dr. Vlekke himself has made some striking contributions to it in recent years. He is particularly successful in clarifying the essentially "open door" characteristics of the Dutch territories. Before the war the Netherlands Indies held second place in Asia as an American investment area, being surpassed only by the Philippine Islands. Exports from the United States to the Netherlands always exceeded imports from the Netherlands, sometimes three to one, and this was another indication of the indirect American interest in the Dutch markets for East Indies exports which supplied the foreign exchange with which the balance of the American export surplus was settled. The total figures for exports to other nations do not reveal the pronounced American interest in Dutch trade until they are expressed in terms that correct for the size of the population involved. Per capita Dutch purchases of American goods far exceeded those of Germany or France, and were about equal to those of Great Britain.

In a similar way American interest in the Netherlands Indies is much greater than is commonly realized. Direct capital investment in oil and in combined American-Dutch agricultural enterprises was expanding rapidly, and few of our recent crop of "South East Asia" experts seem to realize the American policy regarding synthetic rubber may have a far more marked effect on "Indonesian" welfare than hours of rhetoric about the Atlantic Charter in Java. Sixty per cent of the East Indian rubber output in 1940 was produced by small Indonesian landholders, and before the war this figure was increasing. Political developments designed to broaden native participation in government have been continuous for the past generation.

Dr. Vlekke manages to give a graphic picture of the complexity of the problems of an old cultural unit with high and extremely modern economic and technical standards. It will leave American readers with some anxious

questions as to the "realism" of some of our current fashions in diplomacy which focus entirely on "bigness" and overlook such qualitative considerations as are involved in the proportional importance of countries like the Netherlands or Belgium, which, although small in comparative statistics of a general type, have been more important in America's share in world trade than "big powers" like the Soviet Union or China.

HARRY D. GIDEONSE

*Brooklyn College*

*The Senate and the Versailles Mandate System.* By Rayford W. Logan. Washington: The Minorities Publishers; 1945. Pp. viii, 112. Appendix. Index. \$2.00. Because of the noticeable similarities between the Versailles mandate system and the trusteeship plan of the United Nations Charter Professor Logan, of Howard University, has published in this brief volume an extract from a forthcoming larger work on mandates as a reminder of the difficulties of finding a viable solution of the problem.

In dedicating his book to 750,000,000 dependent people he defines his approach. His thesis is that whereas the Senatorial opponents of the League Covenant were often vituperative partisans, its supporters were only lukewarm partly because the humanitarian provisions of the Mandates article and others related to it applied mainly to Negroes and other dark peoples, in whose welfare Southern Senators and their Northern Democratic colleagues had no interest.

The author examines in detail the *Congressional Record* from 1917 to 1920 in the light of his hypothesis; he finds that the race issue came to the surface occasionally, but that generally its influence was latent. In describing Senatorial polemics he justly points out how rhetoric often masks the true purpose of a speaker. In his chronicle the variant forms of the white man's burden and their isolationist antitheses appear frequently. While attention is focused upon the Mandates article of the Covenant, the author places his analysis in perspective by describing with some thoroughness the progress of the debates in the Senate on the treaty as a whole, and of other articles of the Covenant dealing with dependent peoples. The specific application of the general arguments for and against mandates concerns the rejection of an American mandate in Armenia. In this matter Professor Logan sees no more altruism on the part of the Senators than he finds present now in the settlement of international post-war problems.

The book, written from a special viewpoint, illuminates one more facet of the debates surrounding the ratification of the Treaty of Versailles, and as such makes a contribution to the already large literature on the subject.

EDWARD G. LEWIS

*University of Texas*

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\* Mention here neither assures nor precludes review later.

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WILBUR S. FINCH

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## UNITED NATIONS

### ITALIAN MILITARY ARMISTICE\*

*September 3, 1943*

SICILY,

*September 3rd, 1943.*

The following conditions of an Armistice are presented by

General DWIGHT D. EISENHOWER,

Commander-in-Chief of the Allied Forces, acting by authority of the Governments of the United States and Great Britain and in the interest of the United Nations, and are accepted by

Marshal PIETRO BADOGLIO

Head of the Italian Government.

1. Immediate cessation of all hostile activity by the Italian armed forces.
2. Italy will use its best endeavors to deny, to the Germans, facilities that might be used against the United Nations.
3. All prisoners or internees of the United Nations to be immediately turned over to the Allied Commander-in-Chief, and none of these may now or at any time be evacuated to Germany.
4. Immediate transfer of the Italian Fleet and Italian aircraft to such points as may be designated by the Allied Commander-in-Chief, with details of disarmament to be prescribed by him.
5. Italian merchant shipping may be requisitioned by the Allied Commander-in-Chief to meet the needs of his military-naval program.
6. Immediate surrender of Corsica and of all Italian territory, both islands and mainland, to the Allies, for such use as operational bases and other purposes as the Allies may see fit.
7. Immediate guarantee of the free use by the Allies of all airfields and naval ports in Italian territory, regardless of the rate of evacuation of the Italian territory by the German forces. These ports and fields to be protected by Italian armed forces until this function is taken over by the Allies.
8. Immediate withdrawal to Italy of Italian armed forces from all participation in the current war from whatever areas in which they may now be engaged.
9. Guarantee by the Italian Government that if necessary it will employ all its available armed forces to insure prompt and exact compliance with all the provisions of this armistice.
10. The Commander-in-Chief of the Allied Forces reserves to himself the right to take any measure which in his opinion may be necessary for the protection of the interests of the Allied Forces for the prosecution of the

\* *Department of State Bulletin*, Vol. XIII, No. 333 (November 11, 1945), p. 748.

war, and the Italian Government binds itself to take such administrative or other action as the Commander-in-Chief may require, and in particular the Commander-in-Chief will establish Allied Military Government over such parts of Italian territory as he may deem necessary in the military interests of the Allied Nations.

11. The Commander-in-Chief of the Allied Forces will have a full right to impose measures of disarmament, demobilization and demilitarization.

12. Other conditions of a political, economic and financial nature with which Italy will be bound to comply will be transmitted at later date.

The conditions of the present Armistice will not be made public without prior approval of the Allied Commander-in-Chief. The English will be considered the official text.

Marshal PIETRO BADOGLIO

*Head of the Italian Government*

DWIGHT D. EISENHOWER

*General, U. S. Army*

*Commander in Chief, Allied Forces*

by:

GIUSEPPE CASTELLANO

*Brigadier General, attached to The Italian  
High Command*

by:

WALTER B. SMITH

*Major General, U. S. Army  
Chief of Staff*

Present:

Rt. Hon. HAROLD MACMILLAN

*British Resident Minister, AFHQ*

ROBERT MURPHY

*Personal Representative of the President of  
the United States*

ROYER DICK

*Commodore, R.N.*

*Chief of Staff to the C. in C. Med.*

LOWELL W. ROOKS

*Major General, U.S. Army*

*Assistant Chief of Staff, G-3, AFHQ*

FRANCO MONTANARI

*Official Italian Interpreter*

Brigadier KENNETH STRONG

*Assistant Chief of Staff, G-2, AFHQ*

#### ADDITIONAL CONDITIONS OF ARMISTICE WITH ITALY\*

*September 29, 1943*

Whereas in consequence of an Armistice dated September 3, 1943 between the United States and United Kingdom Governments acting in the interests of all the United Nations on the one hand, and the Italian Government on the other hand, hostilities were suspended between Italy and United Nations on certain terms of a military nature.

And whereas in addition to those terms it was also provided in the said Armistice that the Italian Government bound themselves to comply with other conditions of a political, economic and financial nature to be transmitted later;

And whereas it is convenient that the terms of a military nature and the said other conditions of a political, economic and financial nature should

\* *Department of State Bulletin*, Vol. XIII, No. 333 (November 11, 1945), p. 749.

without prejudice to the continued validity of the terms of the said Armistice of September 3, 1943, be comprised in a further instrument;

The following, together with the terms of the Armistice of September 3, 1943, are the terms on which the United States, United Kingdom and Soviet Governments, acting on behalf of the United Nations, are prepared to suspend hostilities against Italy so long as their military operations against Germany and the Allies are not obstructed and Italy does not assist these powers in any way and complies with the requirements of these governments.

These terms have been presented by General DWIGHT D. EISENHOWER, Commander-in-Chief, Allied Forces, duly authorized to that effect;

and have been accepted unconditionally by Marshal PIETRO BADOLIO, Head of the Italian Government representing the Supreme Command of the Italian land, sea and air forces and duly authorized to that effect by the Italian Government.

1. (A) The Italian land, sea and air forces wherever located hereby surrender. Italian participation in the war in all Theaters will cease immediately. There will be no opposition to landings, movements or other operations of the Land, Sea and Air Forces of the United Nations. Accordingly, the Italian Supreme Command will order the immediate cessation of hostilities of any kind against the Forces of the United Nations and will direct the Italian Navy, Military and Air Force authorities in all Theaters to issue forthwith the appropriate instructions to those under their Command.

(B) The Italian Supreme Command will further order all Italian Naval, Military and Air Forces or authorities and personnel to refrain immediately from destruction of or damage to any real or personal property, whether public or private.

2. The Italian Supreme Command will give full information concerning the disposition and condition of all Italian Land, Sea and Air Forces, wherever they are situated and of all such forces of Italy's Allies as are situated in Italian or Italian occupied territory.

3. The Italian Supreme Command will take the necessary measures to secure airfields, port facilities, and all other installations against seizure or attack by any of Italy's Allies. The Italian Supreme Command will take the necessary measures to insure Law and Order, and to use its available armed forces to insure prompt and exact compliance with all the provisions of the present instrument. Subject to such use of Italian troops for the above purposes, as may be sanctioned by the Allied Commander-in-Chief, all other Italian Land, Sea and Air Forces will proceed to and remain in their barracks, camps or ships pending directions from the United Nations as to their future status and disposal. Exceptionally such Naval personnel shall proceed to shore establishments as the United Nations may direct.

4. Italian Land, Sea and Air Forces will within the periods to be laid down by the United Nations withdraw from all areas outside Italian territory notified to the Italian Government by the United Nations and proceed to

areas to be specified by the United Nations. Such movement of Italian Land, Sea and Air Forces will be carried out in conditions to be laid down by the United Nations and in accordance with the orders to be issued by them. All Italian officials will similarly leave the areas notified except any who may be permitted to remain by the United Nations. Those permitted to remain will comply with the instructions of the Allied Commander-in-Chief.

5. No requisitioning, seizures or other coercive measures shall be effected by Italian Land, Sea and Air Forces or officials in regard to persons or property in the areas notified under Article 4.

6. The demobilization of Italian Land, Sea and Air Forces in excess of such establishments as shall be notified will take place as prescribed by the Allied Commander-in-Chief.

7. Italian warships of all descriptions, auxiliaries and transports will be assembled as directed in ports to be specified by the Allied Commander-in-Chief and will be dealt with as prescribed by the Allied Commander-in-Chief. (NOTE: If at the date of the Armistice the whole of the Italian Fleet has been assembled in Allied ports, this article would run—"Italian warships of all descriptions, auxiliaries, and transports will remain until further notice in the ports where they are at present assembled, and will be dealt with as prescribed by the Allied Commander-in-Chief.")

8. Italian aircraft of all kinds will not leave the ground or water or ships, except as directed by the Allied Commander-in-Chief.

9. Without prejudice to the provisions 14, 15 and 28 (A) and (D) below, all merchant ships, fishing or other craft of whatever flag, all aircraft and inland transport of whatever nationality in Italian or Italian-occupied territory or waters will, pending verification of their identity and status, be prevented from leaving.

10. The Italian Supreme Command will make available all information about naval, military and air devices, installations, and defences, about all transport and inter-communication systems established by Italy or her allies on Italian territory or in the approaches thereto, about minefields or other obstacles to movement by land, sea or air and such other particulars as the United Nations may require in connection with the use of Italian bases, or with the operations, security, or welfare of the United Nations Land, Sea or Air Forces. Italian forces and equipment will be made available as required by the United Nations for the removal of the above mentioned obstacles.

11. The Italian Government will furnish forthwith lists of quantities of all war material showing the location of the same. Subject to such use as the Allied Commander-in-Chief may make of it, the war material will be placed in store under such control as he may direct. The ultimate disposal of war material will be prescribed by the United Nations.

12. There will be no destruction or nor damage to nor except as authorized or directed by the United Nations any removal of war material, wireless, radio location or meteorological stations, railroad, port or other installations or in

general, public or private utilities or property of any kind, wherever situated, and the necessary maintenance and repair will be the responsibility of the Italian authorities.

13. The manufacture, production and construction of war material and its import, export and transit is prohibited, except as directed by the United Nations. The Italian Government will comply with any directions given by the United Nations for the manufacture, production or construction and the import, export or transit of war material.

14. (A) All Italian merchant shipping and fishing and other craft, wherever they may be, and any constructed or completed during the period of the present instrument will be made available in good repair and in seaworthy condition by the competent Italian authorities at such places and for such purposes and periods as the United Nations may prescribe. Transfer to enemy or neutral flags is prohibited. Crews will remain on board pending further instructions regarding their continued employment or dispersal. Any existing options to repurchase or re-acquire or to resume control of Italian or former Italian vessels sold or otherwise transferred or chartered during the war will forthwith be exercised and the above provisions will apply to all such vessels and their crews.

(B) All Italian inland transport and all port equipment will be held at the disposal of the United Nations for such purposes as they may direct.

15. United Nations merchant ships, fishing and other craft in Italian hands wherever they may be (including for this purpose those of any country which has broken off diplomatic relations with Italy) whether or not the title has been transferred as the result of prize court proceedings or otherwise, will be surrendered to the United Nations and will be assembled in ports to be specified by the United Nations for disposal as directed by them. The Italian Government will take all such steps as may be required to secure any necessary transfers of title. Any neutral merchant ship, fishing or other craft under Italian operation or control will be assembled in the same manner pending arrangements for their ultimate disposal. Any necessary repairs to any of the above mentioned vessels will be effected by the Italian Government, if required, at their expense. The Italian Government will take the necessary measures to insure that the vessels and their cargo are not damaged.

16. No radio or telecommunication installations or other forms of intercommunication, ashore or afloat, under Italian control whether belonging to Italy or any nation other than the United Nations will transmit until directions for the control of these installations have been prescribed by the Allied Commander-in-Chief. The Italian authorities will conform to such measures for control and censorship of press and of other publications, of theatrical and cinematograph performances, of broadcasting, and also of all forms of intercommunication as the Allied Commander-in-Chief may direct. The Allied Commander-in-Chief may, at his discretion, take over radio, cable and other communication stations.

17. The warships, auxiliaries, transports and merchant and other vessels and aircraft in the service of the United Nations will have the right freely to use the territorial waters around and the air over Italian territory.

18. The forces of the United Nations will require to occupy certain parts of Italian territory. The territories or areas concerned will from time to time be notified by the United Nations and all Italian Land, Sea and Air Forces will thereupon withdraw from such territories or areas in accordance with the instructions issued by the Allied Commander-in-Chief. The provisions of this article are without prejudice to those of Article 4 above. The Italian Supreme Command will guarantee immediate use and access to the Allies of all airfields and Naval ports in Italy under their control.

19. In the territories or areas referred to in Article 18 all Naval, Military and Air installations, power stations, oil refineries, public utility services, all ports and harbors, all transport and all inter-communication installations, facilities and equipment and such other installations or facilities and all such stocks as may be required by the United Nations will be made available in good condition by the competent Italian authorities with the personnel required for working them. The Italian Government will make available such other local resources or services as the United Nations may require.

20. Without prejudice to the provisions of the present instrument the United Nations will exercise all the rights of an occupying power throughout the territories or areas referred to in Article 18, the administration of which will be provided for by the issue of proclamations, orders or regulations. Personnel of the Italian administrative, judicial and public services will carry out their functions under the control of the Allied Commander-in-Chief unless otherwise directed.

21. In addition to the rights in respect of occupied Italian territories described in Articles 18 to 20,

(A) Members of the Land, Sea or Air Forces and officials of the United Nations will have the right of passage in or over non-occupied Italian territory and will be afforded all the necessary facilities and assistance in performing their functions.

(B) The Italian authorities will make available on non-occupied Italian territory all transport facilities required by the United Nations including free transit for their war material and supplies, and will comply with instructions issued by the Allied Commander-in-Chief regarding the use and control of airfields, ports, shipping, inland transport systems and vehicles, intercommunication systems, power stations and public utility services, oil refineries, stocks and such other fuel and power supplies and means of producing same, as United Nations may specify, together with connected repair and construction facilities.

22. The Italian Government and people will abstain from all action detrimental to the interests of the United Nations and will carry out promptly and efficiently all orders given by the United Nations.



23. The Italian Government will make available such Italian currency as the United Nations may require. The Italian Government will withdraw and redeem in Italian currency within such time limits and on such terms as the United Nations may specify all holdings in Italian territory of currencies issued by the United Nations during military operations or occupation and will hand over the currencies withdrawn free of cost to the United Nations. The Italian Government will take such measures as may be required by the United Nations for the control of banks and business in Italian territory, for the control of foreign exchange and foreign commercial and financial transactions and for the regulation of trade and production and will comply with any instructions issued by the United Nations regarding these and similar matters.

24. There shall be no financial, commercial or other intercourse with or dealings with or for the benefit of countries at war with any of the United Nations or territories occupied by such countries or any other foreign country except under authorization of the Allied Commander-in-Chief or designated officials.

25. (A) Relations with countries at war with any of the United Nations, or occupied by any such country, will be broken off. Italian diplomatic, consular and other officials and members of the Italian Land, Sea and Air Forces accredited to or serving on missions with any such country or in any other territory specified by the United Nations will be recalled. Diplomatic and consular officials of such countries will be dealt with as the United Nations may prescribe.

(B) The United Nations reserve the right to require the withdrawal of neutral diplomatic and consular officers from occupied Italian territory and to prescribe and lay down regulations governing the procedure for the methods of communication between the Italian Government and its representatives in neutral countries and regarding communications emanating from or destined for the representatives of neutral countries in Italian territory.

26. Italian subjects will pending further instructions be prevented from leaving Italian territory except as authorized by the Allied Commander-in-Chief and will not in any event take service with any of the countries or in any of the territories referred to in Article 25 (A) nor will they proceed to any place for the purpose of undertaking work for any such country. Those at present so serving or working will be recalled as directed by the Allied Commander-in-Chief.

27. The Military, Naval and Air personnel and material and the merchant shipping, fishing and other craft and the aircraft, vehicles and other transport equipment of any country against which any of the United Nations is carrying on hostilities or which is occupied by any such country, remain liable to attack or seizure wherever found in or over Italian territory or waters.

28. (A) The warships, auxiliaries and transports of any such country or occupied country referred to in Article 27 in Italian or Italian-occupied ports and waters and the aircraft, vehicles and other transport equipment of such countries in or over Italian or Italian-occupied territory will, pending further instructions, be prevented from leaving.

(B) The Military, Naval and Air personnel and the civilian nationals of any such country or occupied country in Italian or Italian-occupied territory will be prevented from leaving and will be interned pending further instructions.

(C) All property in Italian territory belonging to any such country or occupied country or its nationals will be impounded and kept in custody pending further instructions.

(D) The Italian Government will comply with any instructions given by the Allied Commander-in-Chief concerning the internment, custody or subsequent disposal, utilization or employment of any of the above mentioned persons, vessels, aircraft, material or property.

29. Benito Mussolini, his chief Fascist associates, and all persons suspected of having committed war crimes or analogous offences whose names appear on lists to be communicated by the United Nations and who now or in the future are on territory controlled by the Allied Military Command or by the Italian Government, will forthwith be apprehended and surrendered into the hands of the United Nations. Any instructions given by the United Nations to this purpose will be complied with.

30. All Fascist organizations, including all branches of the Fascist Militia (MVSN), the Secret Police (OVRA), all Fascist youth organizations will insofar as this is not already accomplished be disbanded in accordance with the directions of the Allied Commander-in-Chief. The Italian Government will comply with all such further directions as the United Nations may give for abolition of Fascist institutions, the dismissal and internment of Fascist personnel, the control of Fascist funds, the suppression of Fascist ideology and teaching.

31. All Italian laws involving discrimination on grounds of race, color, creed or political opinions will insofar as this is not already accomplished be rescinded, and persons detained on such grounds will, as directed by the United Nations, be released and relieved from all legal disabilities to which they have been subjected. The Italian Government will comply with all such further directions as the Allied Commander-in-Chief may give for repeal of Fascist legislation and removal of any disabilities or prohibitions resulting therefrom.

32. (A) Prisoners of war belonging to the forces of or specified by the United Nations and any Nationals of the United Nations, including Abyssinian subjects, confined, interned, or otherwise under restraint in Italian or Italian-occupied territory will not be removed and will forthwith be handed over to representatives of the United Nations or otherwise dealt with as the United Nations may direct. Any removal during the period between the

presentation and the signature of the present instrument will be regarded as a breach of its terms.

(B) Persons of whatever nationality who have been placed under restriction, detention or sentence (including sentences in absentia) on account of their dealings or sympathies with the United Nations will be released under the direction of the United Nations and relieved from all legal disabilities to which they have been subjected.

(C) The Italian Government will take such steps as the United Nations may direct to safeguard the persons of foreign nationals and property of foreign nationals and property of foreign states and nationals.

33. (A) The Italian Government will comply with such directions as the United Nations may prescribe regarding restitution, deliveries, services or payments by way of reparation and payment of the costs of occupation during the period of the present instrument.

(B) The Italian Government will give to the Allied Commander-in-Chief such information as may be prescribed regarding the assets, whether inside or outside Italian territory, of the Italian state, the Bank of Italy, any Italian state or semi-state institutions or Fascist organizations or residents in Italian territory and will not dispose or allow the disposal, outside Italian territory of any such assets except with the permission of the United Nations.

34. The Italian Government will carry out during the period of the present instrument such measures of disarmament, demobilization and demilitarization as may be prescribed by the Allied Commander-in-Chief.

35. The Italian Government will supply all information and provide all documents required by the United Nations. There shall be no destruction or concealment of archives, records, plans or any other documents or information.

36. The Italian Government will take and enforce such legislative and other measures as may be necessary for the execution of the present instrument. Italian military and civil authorities will comply with any instructions issued by the Allied Commander-in-Chief for the same purpose.

37. There will be appointed a Control Commission representative of the United Nations charged with regulating and executing this instrument under the orders and general directions of the Allied Commander-in-Chief.

38. (A) The term "United Nations" in the present instrument includes the Allied Commander-in-Chief, the Control Commission and any other authority which the United Nations may designate.

(B) The term "Allied Commander-in-Chief" in the present instrument includes the Control Commission and such other officers and representatives as the Commander-in-Chief may designate.

39. Reference to Italian Land, Sea and Air Forces in the present instrument shall be deemed to include Fascist Militia and all such other military or para-military units, formations or bodies as the Allied Commander-in-Chief may prescribe.

40. The term "War Material" in the present instrument denotes all material specified in such lists or definitions as may from time to time be issued by the Control Commission.

41. The term "Italian Territory" includes all Italian colonies and dependencies and shall for the purposes of the present instrument (but without prejudice to the question of sovereignty) be deemed to include Albania. Provided however that except in such cases and to such extent as the United Nations may direct the provisions of the present instrument shall not apply in or affect the administration of any Italian colony or dependency already occupied by the United Nations or the rights or powers therein possessed or exercised by them.

42. The Italian Government will send a delegation to the Headquarters of the Control Commission to represent Italian interests and to transmit the orders of the Control Commission to the competent Italian authorities.

43. The present instrument shall enter into force at once. It will remain in operation until superseded by any other arrangements or until the voting into force of the peace treaty with Italy.

44. The present instrument may be denounced by the United Nations with immediate effect if Italian obligations thereunder are not fulfilled or, as an alternative, the United Nations may penalize contravention of it by measures appropriate to the circumstances such as the extension of the areas of military occupation or air or other punitive action.

The present instrument is drawn up in English and Italian, the English text being authentic, and in case of any dispute regarding its interpretation, the decision of the Control Commission will prevail.

Signed at Malta on the 29 day of September, 1943.

Marshal PIETRO BADOGLIO  
*Head of the Italian Government*

DWIGHT D. EISENHOWER  
*General, United States Army  
Commander in Chief, Allied Forces*

LETTER FROM GENERAL EISENHOWER TO MARSHAL BADOGLIO ON OCCASION OF  
SIGNING ARMISTICE DOCUMENT\*

*September 29, 1943*

MY DEAR MARSHAL BADOGLIO,

The terms of the armistice to which we have just appended our signatures are supplementary to the short military armistice signed by your representative and mine on September 3rd, 1943. They are based upon the situation obtaining prior to the cessation of hostilities. Developments since that time have altered considerably the status of Italy, which has become in effect a coöperator with the United Nations.

It is fully recognized by the Governments on whose behalf I am acting that these terms are in some respects superseded by subsequent events and that several of the clauses have become obsolescent or have already been put

\* Same, p. 754.

into execution. We also recognize that it is not at this time in the power of the Italian Government to carry out certain of the terms. Failure to do so because of existing conditions will not be regarded as a breach of good faith on the part of Italy. However, this document represents the requirements with which the Italian Government can be expected to comply when in a position to do so.

It is to be understood that the terms both of this document and of the short military armistice of September 3rd may be modified from time to time if military necessity or the extent of coöperation by the Italian Government indicates this as desirable.

Sincerely,

DWIGHT D. EISENHOWER  
General, United States Army  
Commander-in-Chief, Allied Forces

His Excellency

Marshal PIETRO BADOGLIO,  
Head of the Italian Government

MEMORANDUM OF AGREEMENT ON EMPLOYMENT AND DISPOSITION OF ITALIAN  
FLEET AND MERCANTILE MARINE\*

September 23, 1943

OFFICE OF COMMANDER-IN-CHIEF,  
MEDITERRANEAN STATION,

Memorandum of Agreement on the Employment and Disposition of the Italian Fleet and Mercantile Marine between the Allied Naval Commander-in-Chief, Mediterranean, Acting on Behalf of the Allied Commander-in-Chief and the Italian Minister of Marine

The armistice having been signed between the Head of the Italian Government and the Allied Commander-in-Chief under which all Italian warships and the Italian Mercantile Marine were placed unconditionally at the disposal of the United Nations, and H.M. The King of Italy and the Italian Government having since expressed the wish that the Fleet and the Italian Mercantile Marine should be employed in the Allied effort to assist in the prosecution of the war against the Axis powers, the following principles are established on which the Italian Navy and Mercantile Marine will be disposed.

- (A) Such ships as can be employed to assist actively in the Allied effort will be kept in commission and will be used under the orders of the Commander-in-Chief, Mediterranean, as may be arranged between the Allied Commander-in-Chief and the Italian Government.
- (B) Ships which cannot be so employed will be reduced to a care and maintenance basis and be placed in designated ports, measures of disarmament being undertaken as may be necessary.

\* Same, p. 755.

(C) The Government of Italy will declare the names and whereabouts of

- (i) Warships
- (ii) Merchant ships

now in their possession which previously belonged to any of the United Nations. These vessels are to be returned forthwith as may be directed by the Allied Commander-in-Chief. This will be without prejudice to negotiations between the Governments which may subsequently be made in connection with replacing losses of ships of the United Nations caused by Italian action.

(D) The Allied Naval Commander-in-Chief will act as the agent of the Allied Commander-in-Chief in all matters concerning the employment of the Italian Fleet or Merchant Navy, their disposition and related matters.

(E) It should be clearly understood that the extent to which the terms of the armistice are modified to allow of the arrangements outlined above and which follow, are dependent upon the extent and effectiveness of Italian coöperation.

2. *Method of operation.* The Commander-in-Chief, Mediterranean will place at the disposal of the Italian Ministry of Marine a high ranking Naval officer with the appropriate staff who will be responsible to the Commander-in-Chief, Mediterranean, for all matters in connection with the operation of the Italian fleet, and be the medium through which dealings will be carried out in connection with the Italian Mercantile Marine. The Flag Officer acting for these duties (Flag Officer, Liaison) will keep the Italian Ministry of Marine informed of the requirements of the Commander-in-Chief, Mediterranean, and will act in close coöperation as regards issue of all orders to the Italian Fleet.

### 3. *Proposed disposition of the Italian Fleet.*

- (a) All battleships will be placed on a care and maintenance basis in ports to be designated and will have such measures of disarmament applied as may be directed. These measures of disarmament will be such that the ships can be brought into operation again if it so seems desirable. Each ship will have on board a proportion of Italian Naval personnel to keep the ships in proper condition and the Commander-in-Chief, Mediterranean, will have the right of inspection at any time.
- (b) *Cruisers.* Such cruisers as can be of immediate assistance will be kept in commission. At present it is visualized that one squadron of four cruisers will suffice and the remainder will be kept in care and maintenance as for the battleships but at a rather greater degree of readiness to be brought into service if required.
- (c) *Destroyers and Torpedo Boats.* It is proposed to keep these in commission and to use them on escort and similar duties as may be

requisite. It is proposed that they should be divided into escort groups working as units and that they should be based on Italian ports.

(d) *Small Craft.* M.A.S., minesweepers, auxiliaries and similar small craft will be employed to the full, detailed arrangements being made with the Flag Officer (Liaison) by the Italian Ministry of Marine for their best employment.

(e) *Submarines.* In the first instance submarines will be immobilized in ports to be designated and at a later date these may be brought into service as may be required to assist the Allied effort.

4. *Status of Italian Navy.* Under this modification of the armistice terms, all the Italian ships will continue to fly their flag. A large proportion of the Italian Navy will thus remain in active commission operating their own ships and fighting alongside the forces of the United Nations against the Axis powers.

The requisite Liaison officers will be supplied to facilitate the working of the Italian ships in coöperation with Allied forces. A small Italian liaison mission will be attached to the Headquarters of the Commander-in-Chief, Mediterranean, to deal with matters affecting the Italian fleet.

5. *Mercantile Marine.* It is the intention that the Italian Mercantile Marine should operate under the same conditions as the merchant ships of the Allied Nations. That is to say, all mercantile shipping of the United Nations is formed into a pool which is employed as may be considered necessary for the benefit of all the United Nations. In this will naturally be included the requirements for the supply and maintenance of Italy. The system will be analogous to that used in North Africa, where the North Africa Shipping Board controls all United States, British and French shipping under certain agreements which will have to be arranged in detail in so far as Italian ships are concerned. While it may be expected that a proportion of Italian ships will be working within the Mediterranean and to and from Italian ports, it must be appreciated that this will not always necessarily be the case and ships flying the Italian flag may be expected to be used elsewhere as is done with the merchant ships of all the United Nations. Italian ships employed as outlined in this paragraph will fly the Italian flag and will be manned by crews provided by the Italian Ministry of Marine.

AMENDMENT TO AGREEMENT RESPECTING EMPLOYMENT OF ITALIAN NAVY\*

November 17, 1945

Amendment to Agreement Between the Naval Commander-in-Chief, Mediterranean, Allied Forces and the Royal Italian Minister of Marine with Respect to the Employment of the Italian Navy

The aforementioned agreement is amended as follows:

The following phrase to be added to the Preamble:

\* Same, p. 756.

"It is understood and agreed that the provisions of this agreement as to immediate employment and disposition of Italian warships and merchant ships do not affect the right of United Nations to make such other dispositions of any or all Italian ships as they may think fit. Their decisions in this respect will be notified to the Italian Government from time to time."

Final sentence of last paragraph to be amended to read:

"will be manned so far as possible by crews provided by Italian Ministry of Marine and will fly the Italian flag."

The present instrument is drawn up in English and Italian, the English text being authentic, and in case of any dispute regarding its interpretation the decision of the Control Commission will prevail.

Signed on the 17th November 1943 at BRINDISI.

For the Naval Commander-in-Chief  
Mediterranean, Allied Forces.

R. MCGREGOR  
*Rear Admiral,  
Flag Officer Liaison, Italy*

AMM. R. DE COURTEN  
*Ministro della Marina*

STATEMENT OF ADMIRAL DE COURTEN\*

*November 17, 1943*

*Translation*

By order of His Excellency, Marshal Badoglio, Chief of the Government, I have signed the clauses added to the Preamble and to the last paragraph of the Cunningham-de Courten Agreement, which were requested by the Allied Governments as conditions of the signature of the amendments to the Armistice.

In signing, I request that note be taken of the following statement:

"I believe it my duty to make clear that the request for insertion of these clauses, put forth less than two months after the meeting with Sir Andrew Cunningham, then Commander-in-Chief of the Allied Mediterranean Fleet, alters the spirit of the agreement concluded between Admiral Cunningham and me. The clauses of this Agreement had been put forward in accordance with the Armistice, by Admiral Cunningham himself, who invited me to examine them and make known to them my observations and comments. In as much as there was complete agreement in regard to the text presented by the Allies, and as the Agreement has up to now been carried out in the widest and most complete manner without opposition either in letter or spirit, I did not and do not have any reason to believe it should be modified and completed by a subsequent safeguarding clause. This clause seems to be at odds with the active collaboration given up to now by the Italian Navy and with the visible demonstration of the loyalty with which the Italian Fleet is contributing to the utmost to the conduct of the war against the common enemy in the spirit of existing co-belligerency."

BRINDISI, 17 November 1943.

Admiral DE COURTEN  
*Minister of the Navy*

\* P. 757.



## AIDE-MÉMOIRE TO THE ITALIAN GOVERNMENT FROM PRESIDENT, ALLIED COMMISSION\*

*February 24, 1945*

In accordance with the declaration of the President of the United States of America and the Prime Minister of the United Kingdom of Great Britain, the Allied Governments propose to relax the control of the Italian Government under the armistice in the matter of day-to-day administration and only to exercise such control when Allied military interests require.

2. The Political Section of the Allied Commission is being abolished as of the 1st March, 1945. The Italian Ministry for Foreign Affairs will deal with the Chief Commissioner on matters of major policy, and on matters of minor policy and routine business it will address itself to whatever section (economic or civil affairs) of the commission may be appropriate to the subject involved. Matters involving the travel of diplomatic and other public officials will hereafter be dealt with on behalf of the commission by the office of the Executive Commissioner.

3. The Italian Government will continue, as at present, to have direct relations with foreign diplomatic representatives accredited to the Quirinal. The Allied Commission should be kept generally informed by the Italian Government of any negotiations in which they engage with other Governments. Facilities for the use of secret bags will be granted to the Italian Government for use in correspondence with their diplomatic representatives abroad. Undeposited cypher facilities cannot be allowed for the present.

In so far as these negotiations have to do with economic and financial matters, the Economic Section and its Finance Sub-Commission should be kept informed of their progress.

It would be convenient if the Italian Government would furnish a periodic summary of all negotiations completed or pending with other Governments.

4. The Allied Commission will limit its dealings with respect to territory under the jurisdiction of the Italian Government to consultation with and advice to the Ministers of the Italian Government.

5. The advisory functions of the Sub-Commissions of Education, Monuments and Fine Arts, Local Government, Legal and Labor in territory under the jurisdiction of the Italian Government will be performed only when requested by the Italian Government.

6. It will no longer be necessary for the Italian Government to obtain the approval of the Allied Commission for decrees and other legislation enacted by the Italian Government in the territory under the jurisdiction of the Italian Government.

Nevertheless the Allied Commission should be informed of proposed decrees some time before their enactment, in order to enable the Chief Commissioner to consult with the Italian Government as to their application to territory under the jurisdiction of Allied Military Government (A.M.G.),

\* P. 757.

and to lay plans for their effective implementation in such territory when appropriate.

7. It will no longer be necessary for the Italian Government to obtain approval of the Allied Commission for Italian appointments, whether to national or local offices, in territory under the jurisdiction of the Italian Government except with regard to the attached list of positions having military significance. The Italian Government will have the right to alter appointments made previously by A.M.G. authorities.

8. The Allied Commission officers stationed in the field in the territory under the jurisdiction of the Italian Government will be withdrawn. As a first step it is intended to abolish by the 1st April, 1945, the Regional Offices of the Allied Commission for Sicilia, Sardegna, Southern and Lazio-Umbria Regions. Representatives of the Allied Commission will, however, be sent into territory under the jurisdiction of the Italian Government when necessary, and certain specialist officers with economic functions will remain in such territory for a limited period.

9. It is the desire of the Allies to encourage free trade in knowledge and learning with the Italian people. Arrangements will be facilitated for the flow between Italy and the United Nations of books and other publications of a scientific, political, philosophical and artistic nature, and for the movement of scholars, artists and professional men between Italy and the United Nations.

10. The Allies welcome the decision to hold local elections in territory under the jurisdiction of the Italian Government as soon as may be.

11. The Allied nations desire to make concessions with regard to Italian prisoners of war now or hereafter held in Italy, other than those captured since the armistice was signed. Provided that arrangements can be made for the services of such persons to continue to be made available on terms satisfactory to the Supreme Allied Commander, their status as prisoners of war will be terminated.

12. It is essential that the Italian Government formulate and implement appropriate economic controls and take all other steps possible both in order to ensure that maximum production and effective and equitable distribution and control of consumption of local resources possible under existing conditions be secured and as a prerequisite to increased economic assistance.

13. In the joint program of essential Italian imports, now being prepared by the Inter-Ministerial Committee for Reconstruction and the Economic Section of this commission, there will be some supplies for which the combined United States-United Kingdom military authorities will assume responsibility for procurement (Category "A") and other supplies for which they will not assume responsibility (Category "B"). A definition of the supplies which fall into Category "A" follows:

(a) Those quantities of agreed essential supplies necessary to prevent dis-

- ease and unrest prejudicial to military operations, such as food, fuel, clothing, medical and sanitary supplies.
- (b) Those supplies, the importation of which will reduce military requirements for the import of essential civilian supplies for the purposes referred to in this paragraph, such as fertilizer, raw materials, machinery and equipment.
  - (c) Those materials essential for the rehabilitation of such of the Italian communication facilities, power systems and transportation facilities as will directly further the Allied military effort.

14. The program for which the military authorities assume responsibility will be maintained for the duration of combined (United States-United Kingdom) operations in Italy. For this period, and within the limits defined in paragraph 13, Italy will be treated as a whole. The date of the termination of military responsibility will be fixed by the Allied Nations.

15. In addition to the program of supplies for which the military assume responsibility for procurement (Category "A") the Allied Commission will assist the Italian Government in the preparation of programs of supplies designed to rehabilitate Italian industry. Such programs, referred to as Category "B," will be handled under procedures already notified. The purchasing of supplies in Category "B" programs will be undertaken immediately without reference to the present difficult shipping position in order that the supplies so purchased may be called forward as and when shipping space becomes available.

16. The Allies desire that industrial rehabilitation in Italy be carried out by the Italian Government to the fullest extent permitted by Italian resources and such supplies as it may be possible to import under the terms of paragraphs 13, 14 and 15 above, and subject to the limitation in paragraph 19 below. The sole exception to this principle is to be made in the case of industries involving the production or repair of munitions or other implements of war, which will be rehabilitated only to the extent required by the Supreme Allied Commander in the discharge of his military mission, and to the extent necessary to further the Allied military effort in other theaters. The priority order in which Italian industry will be rehabilitated (after the rehabilitation of industries essential for Allied Military purposes) will be determined by the Italian Government, with the assistance and advice of the Allied Commission.

17. The prime responsibility for the control of inflation in Italy, including the imposition and administration of the appropriate financial controls and economic controls, and appropriate utilization of supplies, rests with the Italian Government. In this connection, as in others, the Allied Commission stands ready to advise and assist.

18. The extent to which exports are to be stimulated and the development of machinery to handle export trade are for determination by the Italian

Government. For the time being, the Italian export program will necessarily be limited by certain shipping, military, financial and supply factors. The applicability of these factors to individual programs will be worked out between the Italian Government and the Economic Section of the Allied Commission along the lines already discussed by the Economic Section with the Inter-Ministerial Committee for Reconstruction.

19. Nothing contained in the above should be taken as constituting a commitment by the Allied Nations with respects to shipping. Any supplies to be imported into Italy must be transported within such shipping as may be allocated from time to time by the Allied Nations.

HAROLD MACMILLAN

24th February, 1945

*List of Italian Government appointments requiring prior approval by the Allied Commission.*

Minister of War.

Minister of Marine.

Minister of Air.

Any other Minister of Armed Forces who may be created.

Under-Secretary for Telecommunications.

Director of Railroads.

Director-General of Public Security.

Commanding General, CC. RR.

Chief of Staff, CC. RR.

Commanding General, GG. FF.

Appointments in the Army, Navy and Air Force in accordance with current practice.

#### COMMENTARY ON THE ADDITIONAL CONDITIONS OF THE ARMISTICE WITH ITALY\*

The extent to which certain articles of the agreement have been implemented or modified is indicated in the following comment. The remaining articles, on which no comment is given, have either been superseded by events and are therefore dormant, or are still in force.

Articles 1 to 5 were complied with.

*Articles 6 to 12:* With the coöperation of the Italian Government, the Italian armed forces have been used to the maximum useful extent in the service of the United Nations and have contributed materially towards the liberation of Italy and final victory. The Italian Navy has operated with Allied warships in the Mediterranean and elsewhere, and since the cessation of hostilities has largely been employed in the Italian interest in minesweeping and the transport of displaced persons.

The Army fought alongside Allied formations during the campaign in Italy and the Air Force took its place with the Allied Air Forces.

*Article 14:* While Italian merchant ships have been employed in the general interests of the United Nations they have been primarily employed in the Italian interest. Italian inland transport and ports have now been

\* Information given by Department of State in same, p. 759.

largely returned to Italian administration except insofar as redeployment and maintenance of Allied Forces has had to be effected.

*Article 15:* The provisions of this clause, as regards small vessels and craft, have not been fully satisfied owing to the difficulty of locating and identifying the vessels and craft concerned.

*Article 16:* Control of radio has been returned to the Italian Government. All military and rehabilitated civilian telecommunications are being handed over to the Italians as military requirements decrease. Internal censorship has been abolished in the areas under Italian Government control.

*Article 18:* The second sentence of this clause has never been invoked, except in two frontier areas, i.e. on the Franco-Italian frontier and in Venezia Giulia.

*Article 19:* Care has been taken to conserve wherever possible Italian resources for the use of the civil economy and to utilize local goods and services only when military necessity demanded. The Allied Forces Local Resources Board, on the Committees of which Italian representatives have sat, was established as the allocation agency.

While the legal rights of the Allied Forces under this article have not been modified, in practice it has been administered with as much regard as possible for Italian needs.

With the redeployment of Allied troops from Italy, the utilization of local resources and facilities is diminishing rapidly. In addition, large quantities of food, coal, clothing and other commodities have been imported into Italy by the United Nations largely in United Nations ships to supplement local resources and to alleviate distress.

*Article 20:* Allied Military Government was rigorously enforced in combat zones for obvious operational reasons. This was progressively relaxed as the battle moved forward until territories were handed over wholly to Italian administration.

*Article 21:* As Allied Forces are redeployed, facilities are progressively being handed back to Italian control.

*Article 22:* With the declaration of war upon the Germans by the Italian Government in October 1943, and the coöperation and loyalty of the Italian people to the Allied cause, there has never been any necessity to invoke this article.

*Article 23:* The Italian Government has been informed that the Allied Commission will no longer intervene in Italian internal financial affairs (except in cases of Allied military necessity) and that, with certain exceptions in Italy's own interest, the Italian Government need no longer obtain the approval of the Allied Commission prior to the execution of external financial transactions. The Italian Government is now free to fix or negotiate exchange rates for the lira without prior consultation with the Allied Commission.

*Article 24:* Private export trade may now be resumed and all types of com-

mercial and financial correspondence may now go forward from Italy to the non-enemy world, subject to the Italian Government putting into force certain trade control measures similar to those employed by the United Nations against enemy interests.

*Article 26:* This article is no longer enforced, and provided an individual has the necessary civil documents, such as passport, visas, et cetera, there is nothing to prevent him leaving Italian territory, subject of course to the immigration laws and regulations of the countries of intended destination.

*Articles 30 and 31:* The Italian Government has of its own volition done all that would have been required.

*Article 32:* This article has been complied with and is, in the case of Clauses A and B no longer applicable. As regards Clause C the Italian Government has coöperated loyally in carrying out such instructions as have been given concerning the preservation and administration of United Nations property in Italy, previously sequestered by the Italian Government.

*Article 33:* The part of Clause B that deals with the disposal of foreign assets has been modified in favor of the Italian Government (see under Article 23).

*Articles 36 and 37:* The execution of these articles has been modified by the MacMillan aide memoire of February 24, 1945.

*Article 41:* In practice the Armistice conditions have not been applied to Albania or to any former Italian territories overseas.

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With respect to the Cunningham-de Courten Agreement, the following general comments show the extent to which certain articles have been implemented or modified.

1. As explained in the document this agreement was produced in modification of the Armistice terms so that the Italian Fleet and merchant marine could assist in the prosecution of the war against the Axis powers.

2. The additions to the agreement were inserted at the Allied request after the original agreement had been concluded and were accepted on the Italian side in view of an amelioration of certain articles in the original terms of the Armistice. Signature was accompanied by the formal statement by Admiral de Courten printed above.

3. The provisions of this agreement have been carried out and those provisions that remain operative with the cessation of hostilities and change of circumstances are still being carried out. Furthermore, many Italian warships are undertaking work of direct benefit to the Italians themselves, for example, transport of displaced persons.

4. While the employment of Italian ships has been of use to the United Nations it is pointed out that considerable United Nations resources have been expended in Italy and elsewhere to help the Italian Government in keeping the Italian ships running and their crews fed and clothed.

5. In addition to the use of Italian mercantile shipping under this agreement a number of the smaller Italian merchant ships has been returned to the control of the Italian authorities.

## UNITED STATES-FRANCE-GREAT BRITAIN-SOVIET UNION

### ARRANGEMENTS FOR CONTROL OF GERMANY BY ALLIED REPRESENTATIVES\*

*September 20, 1945*

Agreement Between the Governments of the United Kingdom, the United States of America, and the Union of Soviet Socialist Republics, and the Provisional Government of the French Republic on Certain Additional Requirements to Be Imposed on Germany

*The Governments of the U.K., U.S.A., and U.S.S.R. and Provisional Government of French Republic have reached the following agreement regarding instructions to be issued by the Allied representatives in Germany:*

We, the Allied Representatives, Commanders-in-Chief of the forces of occupation of the United Kingdom, the United States of America, the Union of Soviet Socialist Republics and the French Republic, pursuant to the Declaration regarding the defeat of Germany, signed at Berlin on June 5th, 1945,† hereby announce certain additional requirements arising from the complete defeat and unconditional surrender of Germany with which Germany must comply, as follows:

#### SECTION I

1. All German land, naval and air forces, the S.S., S.A., S.D. and Gestapo, with all their organizations, staffs and institutions, including the General Staff, the Officers' Corps, Reserve Corps, military schools, war veterans' organizations and all other military and quasi-military organizations, together with all clubs and associations which serve to keep alive the military tradition in Germany, shall be completely and finally abolished in accordance with methods and procedures to be laid down by the Allied Representatives.

2. All forms of military training, military propaganda and military activities of whatever nature, on the part of the German people, are prohibited, as well as the formation of any organization initiated to further any aspect of military training and the formation of war veterans' organizations or other groups which might develop military characteristics or which are designed to carry on the German military tradition, whether such organizations or groups purport to be political, educational, religious, social, athletic or recreational or of any other nature.

\* *Department of State Bulletin*, Vol. XIII, No. 328 (Oct. 7, 1945), p. 515.

† This JOURNAL, Vol. 39 (1945), Supplement, p. 171.

## SECTION II

3. (a) German authorities and officials in all territories outside the frontiers of Germany as they existed on 31st December, 1937, and in any areas within those frontiers indicated at any time by the Allied Representatives, will comply with such instructions as to withdrawing therefrom as they may receive from the Allied Representatives.

(b) The German authorities will issue the necessary instructions and will make the necessary arrangements for the reception and maintenance in Germany of all German civilian inhabitants of the territories or areas concerned, whose evacuation may be ordered by the Allied Representatives.

(c) Withdrawals and evacuations under subparagraphs (a) and (b) above will take place at such times and under such conditions as the Allied Representatives may direct.

4. In the territories and areas referred to in paragraph 3 above, there shall immediately be, on the part of all forces under German command and of German authorities and civilians, a complete cessation of all measures of coercion or forced labor and of all measures involving injury to life or limb. There shall similarly cease all measures of requisitioning, seizure, removal, concealment or destruction of property. In particular, the withdrawals and evacuations mentioned in paragraph 3 above will be carried out without damage to or removal of persons or property not affected by the orders of the Allied Representatives. The Allied Representatives will determine what personal property and effects may be taken by persons evacuated under paragraph 3 above.

## SECTION III

5. The Allied Representatives will regulate all matters affecting Germany's relations with other countries. No foreign obligations, undertakings or commitments of any kind will be assumed or entered into by or on behalf of German authorities or nationals without the sanction of the Allied Representatives.

6. The Allied Representatives will give directions concerning the abrogation, bringing into force, revival or application of any treaty, convention or other international agreement, or any part or provision thereof, to which Germany is or has been a party.

7. (a) In virtue of the unconditional surrender of Germany, and as of the date of such surrender, the diplomatic, consular, commercial and other relations of the German State with other States have ceased to exist.

(b) Diplomatic, consular, commercial and other officials and members of service missions in Germany of countries at war with any of the four Powers will be dealt with as the Allied Representatives may prescribe. The Allied Representatives may require the withdrawal from Germany of neutral diplomatic, consular, commercial and other officials and members of neutral service missions.



(c) All German diplomatic, consular, commercial and other officials and members of German service missions abroad are hereby recalled. The control and disposal of the buildings, property and archives of all German diplomatic and other agencies abroad will be prescribed by the Allied Representatives.

8. (a) German nationals will, pending further instructions, be prevented from leaving German territory except as authorized or directed by the Allied Representatives.

(b) German authorities and nationals will comply with any directions issued by the Allied Representatives for the recall of German nationals resident abroad, and for the reception in Germany of any persons whom the Allied Representatives may designate.

9. The German authorities and people will take all appropriate steps to ensure the safety, maintenance and welfare of persons not of German nationality and of their property and the property of foreign States.

#### SECTION IV

10. The German authorities will place at the disposal of the Allied Representatives the whole of the German inter-communication system (including all military and civilian postal and telecommunication systems and facilities and connected matters), and will comply with any instructions given by the Allied Representatives for placing such inter-communication systems under the complete control of the Allied Representatives. The German authorities will comply with any instructions given by the Allied Representatives with a view to the establishment by the Allied Representatives of such censorship and control of postal and telecommunication and of documents and other articles carried by persons or otherwise conveyed and of all other forms of inter-communication as the Allied Representatives may think fit.

11. The German authorities will comply with all directions which the Allied Representatives may give regarding the use, control and censorship of all media for influencing expression and opinions, including broadcasting, press and publications, advertising, films and public performances, entertainments, and exhibitions of all kinds.

#### SECTION V

12. The Allied Representatives will exercise such control as they deem necessary over all or any part or aspect of German finance, agriculture (including forestry), production and mining, public utilities, industry, trade, distribution and economy generally, internal and external, and over all related or ancillary matters, including the direction or prohibition of the manufacture, production, construction, treatment, use and disposal of any buildings, establishments, installations, public or private works, plant, equipment, products, materials, stocks, or resources. Detailed statements of the subjects to which the present provision applies, together with the re-

quirements of the Allied Representatives in regard thereto, will from time to time be communicated to the German authorities.

13. (a) The manufacture, production and construction, and the acquisition from outside Germany, of war material and of such other products, used in connection with such manufacture, production or construction, as the Allied Representatives may specify, and the import, export and transit thereof, are prohibited, except as directed by the Allied Representatives.

(b) The German authorities will immediately place at the disposal of the Allied Representatives all research, experiment, development and design directly or indirectly relating to war or the production of war material, whether in government or private establishments, factories, technological institutions or elsewhere.

14. (a) The property, assets, rights, titles and interests (whether situated inside or outside Germany) of the German State, its political subdivisions, the German Central Bank, State or semi-State, provincial, municipal or local authorities or Nazi organizations, and those situated outside Germany of any person resident or carrying on business in Germany, will not be disposed of in any way whatever without the sanction of the Allied Representatives. The property, assets, rights, titles and interests (whether situated inside or outside Germany), of such private companies, corporations, trusts, cartels, firms, partnerships and associations as may be designated by the Allied Representatives will not be disposed of in any way whatever without the sanction of the Allied Representatives.

(b) The German authorities will furnish full information about the property, assets, rights, titles and interests referred to in sub-paragraph (a) above, and will comply with such directions as the Allied Representatives may give as to their transfer and disposal. Without prejudice to any further demands which may be made in this connection, the German authorities will hold at the disposal of the Allied Representatives for delivery to them at such times and places as they may direct all securities, certificates, deeds or other documents of title held by any of the institutions or bodies mentioned in sub-paragraph (a) above or by any person subject to German law, and relating to property assets, rights, titles and interests situated in the territories of the United Nations, including any shares, stocks, debentures or other obligations of any company incorporated in accordance with the laws of any of the United Nations.

(c) Property, assets, rights, titles and interests situated inside Germany will not be removed outside Germany or be transferred or disposed of to any person resident or carrying on business outside Germany without the sanction of the Allied Representatives.

(d) Nothing in sub-paragraphs (a) and (b) above shall, as regards property, assets, rights, titles and interests situated inside Germany, be deemed to prevent sales or transfers to persons resident in Germany for the purpose of maintaining or carrying on the day-to-day national life, economy and ad-

ministration, subject to the provisions of sub-paragraph 19 (b) and (c) below and to the provisions of the Declaration or of any proclamations, orders, ordinances or instructions issued thereunder.

15. (a) The German authorities and all persons in Germany will hand over to the Allied Representatives all gold and silver, in coin or bullion forms, and all platinum in bullion form, situated in Germany, and all such coin and bullion situated outside Germany as is possessed by or held on behalf of any of the institutions or bodies mentioned in sub-paragraph 14 (a) above or any person resident or carrying on business in Germany.

(b) The German authorities and all persons in Germany will hand over in full to the Allied Representatives all foreign notes and coins in the possession of any German authority, or of any corporation, association or individual resident or carrying on business in Germany and all monetary tokens issued or prepared for issue by Germany in the territories formerly occupied by her or elsewhere.

16. (a) All property, assets, rights, titles and interests in Germany held for or belonging to any country against which any of the United Nations is carrying on hostilities, or held for or belonging to the nationals of any such country, or of any persons resident or carrying on business therein, will be taken under control and will be preserved pending further instructions.

(b) All property, assets, rights, titles and interests in Germany held for or belonging to private individuals, private enterprises and companies of those countries, other than Germany and the countries referred to in sub-paragraph (a) above, which have at any time since the 1st September, 1939, been at war with any of the United Nations, will be taken under control and will be preserved pending further instructions.

(c) The German authorities will take all necessary steps to ensure the execution of the provisions of sub-paragraphs (a) and (b) above, will comply with any instructions given by the Allied Representatives for that purpose, and will afford all necessary information and facilities in connection therewith.

17. (a) There shall, on the part of the German authorities and people, be no concealment, destruction, scuttling, or dismantling of, removal or transfer of, nor damage to, ships, transport, ports or harbors, nor to any form of building, establishment, installation, device, means of production, supply, distribution or communication, plant, equipment, currency, stocks or resources, or, in general, public or private works, utilities or facilities of any kind, wherever situated.

(b) There shall be no destruction, removal, concealment, suppression or alteration of any documents, records, patents, drawings, specifications, plans or information, of any nature, affected by the provisions of this document. They shall be kept intact in their present locations until further directions are given. The German authorities will afford all information and facilities as required by the Allied Representatives in connection therewith.

(c) Any measures already ordered, undertaken or begun contrary to the provisions of sub-paragraphs (a) and (b) above will be immediately countermanded or discontinued. All stocks, equipment, plant, records, patents, documents, drawings, specifications, plans or other material already concealed within or outside Germany will forthwith be declared and will be dealt with as the Allied Representatives may direct.

(d) Subject to the provisions of the Declaration or any proclamations, orders, ordinances, or instructions issued thereunder, the German authorities and people will be responsible for the preservation, safeguarding and upkeep of all forms of property and materials affected by any of the said provisions.

(e) All transport material, stores, equipment, plant, establishments, installations, devices and property generally, which are liable to be surrendered or delivered under the Declaration or any proclamations, orders, ordinances or instructions issued thereunder, will be handed over intact and in good condition, or subject only to ordinary wear and tear and to any damage caused during the continuance of hostilities which it has proved impossible to make good.

18. There shall be no financial, commercial or other intercourse with, or dealings with or for the benefit of, countries at war with any of the United Nations, or territories occupied by such countries, or with any other country or person specified by the Allied Representatives.

#### SECTION VI

19. (a) The German authorities will carry out, for the benefit of the United Nations, such measures of restitution, reinstatement, restoration, reparation, reconstruction, relief and rehabilitation as the Allied Representatives may prescribe. For these purposes the German authorities will effect or procure the surrender or transfer of such property, assets, rights, titles and interests, effect such deliveries and carry out such repair, building and construction work, whether in Germany or elsewhere, and will provide such transport, plant equipment and materials of all kinds, labor, personnel and specialist and other services, for use in Germany or elsewhere, as the Allied Representatives may direct.

(b) The German authorities will also comply with all such directions as the Allied Representatives may give relating to property, assets, rights, titles and interests located in Germany belonging to any one of the United Nations or its nationals or having so belonged at, or at any time since, the outbreak of war between Germany and that Nation, or since the occupation of any part of its territories by Germany. The German authorities will be responsible for safeguarding, maintaining, and preventing the dissipation of, all such property, assets, rights, titles and interests, and for handing them over intact at the demand of the Allied Representatives. For these purposes the German authorities will afford all information and facilities required for tracing any property, assets, rights, titles or interests.

(c) All persons in Germany in whose possession such property, assets, rights, titles and interests may be, shall be personally responsible for reporting them and for safeguarding them until they are handed over in such manner as may be prescribed.

20. The German authorities will supply free of cost such German currency as the Allied Representatives may require, and will withdraw and redeem in German currency, within such time limits and on such terms as the Allied Representatives may specify, all holdings in German territory of currencies issued by the Allied Representatives during military operations or occupation, and will hand over the currencies so withdrawn free of cost to the Allied Representatives.

21. The German authorities will comply with all such directions as may be issued by the Allied Representatives for defraying the costs of the provisioning, maintenance, pay, accommodation and transport of the forces and agencies stationed in Germany by authority of the Allied Representatives, the costs of executing the requirements of unconditional surrender, and payment for any relief in whatever form it may be provided by the United Nations.

22. The Allied Representatives will take and make unrestricted use (whether inside or outside Germany) of any articles referred to in paragraph 12 above, which the Allied Representatives may require in connection with the conduct of hostilities against any country with which any of their respective Governments is at war.

#### SECTION VII

23. (a) No merchant ship, including fishing or other craft, shall put to sea from any German port except as may be sanctioned or directed by the Allied Representatives. German ships in ports outside Germany shall remain in port and those at sea shall proceed to the nearest German or United Nations port and there remain, pending instructions from the Allied Representatives.

(b) All German merchant shipping, including tonnage under construction or repair, will be made available to the Allied Representatives for such use and on such terms as they may prescribe.

(c) Foreign merchant shipping in German service or under German control will likewise be made available to the Allied Representatives for such use and on such terms as they may prescribe. In the case of such foreign merchant vessels which are of neutral registration, the German authorities will take all such steps as may be required by the Allied Representatives to transfer or cause to be transferred to the Allied Representatives all rights relative thereto.

(d) All transfer to any other flag, service or control, of the vessels covered by sub-paragraphs (b) and (c) above, is prohibited, except as may be directed by the Allied Representatives.

24. Any existing options to repurchase or reacquire or to resume control

of vessels sold or otherwise transferred or chartered by Germany during the war will be exercised as directed by the Allied Representatives. Such vessels will be made available for use by the Allied Representatives in the same manner as the vessels covered by sub-paragraphs 23 (b) and (c) above.

25. (a) The crews of all German merchant vessels or merchant vessels in German service or under German control will remain on board and will be maintained by the German authorities pending further instructions from the Allied Representatives regarding their future employment.

(b) Cargoes on board any such vessels will be disposed of in accordance with instructions given to the German authorities by the Allied Representatives.

26. (a) Merchant ships, including fishing and other craft of the United Nations (or of any country which has broken off diplomatic relations with Germany) which are in German hands, wherever such ships may be, will be surrendered to the Allied Representatives regardless of whether title has been transferred as the result of prize court proceedings or otherwise. All such ships will be surrendered in good repair and in seaworthy condition in ports and at times to be specified by the Allied Representatives, for disposal as directed by them.

(b) The German authorities will take all such steps as may be directed by the Allied Representatives to effect or complete transfers of title to such ships regardless of whether the title has been transferred as the result of prize court proceedings or otherwise. They will secure the discontinuance of any arrests of, or proceedings against, such ships in neutral ports.

27. The German authorities will comply with any instructions given by the Allied Representatives for the destruction, dispersal, salvaging, reclamation or raising of wrecked, stranded, derelict or sunken vessels, wherever they may be situated. Such vessels salvaged, reclaimed or raised shall be dealt with as the Allied Representatives direct.

28. The German authorities will place at the unrestricted disposal of the Allied Representatives the entire German shipping, shipbuilding and ship repair industries, and all matters and facilities directly or indirectly relative or ancillary thereto, and will provide the requisite labor and specialist services. The requirements of the Allied Representatives will be specified in instructions which will from time to time be communicated to the German authorities.

#### SECTION VIII

29. The German authorities will place at the unrestricted disposal of the Allied Representatives the whole of the German inland transport system (road, rail, air and waterways) and all connected material, plant and equipment, and all repair, construction, labor, servicing and running facilities, in accordance with the instructions issued by the Allied Representatives.

30. The production in Germany and the possession, maintenance or op-

eration by Germans of any aircraft of any kind or any parts thereof, are prohibited.

31. All German rights in international transport bodies or organizations, and in relation to the use of transport and the movement of traffic in other countries and the use in Germany of the transport of other countries, will be exercised in accordance with the directions of the Allied Representatives.

32. All facilities for the generation, transmission and distribution of power, including establishments for the manufacture and repair of such facilities, will be placed under the complete control of the Allied Representatives, to be used for such purposes as they may designate.

#### SECTION IX

33. The German authorities will comply with all such directions as the Allied Representatives may give for the regulation of movements of population and for controlling travel or removal on the part of persons in Germany.

34. No person may leave or enter Germany without a permit issued by the Allied Representatives or on their authority.

35. The German authorities will comply with all such directions as the Allied Representatives may give for the repatriation of persons not of German nationality in or passing through Germany, their property and effects, and for facilitating the movements of refugees and displaced persons.

#### SECTION X

36. The German authorities will furnish any information and documents, and will secure the attendance of any witnesses, required by the Allied Representatives for the trial of

(a) the principal Nazi leaders as specified by the Allied Representatives and all persons from time to time named or designated by rank, office or employment by the Allied Representatives as being suspected of having committed, ordered or abetted war crimes or analogous offences:

(b) any national of any of the United Nations who is alleged to have committed an offence against his national law and who may at any time be named or designated by rank, office or employment by the Allied Representatives; and will give all other aid and assistance for these purposes.

37. The German authorities will comply with any directions given by the Allied Representatives in regard to the property of any person referred to in sub-paragraphs 36 (a) and (b) above, such as its seizure, custody or surrender.

#### SECTION XI

38. The National Socialist German Workers' Party (NSDAP) is completely and finally abolished and declared to be illegal.

39. The German authorities will comply promptly with such directions as the Allied Representatives may issue for the abolition of the National Socialist Party and of its subordinate organizations, affiliated associations and

supervised organizations, and of all Nazi public institutions created as instruments of Nazi domination, and of such other organizations as may be regarded as a threat to the security of the Allied forces or to international peace, and for prohibiting their revival in any form; for the dismissal and internment of Nazi personnel; for the control or seizure of Nazi property and funds; and for the suppression of Nazi ideology and teaching.

40. The German authorities and German nationals will not allow the existence of any secret organizations.

41. The German authorities will comply with such directions as the Allied Representatives may issue for the repeal of Nazi legislation and for the reform of German law and of the German legal, judicial, administrative, police and educational systems, including the replacement of their personnel.

42. (a) The German authorities will comply with such directions as the Allied Representatives may issue for the rescinding of German legislation involving discrimination on grounds of race, color, creed, language or political opinions and for the cancellation of all legal or other disabilities resulting therefrom.

(b) The German authorities will comply with such directions as the Allied Representatives may issue regarding the property, assets, rights, titles and interests of persons affected by legislation involving discrimination on grounds of race, color, creed, language or political opinions.

43. No person shall be prosecuted or molested by the German authorities or by German nationals on grounds of race, color, creed, language or political opinions, or on account of any dealings or sympathies with the United Nations, including the performance of any action calculated to facilitate the execution of the Declaration or of any proclamations, orders, ordinances or instructions issued thereunder.

44. In any proceedings before any German Court or authority judicial notice shall be taken of the provisions of the Declaration and of all proclamations, orders, ordinances and instructions issued thereunder, which shall override any provisions of German law inconsistent therewith.

## SECTION XII

45. Without prejudice to any specific obligations contained in the provisions of the Declaration or any proclamations, orders, ordinances or instructions issued thereunder, the German authorities and any other person in a position to do so will furnish or cause to be furnished all such information and documents of every kind, public and private, as the Allied Representatives may require.

46. The German authorities will likewise produce for interrogation and employment by the Allied Representatives upon demand any and all persons whose knowledge and experience would be useful to the Allied Representatives.

47. The Allied Representatives will have access at all times to any build-



ing, installation, establishment, property or area, and any of the contents thereof, for the purposes of the Declaration or any proclamations, orders, ordinances or instructions issued thereunder, and in particular for the purposes of safeguarding, inspecting, copying or obtaining any of the desired documents and information. The German authorities will give all necessary facilities and assistance for this purpose, including the service of all specialist staff, including archivists.

### SECTION XIII

48. In the event of any doubt as to the meaning or interpretation of any term or expression in the Declaration and in any proclamations, orders, ordinances and instructions issued thereunder, the decision of the Allied Representatives shall be final.

## UNITED NATIONS

### AGREEMENT CONCERNING THE ESTABLISHMENT OF AN EUROPEAN CENTRAL INLAND TRANSPORT ORGANIZATION\*

*September 27, 1945*

WHEREAS, upon the liberation of the territories of the United Nations in Europe, and upon the occupation of the territories of the enemy in Europe, it is expedient for the fulfilment of the common military needs of the United Nations and in the interests of the social and economic progress of Europe, to provide for coördination both in the movement of traffic and in the allocation of transport equipment and material with a view to ensuring the best possible movement of supplies both for military forces and the civil population and the speedy repatriation of displaced persons, and also with a view to creating conditions in which the normal movement of traffic can be more rapidly resumed;

The Governments whose duly authorized representatives have signed the present Agreement

Have agreed as follows:—

### ARTICLE I

There is hereby established the European Central Inland Transport Organization, hereinafter called "the Organization," which shall act in accordance with the provisions of the following Articles. The Organization is established as a coördinating and consultative organ. Having regard to the successful completion of the war, it shall coördinate efforts to utilize all means of transport for the improvement of communications so as to provide for the restoration of normal conditions of economic life. It shall also provide assistance to the Allied Commanders-in-Chief and to the Occupation

\* Text by courtesy of Department of State; see *British Parliamentary Papers*, Misc. No. 13 (1945), Cmd. 6685.

Authorities set up by Governments of the United Nations to maintain and improve the carrying capacity of transport.

## ARTICLE II

### Membership

The members of the Organization shall be the Governments signatory hereto and such other Governments as may be admitted thereto by the Council.

## ARTICLE III

### Constitution

1. The Organization shall consist of a Council and an Executive Board with the necessary headquarters, regional and local staff. The Organization shall concert arrangements for the establishment of regional and local offices with the member Government in whose territory the offices are situated, and/or, in appropriate cases, in agreement with the Allied Commander-in-Chief concerned.

#### *The Council*

2. Each member Government shall name one representative and such alternates as may be necessary upon the Council. The Council shall, for each of its sessions, select one of its members to preside. The Council shall determine its own rules of procedure. Unless otherwise provided in this Agreement or by action of the Council, the Council shall vote by simple majority.

3. The Council shall be convened in regular session not less than twice a year by the Executive Board. It may be convened in special session whenever the Executive Board shall deem necessary and shall be convened within thirty days after request by one-third of the members of the Council.

4. The Council shall perform the functions assigned to it under this Agreement and review the work of the Organization generally to ensure its conformity with the broad policies determined by the Council.

#### *The Executive Board*

5. The Executive Board shall consist of seven members who shall be appointed by the Council. These seven members shall include one member nominated by each of the following Governments: the Provisional Government of the French Republic and the Governments of the Union of Soviet Socialist Republics, the United Kingdom of Great Britain and Northern Ireland and the United States of America. Each member of the Executive Board shall be provided with an alternate similarly selected, who shall act only in the absence of the member of the Executive for whom he is the alternate. The members and their alternates shall be appointed for not longer than one year. The Executive Board shall choose its own Chairman, subject to confirmation by the Council.

6. The Executive Board shall perform the executive functions assigned to the Organization within the framework of the broad policies determined by the Council. It shall act in accordance with the ruling of the majority of its members. It shall present to the Council such reports on the performance of its functions as the Council may require.

7. The Executive Board shall appoint a chief officer who shall direct under its supervision the technical and administrative work of the Organization in conformity with the policies of the Council and the Executive Board as determined by their decisions. This officer shall appoint the staff at headquarters, and at regional and local offices, subject to the approval of the Executive Board, taking into account the exigencies of the various branches of transport concerned. The responsibilities of the chief officer and staff shall be exclusively international in character.

8. Each member Government shall appoint one or more representatives for the purpose of consultation and communication with the Executive Board, and with the chief officer. Such representatives shall be fully informed by the Board and by the chief officer of all activities of the Organization. Each time that any important question concerning the interests of a member Government is discussed by the Board, the representatives of that Government shall be entitled to take part in the discussions without the right of vote.

#### ARTICLE IV

1. The Organization shall have the capacity to perform any legal act appropriate to its object and purposes, including the power to acquire, hold and convey property, to enter into contracts and undertake obligations, to designate or create subordinate organs and to review their activity. The Organization shall not, however, have power to own transport equipment and material other than for its own internal or demonstration purposes, except with the unanimous consent of the Council.

2. These powers are vested in the Council. Subject to the provisions of paragraph 2 of Article V, the Council may delegate such of these powers as it may deem necessary to the Executive Board, including the power of sub-delegation. The Executive Board shall be responsible to the Council for the upkeep and administration of any property owned by the Organization.

#### ARTICLE V

##### Finance

1. The Executive Board shall submit to the Council an initial budget and from time to time such supplementary budgets as may be required, covering the administrative expenses of the Organization. Upon approval of a budget by the Council, the total amount approved shall be raised in such manner, or be allocated between member Governments in such proportions, as these Governments may agree. Each member Government undertakes, subject to

the requirements of its constitutional procedure, promptly to contribute to the Organization, in such currency or currencies as may be agreed by such Government with the Executive Board, its share of these expenses. Each member Government shall also provide such facilities as are required for the transfer into other currencies of sums so contributed and held by the Organization in that Government's own currency.

2. The Organization shall not incur any expenses, other than administrative expenses, except under the authority of the Council. Proposals for such expenses shall be submitted by the Executive Board to the Council and, when approved by the Council, such expenses shall be met by contributions which one or more member Governments may agree to make or in such other manner as may be agreed between member Governments. However, the obligation of transfer into foreign currencies, as defined in paragraph 1 of this Article, does not apply to these contributions.

3. Nothing in this Agreement shall require any member Government or transport administration under its authority to perform services without remuneration.

## ARTICLE VI

### Scope of the Organization

1. The Organization shall, after giving notice of its intention, exercise its functions in any territory in Continental Europe, upon the acceptance of this Agreement by the Government of that territory and/or, in appropriate cases, provided that the Allied Commander-in-Chief concerned is satisfied that military exigencies permit and subject to such conditions as he may deem necessary.

2. In respect of any territory in Continental Europe in which any Allied Commander-in-Chief retains responsibility for the direction of the transport system, the Organization shall on request give advice or assistance to the Allied Commander-in-Chief, and, in consultation with him, to any member Government or to other appropriate authorities of the United Nations, on any question with which it is empowered to deal under Article VII.

3. The Organization shall treat with any of the Occupation Authorities set up by Governments of the United Nations in respect of any territory in Continental Europe in which such Occupation Authorities are exercising authority.

## ARTICLE VII

### Executive Functions of the Organization

#### *Introductory*

1. The Organization shall carry out thorough studies of the technical and economic conditions affecting traffic of an international character and shall give to the Governments concerned with such traffic technical advice and

recommendations directed to restoring and increasing the carrying capacity of the transport systems in Continental Europe and to coördinating the movement of traffic of common concern on these systems.

2. In case any member Government meets with difficulties in carrying out these recommendations owing to reasons of a material or economic character, the Organization shall investigate with member Governments concerned means of practical help.

#### *Information on Transport Equipment and Material*

3. The Organization shall receive and collect information concerning the requirements of transport equipment and material for Continental Europe.

#### *Realization of Requirements for Transport Equipment and Material*

4. The Organization shall assist the realization of requirements of any member Government in Continental Europe for transport equipment and material.

#### *Allocation and Distribution for Use of Transport Equipment and Material*

5. The Organization shall, within the framework of the priorities determined by the appropriate authorities of the United Nations, determine the allocation, or distribution for use, to Governments in Continental Europe, on such conditions as it may deem necessary, of such transport equipment and material as may be made available for this purpose by the Allied Commanders-in-Chief, by Occupation Authorities, or by agencies of any one or more of the United Nations. To enable the Organization to carry out this function effectively, it may consult with the Governments concerned on their export possibilities of, and import needs of, transport equipment and material for Continental Europe and will receive from such Governments notification of all arrangements made in respect thereto of which they have notice.

#### *Arrangements to make mobile Transport Equipment and Material available*

6. In cases where temporary emergency requirements of mobile transport equipment for carrying traffic of common concern arise and the usual arrangements for the interchange of such mobile transport equipment are inadequate, the Organization shall arrange with member Governments concerned to make available mobile transport equipment for the purpose of meeting such requirements. Such mobile transport equipment shall be made available under arrangements made between the member Governments concerned, with the assistance of the Organization.

#### *Census of Transport Equipment and Material*

7. The Organization shall at the earliest practicable time arrange through the member Governments for a census of rolling-stock in Continental Eu-

rope and of such other transport equipment and material there as may appear necessary for the proper discharge of its functions.

*Identification and restoration of Transport Equipment and Material*

8. The Organization shall arrange, as soon as practicable, to restore to any member Government transport equipment and material belonging to it or to its nationals, found outside the territories under its authority and outside its control. Should any difficulties of identification arise, the Organization shall arrange immediately for such special measure to be taken as may be necessary to meet them. Where such restoration would unduly prejudice the operation of essential transport, the Organization shall work out agreements with the Governments concerned for the temporary use of transport equipment pending its restoration. The arrangements for restoration shall be made on the basis of the ownership of property which existed before any territorial changes in Europe, resulting from Axis policy, and in accordance with any general policies which may be determined by the appropriate authorities of the United Nations regarding restoration and restitution of the property removed by the enemy.

*Traffic*

9. The Organization may make such recommendations to the appropriate authorities as it deems necessary with respect to the method of carrying out projected movements of traffic of common concern, having regard to the transport facilities available for the movement of such traffic.

10. The Organization shall make recommendations to the Governments concerned in order to ensure the movement of traffic of common concern on all routes of transport in Continental Europe in accordance with all priorities determined by the appropriate authorities of the United Nations. In respect of traffic of military importance sponsored by the Allied Commanders-in-Chief, the appropriate authority for this purpose will be the Allied Commander-in-Chief concerned.

*Charges*

11. The Organization may work out the unification of tariffs, terms and conditions of transport and the like applicable to traffic of an international character. It shall recommend to the Governments concerned the principles by which reasonable transport charges for traffic of common concern in Continental Europe should be fixed by them in accordance with the provisions of paragraph 9 of Article VIII. This paragraph shall not apply to military traffic under the control of any Allied Commander-in-Chief except at his request.

*Rehabilitation of Transport Systems*

12. The Organization may study the conditions of transport affecting traffic of an international character in individual countries and make recom-

mendations to the Governments concerned as to technical measures directed to the quickest restoration of transport facilities and their most effective use, and as to the priority in which works or projects in respect of the restoration or improvements of transport facilities shall be carried out.

#### *Operation of Transport*

13. While it remains the task of each member Government to provide for the efficient operation of the transport systems in Continental Europe for which it is responsible, the Organization may exceptionally, at the request of any member Government, give any assistance in its power in the rehabilitation or operation of transport in any territory in Continental Europe under the authority of such Government on such conditions as may be agreed between it and the Organization, having due regard to the rights of other member Governments.

#### *Coördination of European Transport*

14. The Organization shall work out and coördinate common action to secure the inauguration, maintenance, modification, resumption or, where appropriate, suppression, of international arrangements for through working of railways and exchange of rolling-stock of the Continental European countries for carrying out international transport. In particular, it shall ensure a unified clearing system for traffic operations between the different countries in Continental Europe. In general, it shall promote where necessary the establishment of appropriate machinery for coöperation between railway administrations.

15. The Organization shall place its services at the disposal of member Governments and make recommendations with a view to ensuring the most efficient movement of international traffic on waterways. It shall not, however, make recommendations with regard to questions concerning the regimes of the inland international waterways of Continental Europe.

16. The Organization shall take through the Governments concerned such steps as may be practicable to facilitate international traffic of common concern in lorries and other road vehicles and the coördination of road and other means of transport with a view to ensuring the movement of international traffic.

17. In carrying out the functions mentioned in paragraphs 14 and 16 of this Article and in placing its services at the disposal of member Governments as described in paragraph 15 of this Article, the Organization shall make use, to the extent practicable, of conventions in force between member Governments so as to obtain the greatest benefit therefrom for the fulfilment of this task provided that the Organization shall act—

- (a) in accordance with any general policies which may be determined by the appropriate authorities of the United Nations; and
- (b) with due respect for existing rights and obligations.

18. The Organization shall make recommendations to the Governments

concerned designed to promote adequate coördination of all European transport for the fulfilment of the common military needs of the United Nations or in the interests of traffic of an international character.

#### *Relations with other Agencies*

19. The Organization shall coöperate as may be required with the appropriate authorities and agencies of any one or more of the United Nations and with international organizations.

20. The Organization shall provide all possible assistance to the Allied Commanders-in-Chief in meeting their needs for transport facilities and improving the use of these facilities for the successful fulfilment of military requirements.

21. The Organization shall arrange for consultation, through appropriate machinery, with representatives of persons employed in inland transport on international questions of mutual concern to the Organization and such representatives within the field of the Organization's activities.

#### *Miscellaneous*

22. The Organization may advise the Governments concerned and the appropriate authorities of the United Nations on the priority to be given, in the interests of the rehabilitation of European transport, to the repatriation of displaced transport personnel and to workers required for the production, maintenance or repair of transport equipment and material.

23. The Organization shall give all practicable assistance through the appropriate authorities to any member Government at its request in obtaining supplies of fuel, power and lubricants to meet the needs of traffic of common concern, in order that that Government may fulfil its obligations under paragraph 7 of Article VIII.

### ARTICLE VIII

#### Obligations of Member Governments

##### *Information*

1. Every member Government, in respect of any territory which is under its authority and in the field of activity of the Organization, shall, upon request of the Organization, provide it with such information as is essential for the performance of its functions.

##### *Census of Transport Equipment and Material*

2. Every member Government undertakes to coöperate fully with the Organization in arranging any census for which provision is made in paragraph 7 of Article VII.

##### *Identification and Restoration of Transport Equipment and Material*

3. Every member Government, in respect of any territory which is under



its authority and in the field of activity of the Organization, undertakes that:—

- (i) it will facilitate the execution of paragraph 8 of Article VII;
- (ii) it will not seize:—
  - (a) transport equipment and material in Continental Europe found outside the territories under its authority, even though such equipment and material may belong to it or to any of its nationals;
  - (b) transport equipment and material found within territory under its authority but not belonging to it or any of its nationals;
  - (c) transport equipment and material coming within territory under its authority as the result of arrangements made under the auspices of the Organization for the movement of traffic of common concern;

provided, however:—

- (1) that every member Government shall be permitted to use equipment defined under (b) and (c) above subject to the provisions of paragraphs 5 and 8 of Article VII and, in the case of enemy or ex-enemy transport equipment and material, without prejudice to its ultimate disposal by the appropriate authorities of the United Nations; and
- (2) that nothing in this paragraph shall cēbar any member Government or any of its nationals from continuing the management of its or his own inland vessels.

4. The provisions of paragraph 3 of this Article shall not affect the rights of the Allied Commanders-in-Chief within any territory in respect of which the Organization has not begun to exercise its functions under Article VII.

#### *Traffic*

5. Every member Government undertakes to ensure by any means in its power the best possible movement of traffic of common concern in accordance with the recommendations made by the Organization under paragraph 10 of Article VII.

6. Every member Government undertakes to provide inland vessels under its control in Continental Europe required for traffic of common concern,

- (i) in accordance with the recommendations of the Organization generally, and
- (ii) if signatory to the Annex to this Agreement, in accordance with its terms.

#### *Provision of Fuel, Power and Lubricants*

7. Every member Government shall take all measures necessary and practicable to ensure, in respect of the territory in Continental Europe under its authority that adequate supplies of fuel, power and lubricants are available

for traffic of common concern, provided that the Organization has made suitable arrangements with the Government concerned.

### *Charges*

8. Every member Government undertakes not to levy or permit the levy of customs duties or other charges, other than transport charges, and admissible transit charges on traffic of common concern in transit through territories in Continental Europe under its authority. No discrimination shall be made in respect of import duties levied on goods of common concern, dependent on the route the goods have travelled prior to importation into the country concerned.

9. Every member Government undertakes to secure that transport charges made within territories in Continental Europe under its authority on traffic of common concern, including such traffic in transit through such territories, shall be as low and simple and as uniform with those in other territories, to which this Agreement applies, as is practicable. Every member Government shall give the fullest consideration to recommendations made by the Organization in accordance with paragraph 11 of Article VII and report to the Organization on the action taken.

### *Miscellaneous*

10. Every member Government undertakes to coöperate with the Organization in the exercise of its functions under paragraphs 14 and 16 of Article VII.

11. Every member Government shall use its best endeavours in its relations with any other international organizations, agencies or authorities to give effect to the provisions of this Agreement.

12. Every member Government shall give the fullest consideration to any recommendations made by the Organization in accordance with paragraphs 12, 15 and 19 of Article VII and report to the Organization on the action taken.

13. Every member Government shall recognize the international personality and legal capacity which the Organization possesses.

14. Every member Government shall respect the exclusively international character of the members of the Executive Board, the chief officer and the staff of the Organization.

15. Every member Government shall accord to the Organization the privileges, immunities and facilities which they grant to each other, including in particular:—

- (a) immunity from every form of legal process;
- (b) exemption from taxation and customs duties; and
- (c) inviolability of premises occupied by, and of the archives and communications of the Organization.

16. Every member Government shall accord diplomatic privileges and

immunities to persons appointed by other members as their representatives in or to the Organization, to the members of the Executive Board, and to the higher officials of the Organization not being their own nationals.

17. Every member Government shall accord to all officials and employees of the Organization:—

- (a) immunity from suit and legal process relating to acts performed by them in their official capacity;
- (b) all such facilities for their movements and for the execution of their functions, as are deemed necessary by the Organization for the speedy and effective fulfillment of their official duties; and
- (c) except in the case of their own nationals, exemption from taxation of their official salaries and emoluments.

18. Every member Government shall in territory under its authority take all steps in its power to facilitate the exercise by the Organization of any of the powers referred to in Article IV.

#### ARTICLE IX

The Organization shall be related to any general international organization to which may be entrusted the coördination of the activities of international organizations with specialized responsibilities.

#### ARTICLE X

1. The functions of the Organization shall relate to all forms of transport by road, rail or waterway, within the territories of the Continent of Europe in which the Organization operates, but not to seagoing shipping, except that the provisions of paragraph 10 of Article VII and paragraph 5 of Article VIII shall apply in respect of such shipping when employed in Continental Europe on inland waterways.

2. In regard to the handling of traffic in ports where seagoing vessels are discharged or loaded, the Organization shall coöperate with the appropriate authorities of the member Government concerned and any shipping organization set up by them to ensure:—

- (i) the rapid turn-round of ships;
- (ii) the efficient use of port facilities in the best interests of the prompt clearance of cargo of common concern.

#### ARTICLE XI

In the event of there being any direct inconsistency between the provisions of this Agreement and the provisions of any agreement already existing between any of the member Governments, the provisions of this Agreement shall, as between such member Governments, be deemed to prevail, due respect being had to the provisions of paragraph 17 of Article VII, provided, however, that nothing in this Article shall be construed to prevent member

Governments from entering into agreements to facilitate the working of traffic across national frontiers.

## ARTICLE XII

### Definitions

1. For the purpose of this Agreement and its Annex, the definitions given in this Article have been adopted.

2. The term "inland transport" shall include all forms of transport as referred to in Article X of this Agreement.

3. The term "Continental Europe" shall mean all territories in Europe under the authority or control of member Governments but shall not extend to territory of the United Kingdom or of the Union of Soviet Socialist Republics.

4. The term "territory under the authority of a member Government" shall be construed to mean territory in Continental Europe either under the sovereignty of a member Government or territory over which a member Government or member Governments is or are exercising authority or control.

5. The term "transport equipment and material" shall include, so far as the Executive Board deems it necessary for the execution of the functions of the Organization:—

- (i) any items of fixed and mobile equipment, stores (other than fuel), plant and spares and accessories of all kinds specifically intended and required for use of transport undertakings, including equipment required for use in ports, whether ashore or afloat;
  - (ii) equipment and material specifically intended and required for the rehabilitation, maintenance or construction of roads, railways, bridges, ports and inland waterways;
  - (iii) major plant and tools specifically required for the repair of transport equipment and material for use by transport authorities.
6. The term "traffic of common concern" shall include—
- (i) personnel, stores, supplies or other traffic to be moved in accordance with the requirements of the Allied Commanders-in-Chief;
  - (ii) displaced and other persons to be moved in accordance with the priorities determined by the appropriate United Nations authorities;
  - (iii) supplies for civil needs to be moved in Continental Europe in accordance with the priorities determined by the appropriate United Nations authorities;
  - (iv) property removed by the enemy.

7. The term "transport charges" shall include, in addition to freight or conveyance charges, any other incidental charges, such as tolls, port charges, charges for warehousing and handling goods in transit which may affect the cost of transport.

8. The term "admissible transit charges" means dues intended solely to defray expenses of supervision and administration entailed by the transit traffic concerned.

9. The term "Allied Commander-in-Chief" shall mean any Commander-in-Chief designated for command on the Continent of Europe by the appropriate authorities of any of the following:—

the French Republic,  
the Union of Soviet Socialist Republics  
the United Kingdom of Great Britain and Northern Ireland,  
the United States of America.

10. The term "Government" includes any Provisional Government.

#### ARTICLE XIII

Until the expiry of the period of two years from this day's date, the provisions of this Agreement may be amended, suspended or terminated only by a unanimous vote of the Council. At any time after that date any provision of this Agreement may be amended, suspended or terminated by a two-thirds majority of the Council, provided that no alteration shall be made in the provisions of this Agreement so as to extend the obligations or financial liability of any member Government without that Government's consent.

#### ARTICLE XIV

1. This Agreement shall come into force for each member Government on the date of signature on its behalf or of its admission to the Organization under Article II.

2. It shall remain in force for two years from this day's date. It shall thereafter remain in force, subject to the right of any member Government, after the expiry of eighteen months from this day's date, to give six months' notice in writing to the Council of its intention to withdraw from this Agreement.

IN WITNESS whereof the undersigned, duly authorized by their respective Governments, have signed the present Agreement.

Done in London on the 27th day of September, 1945, in English, French and Russian, all three texts being equally authentic, in a single copy which shall remain deposited in the archives of the Government of the United Kingdom of Great Britain and Northern Ireland, by whom certified copies shall be transmitted to all Signatory Governments.

#### ANNEX

##### PROTOCOL RELATING TO TRAFFIC ON INLAND WATERWAYS

##### PREAMBLE

With a view to fulfilling, in respect of traffic on inland waterways, the obligations assumed by the member Governments under the Agreement con-

cerning the establishment of an European Central Inland Transport Organization (hereinafter referred to as the Agreement), and subject to the conditions set out therein, the Governments signatory hereto have agreed as follows:—

#### ARTICLE I

Every Government signatory hereto undertakes to establish appropriate machinery necessary for the application of all the obligations assumed in paragraphs 5 and 6 of Article VIII of the Agreement to traffic on inland waterways and to appoint persons or organizations entitled to treat with the Organization on questions of this nature.

#### ARTICLE II

The Governments signatory hereto, taking into account the geographical, technical and other peculiarities connected with traffic on inland waterways and the needs of each of them in these respects, will designate experts to be consulted by the Organization on questions of traffic on inland waterways within the various areas of such traffic.

#### ARTICLE III

For each waterways traffic area in Continental Europe, the allocation of inland shipping and, if necessary, shipping space for carrying traffic of common concern in accordance with approved programs, will be determined from time to time by the Organization in agreement with the Governments concerned. In determining this allocation, due account shall be taken of the particulars of the vessel, its equipment and crew and of its normal traffic.

#### ARTICLE IV

The terms of remuneration to be paid by the users of inland vessels for traffic of common concern shall be worked out by the Organization in agreement with the Governments and/or the authorities concerned on a fair and reasonable basis in such a manner as to give effect to the following two principles:

- (i) inland vessels of all flags performing the same services should receive the same freights;
- (ii) freights with reference to paragraph 11 of Article VII shall be calculated so as to include, after providing for depreciation of the ship, a reasonable margin of profit.

#### ARTICLE V

1. This Protocol shall remain open for signature in London on behalf of any member Government of the European Central Inland Transport Organization.

2. This Protocol shall come into force for each Government signatory

thereto as from the date of signature on its behalf. Any Government when signing the present Protocol may declare that its signature shall not become effective until this Protocol has been signed by certain other specified Governments.

3. This Protocol shall remain in force for two years from this day's date. It shall thereafter remain in force, subject to the right of any signatory Government, after the expiry of eighteen months from this day's date, to give six months' notice in writing to the Council of the European Central Inland Transport Organization of its intention to withdraw from this Protocol.

IN WITNESS whereof the undersigned, duly authorized by their respective Governments, have signed the present Protocol.

Done in London on the 27th day of September 1945, in English, French and Russian, all three texts being equally authentic, in a single copy which shall remain deposited in the archives of the Government of the United Kingdom of Great Britain and Northern Ireland, by whom certified copies shall be transmitted to all Signatory Governments.

## UNITED STATES

### PROCLAMATION BY THE PRESIDENT WITH RESPECT TO THE NATURAL RESOURCES OF THE SUBSOIL AND SEA BED OF THE CONTINENTAL SHELF\*

*September 28, 1945*

WHEREAS the Government of the United States of America, aware of the long range world-wide need for new sources of petroleum and other minerals, holds the view that efforts to discover and make available new supplies of these resources should be encouraged; and

WHEREAS its competent experts are of the opinion that such resources underlie many parts of the continental shelf off the coasts of the United States of America, and that with modern technological progress their utilization is already practicable or will become so at an early date; and

WHEREAS recognized jurisdiction over these resources is required in the interest of their conservation and prudent utilization when and as development is undertaken; and

WHEREAS it is the view of the Government of the United States that the exercise of jurisdiction over the natural resources of the subsoil and sea bed of the continental shelf by the contiguous nation is reasonable and just, since the effectiveness of measures to utilize or conserve these resources would be contingent upon cooperation and protection from the shore, since the continental shelf may be regarded as an extension of the land-mass of the coastal nation and thus naturally appurtenant to it, since these resources frequently form a seaward extension of a pool or deposit lying within the territory, and since self-protection compels the coastal nation to keep close watch over

\* White House Press Release.

activities off its shores which are of the nature necessary for utilization of these resources;

*Now, therefore*, I, HARRY S. TRUMAN, President of the United States of America, do hereby proclaim the following policy of the United States of America with respect to the natural resources of the subsoil and sea bed of the continental shelf.

Having concern for the urgency of conserving and prudently utilizing its natural resources, the Government of the United States regards the natural resources of the subsoil and sea bed of the continental shelf beneath the high seas but contiguous to the coasts of the United States as appertaining to the United States, subject to its jurisdiction and control. In cases where the continental shelf extends to the shores of another State, or is shared with an adjacent State, the boundary shall be determined by the United States and the State concerned in accordance with equitable principles. The character as high seas of the waters above the continental shelf and the right to their free and unimpeded navigation are in no way thus affected.

*In witness whereof*, I have hereunto set my hand and caused the seal of the United States of America to be affixed.

Done at the City of Washington this twenty-eighth day of September, in the year of our Lord nineteen hundred and forty-five, and of the (SEAL) Independence of the United States of America the one hundred and seventieth.

HARRY S. TRUMAN

By the President:

DEAN ACHESON

*Acting Secretary of State*

PROCLAMATION BY THE PRESIDENT WITH RESPECT TO COASTAL FISHERIES IN CERTAIN AREAS OF THE HIGH SEAS \*

*September 28, 1945*

WHEREAS for some years the Government of the United States of America has viewed with concern the inadequacy of present arrangements for the protection and perpetuation of the fishery resources contiguous to its coasts, and in view of the potentially disturbing effect of this situation, has carefully studied the possibility of improving the jurisdictional basis for conservation measures and international cooperation in this field; and

WHEREAS such fishery resources have a special importance to coastal communities as a source of livelihood and to the nation as a food and industrial resource; and

WHEREAS the progressive development of new methods and techniques contributes to intensified fishing over wide sea areas and in certain cases seriously threatens fisheries with depletion; and

WHEREAS there is an urgent need to protect coastal fishery resources from destructive exploitation, having due regard to conditions peculiar to each

\* White House Press Release.



region and situation and to the special rights and equities of the coastal State and of any other State which may have established a legitimate interest therein;

Now, therefore, I, HARRY S. TRUMAN, President of the United States of America, do hereby proclaim the following policy of the United States of America with respect to coastal fisheries in certain areas of the high seas:

In view of the pressing need for conservation and protection of fishery resources, the Government of the United States regards it as proper to establish conservation zones in those areas of the high seas contiguous to the coasts of the United States wherein fishing activities have been or in the future may be developed and maintained on a substantial scale. Where such activities have been or shall hereafter be developed and maintained by its nationals alone, the United States regards it as proper to establish explicitly bounded conservation zones in which fishing activities shall be subject to the regulation and control of the United States. Where such activities have been or shall hereafter be legitimately developed and maintained jointly by nationals of the United States and nationals of other States, explicitly bounded conservation zones may be established under agreements between the United States and such other States; and all fishing activities in such zones shall be subject to regulation and control as provided in such agreements. The right of any State to establish conservation zones off its shores in accordance with the above principles is conceded, provided that corresponding recognition is given to any fishing interests of nationals of the United States which may exist in such areas. The character as high seas of the areas in which such conservation zones are established and the right to their free and unimpeded navigation are in no way thus affected.

*In witness whereof*, I have hereunto set my hand and caused the seal of the United States of America to be affixed.

Done at the City of Washington this twenty-eighth day of September, in the year of our Lord nineteen hundred and forty-five, and of the  
(SEAL) Independence of the United States of America the one hundred and seventieth.

HARRY S. TRUMAN

By the President:

DEAN ACHESON

*Acting Secretary of State*

EXECUTIVE ORDER OF THE PRESIDENT RESERVING AND PLACING CERTAIN  
RESOURCES OF THE CONTINENTAL SHELF UNDER THE CONTROL AND JURIS-  
DICTION OF THE SECRETARY OF THE INTERIOR\*

*September 28, 1945*

By virtue of and pursuant to the authority vested in me as President of the United States, it is ordered that the natural resources of the subsoil and

\* White House Press Release.

sea bed of the continental shelf beneath the high seas but contiguous to the coasts of the United States declared this day by proclamation to appertain to the United States and to be subject to its jurisdiction and control, be and they are hereby reserved, set aside, and placed under the jurisdiction and control of the Secretary of the Interior for administrative purposes, pending the enactment of legislation in regard thereto. Neither this Order nor the aforesaid proclamation shall be deemed to affect the determination by legislation or judicial decree of any issues between the United States and the several states, relating to the ownership or control of the subsoil and sea bed of the continental shelf within or outside of the three-mile limit.

HARRY S. TRUMAN

THE WHITE HOUSE  
September 28, 1945

EXECUTIVE ORDER OF THE PRESIDENT PROVIDING FOR THE ESTABLISHMENT OF  
FISHERY CONSERVATION ZONES\*

*September 28, 1945*

By virtue of and pursuant to the authority vested in me as President of the United States, it is hereby ordered that the Secretary of State and the Secretary of the Interior shall from time to time jointly recommend the establishment by Executive orders of fishery conservation zones in areas of the high seas contiguous to the coasts of the United States, pursuant to the proclamation entitled "Policy of the United States With Respect to Coastal Fisheries in Certain Areas of the High Seas," this day signed by me, and said Secretaries shall in each case recommend provisions to be incorporated in such orders relating to the administration, regulation and control of the fishery resources of and fishing activities in such zones, pursuant to authority of law heretofore or hereafter provided.

HARRY S. TRUMAN

THE WHITE HOUSE  
September 28, 1945

UNITED STATES—GREAT BRITAIN—CANADA

DECLARATION ON ATOMIC ENERGY †

*November 15, 1945*

THE PRESIDENT OF THE UNITED STATES, THE PRIME MINISTER OF THE UNITED KINGDOM, AND THE PRIME MINISTER OF CANADA have issued the following statement.<sup>1</sup>

1. We recognize that the application of recent scientific discoveries to the methods and practice of war has placed at the disposal of mankind means of

\* White House Press Release.

† *Department of State Bulletin*. Vol. XIII, No. 334 (November 18, 1945), p. 781.

<sup>1</sup> The Secretary of State announced immediately after release of the declaration that texts were cabled to the foreign ministers of the permanent members of the United Nations Security Council, and later in the day he advised that the remainder of the United Nations were informed of the declaration.

destruction hitherto unknown, against which there can be no adequate military defence, and in the employment of which no single nation can in fact have a monopoly.

2. We desire to emphasize that the responsibility for devising means to ensure that the new discoveries shall be used for the benefit of mankind, instead of as a means of destruction, rests not on our nations alone, but upon the whole civilized world. Nevertheless, the progress that we have made in the development and use of atomic energy demands that we take an initiative in the matter, and we have accordingly met together to consider the possibility of international action:

- (a) To prevent the use of atomic energy for destructive purposes
- (b) To promote the use of recent and future advances in scientific knowledge, particularly in the utilization of atomic energy, for peaceful and humanitarian ends.

3. We are aware that the only complete protection for the civilized world from the destructive use of scientific knowledge lies in the prevention of war. No system of safeguards that can be devised will of itself provide an effective guarantee against production of atomic weapons by a nation bent on aggression. Nor can we ignore the possibility of the development of other weapons, or of new methods of warfare, which may constitute as great a threat to civilization as the military use of atomic energy

4. Representing, as we do, the three countries which possess the knowledge essential to the use of atomic energy, we declare at the outset our willingness, as a first contribution, to proceed with the exchange of fundamental scientific information and the interchange of scientists and scientific literature for peaceful ends with any nation that will fully reciprocate.

5. We believe that the fruits of scientific research should be made available to all nations, and that freedom of investigation and free interchange of ideas are essential to the progress of knowledge. In pursuance of this policy, the basic scientific information essential to the development of atomic energy for peaceful purposes has already been made available to the world. It is our intention that all further information of this character that may become available from time to time shall be similarly treated. We trust that other nations will adopt the same policy, thereby creating an atmosphere of reciprocal confidence in which political agreement and coöperation will flourish.

6. We have considered the question of the disclosure of detailed information concerning the practical industrial application of atomic energy. The military exploitation of atomic energy depends, in large part, upon the same methods and processes as would be required for industrial uses.

We are not convinced that the spreading of the specialized information regarding the practical application of atomic energy, before it is possible to devise effective, reciprocal, and enforceable safeguards acceptable to all nations, would contribute to a constructive solution of the problem of the atomic bomb. On the contrary we think it might have the opposite effect. We are, however, prepared to share, on a reciprocal basis with others of the

United Nations, detailed information concerning the practical industrial application of atomic energy just as soon as effective enforceable safeguards against its use for destructive purposes can be devised.

7. In order to attain the most effective means of entirely eliminating the use of atomic energy for destructive purposes and promoting its widest use for industrial and humanitarian purposes, we are of the opinion that at the earliest practicable date a Commission should be set up under the United Nations Organization to prepare recommendations for submission to the Organization.

The Commission should be instructed to proceed with the utmost dispatch and should be authorized to submit recommendations from time to time dealing with separate phases of its work.

In particular the Commission should make specific proposals:

- (a) For extending between all nations the exchange of basic scientific information for peaceful ends.
- (b) For control of atomic energy to the extent necessary to ensure its use only for peaceful purposes.
- (c) For the elimination from national armaments of atomic weapons and of all other major weapons adaptable to mass destruction,
- (d) For effective safeguards by way of inspection and other means to protect complying states against the hazards of violations and evasions.

8. The work of the Commission should proceed by separate stages, the successful completion of each one of which will develop the necessary confidence of the world before the next stage is undertaken. Specifically it is considered that the Commission might well devote its attention first to the wide exchange of scientists and scientific information, and as a second stage to the development of full knowledge concerning natural resources of raw materials.

9. Faced with the terrible realities of the application of science to destruction, every nation will realize more urgently than before the overwhelming need to maintain the rule of law among nations and to banish the scourge of war from the earth. This can only be brought about by giving wholehearted support to the United Nations Organization, and by consolidating and extending its authority, thus creating conditions of mutual trust in which all peoples will be free to devote themselves to the arts of peace. It is our firm resolve to work without reservations to achieve these ends.

HARRY S. TRUMAN

*President of the United States*

C. R. ATTLEE

*Prime Minister of the United Kingdom*

W. L. MACKENZIE KING

*Prime Minister of Canada*

The City of Washington  
The White House  
November 15, 1945

# AMERICAN JOURNAL OF INTERNATIONAL LAW

VOL. 40

April, 1946

NO. 2

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## FURTHER DEVELOPMENTS CONCERNING JURISDICTION OVER FRIENDLY FOREIGN ARMED FORCES

By ARCHIBALD KING<sup>1</sup>

In the October, 1942, number of this JOURNAL, there was published an article by the present writer dealing with the jurisdiction of the courts of one nation over the personnel of the armed forces of another friendly nation on the soil of the former.<sup>2</sup> During the three years which have elapsed since that time there have issued several international agreements, statutes, executive orders, and judicial decisions in various countries dealing with this subject, a summary of which will bring the previous article down to date.

### *Egypt*

The status of friendly forces in Egypt has been fully treated by Judge Brinton in a recent very interesting and able article in this JOURNAL.<sup>3</sup> As there stated in detail, Egypt concluded a treaty with Great Britain in 1936 conceding to British courts, without limitation as to time, exclusive criminal jurisdiction over British military and naval personnel in Egypt and a limited jurisdiction over civil suits against them.<sup>4</sup> On March 2, 1943, an executive agreement was concluded between the United States and Egypt conceding to our courts exclusive criminal jurisdiction over our armed forces in Egypt for the duration of the war.<sup>5</sup> Even before the notes constituting that agreement were exchanged the Egyptian Government made no effort to subject United States military or naval personnel to the jurisdiction of its courts.<sup>6</sup>

Judge Brinton's article also discusses several recent decisions of the Mixed Courts of Egypt in which exemption from local criminal jurisdiction was claimed by several members of various other military or naval forces serving in Egypt with the consent of the government of that country, some of which have been published in this JOURNAL.<sup>7</sup> The opinions in those cases admit

<sup>1</sup> The author was until recently a Colonel in the Judge Advocate General's Department, United States Army and is now a Colonel, retired; but the opinions herein expressed are his own and not necessarily those of the War Department or The Judge Advocate General.

<sup>2</sup> King, "Jurisdiction over Friendly Foreign Armed Forces," this JOURNAL, Vol. 36 (1942), p. 539.

<sup>3</sup> Brinton, Jurisdiction over Members of Allied Forces in Egypt, this JOURNAL, Vol. 38 (1944), p. 375.

<sup>4</sup> League of Nations, *Treaty Series*, Vol. 173, p. 434.

<sup>5</sup> Department of State, *Executive Agreement Series*, No. 356.

<sup>6</sup> This statement is made on the authority of two officers of the U. S. Army who were in Egypt at the time and in a position to know the facts.

<sup>7</sup> This JOURNAL, Vol. 39 (1945), pp. 345, 347, 349. Other decisions of this class, not reprinted in this JOURNAL, are *Ministère Public c. Gaitanos*, *Journal des Tribunaux Mixtes*, July 13-14, 1942; *M.P. c. Anne*, *J.T.M.*, Jan. 21-22, 1944; *M.P. c. Cambouras*, *J.T.M.*, Jan. 26-27, 1944; *M.P. c. Scordalos*, *J.T.M.*, May 19-20, 1944.

the immunity of the visiting soldier or sailor from the jurisdiction of the local courts and the exclusive jurisdiction of the court-martial of his own service over him when in his camp or on his ship, but hold that when absent therefrom the said immunity exists only when he is on *service commandé*. In the first case in which the above rule was laid down, that of Triandafilou, a sailor in the Greek navy, the Court based its decision on Article 20 of the resolutions adopted by the Institute of International Law at its meeting at Stockholm in 1928, which follows an article of resolutions voted at the Hague in 1898, and which provides that members of the crew of a ship of war, who commit offenses against the laws of the country while ashore, may be arrested by the local authorities and tried by the local courts, unless at the time of the offense they are on *service commandé*.<sup>8</sup>

The title of the resolutions of which the above article forms a part is *Règlement sur le Régime des Navires de Mer et de leurs Équipages dans les Ports étrangers en Temps de Paix*.<sup>9</sup> All of these cases arose during the war. Nor will it do to say that Egypt was at peace. Though that is strictly true, the title does not say that the resolutions are drawn for places at peace, but for a time of peace. And in fact Egypt's state of peace was little more than a technical one. She had, to her credit be it said, freely opened her ports and borders to the ships of war and troops of the Allied nations. Scores of those ships accepted the hospitality of her harbors and thousands of those troops served, fought, and died on her soil. The date of Triandafilou's offense is not stated in papers now available, but presumably was not long before May 4, 1942, the date of his trial in the Correctional Court of Alexandria. Prior to that time the German and Italian forces had twice invaded Egypt and had twice been driven back by the British as far as El Agheila, at the western edge of Cyrenaica. On January 21, 1942, Rommel, the German commander, attacked the British and drove them east to a defensive line extending south from El Gazala, 35 miles west of Tobruk, where they still were at the supposed date of Triandafilou's offense. About that supposed date, on April 7, 1942, Axis planes bombed the port of Alexandria,

<sup>8</sup> *Annuaire de l'Institut de Droit International*, 1928, p. 748. Article 20 is found in Chapter II, headed, *Bâtiments and militaires*. The article is as follows:

"ART. 20

*Si des gens du bord, se trouvant à terre, commettent des infractions aux lois du pays, ils peuvent être arrêtés par les agents de l'autorité territoriale et déferés à la justice local. Avis de l'arrestation doit être donné au commandant du navire, qui ne peut exiger qu'ils lui soient remis.*

*Si les délinquants, n'étant point arrêtés, ont rejoint le bord, l'autorité territoriale ne peut pas les y saisir, mais seulement demander qu'ils soient déferés aux tribunaux compétents d'après la loi du pavillon et qu'avis lui soit donné du résultat des poursuites.*

*Si des gens du bord, se trouvant à terre en service commandé, soit individuellement, soit collectivement, sont inculpés de délit ou de crime commis à terre, l'autorité territoriale peut procéder à leur arrestation, mais elle doit les livrer au commandant sur la demande de celui-ci.*

*L'autorité territoriale doit, lors de la remise des délinquants, faire suivre les procès-verbaux constatant les faits, elle a le droit de demander qu'ils soient poursuivis devant les autorités compétentes et qu'avis lui soit donné du résultat des poursuites.*

<sup>9</sup> Same, p. 736.



in which Triandafilou's ship lay, and killed 52 persons. On May 26 Rommel attacked again, turned the left flank of and defeated the British army. On June 21, he captured Tobruk with its garrison of 25,000 men and great quantities of supplies. Rommel invaded Egypt a third time, pressed forward, and the British withdrew until they reached El Alamein, where they bravely stood, fought off and stopped the enemy. El Alamein was the last possible defensive position short of Alexandria and only 80 miles from that city, which was the place of Triandafilou's offense and of the sessions of the Mixed Courts. The British retreat reached El Alamein on June 29, 1942, the very day that the Court of Cassation delivered its opinion citing the Stockholm Resolutions, which by their title are applicable only *en temps de paix*. The next day, June 30, Axis planes twice raided Alexandria. To hold that there was a "time of peace" at Alexandria in the spring and early summer of 1942, merely because there had been no declaration of war by Germany or Italy upon Egypt, or *vice versa*, is to take leave of reality.<sup>10</sup>

The Stockholm resolutions are entitled a *Règlement* and apparently were meant to be annexed to a multipartite treaty, as the *règlement* concerning the laws and customs of war on land is annexed to Hague Convention No. IV of 1907; but, so far as this writer knows, no such treaty has ever been made. Notwithstanding the respect which every one (and nobody more than this writer) feels for the learning and ability of the eminent men who composed the Institute of International Law and who drew up the article in question, it is nevertheless purely an unofficial expression of the opinion of those persons, and has *per se* no binding force.

The fact that the learned jurists who drew the resolution of the Institute of International Law inserted the words *en temps de paix* in its title justifies the inference that they thought the rule inapplicable in time of war. On the other hand, a number of authorities have laid down substantially the same rule without any express limitation to a time of peace.<sup>11</sup> Furthermore, the Mixed Courts applied a resolution intended for ships and naval personnel to armies, as the defendants in four of the cases already mentioned were soldiers.<sup>12</sup>

The principal objection to the decisions of the Mixed Courts cited above arises from the fact that they disregard the military necessities of the situation. As this writer pointed out in his earlier article,<sup>13</sup> in order that he may carry out the mission which brought him in time of war into a theater of

<sup>10</sup> See *The Prize Cases*, 2 Black 635, in which the Supreme Court of the United States upheld the legality of the blockade of the coasts of the Southern States during the Civil War, because war existed in fact, though there had been no declaration.

<sup>11</sup> C. C. Hyde, *International Law*, 2d ed., Vol. II, Sec. 255; Oppenheim, *International Law*, 4th ed., Vol. I, Sec. 451; J. B. Moore, *Digest of International Law*, Vol. II, Sec. 256; G. H. Hackworth, *Digest of International Law*, Vol. II, p. 422.

<sup>12</sup> Those of Stamatopoulos, Cambouras, Gongoulis, and Mal-ro, cited above, note 7.

<sup>13</sup> This JOURNAL, Vol. 36 (1942), p. 560.

military operations, it is indispensable that a commanding officer have exclusive control of his men. It may be argued that a battle will not be lost because the army has one less soldier; but, if the civil authorities may take away one soldier at such a time and place, they may take away a hundred, if that many are charged with offenses; and, if they may lock up a private, they may lock up the general, if in his haste to get to the front his car has knocked down a civilian, and the army may lose its directing head.

The need for the captain of a warship in a theater of operations in time of war to have complete and exclusive jurisdiction and control over his men, even if they go ashore temporarily, is as great as that of a commanding officer of land troops. Every man on a warship has his battle station. Surplus personnel are rarely carried. For the courts or police of another even though friendly nation to take a man from his ship diminishes *pro tanto* her combat efficiency, and she may have to engage in combat an hour after leaving harbor. There is therefore the strongest military reason against permitting the local jurisdiction to prevail in time of war and in favor of the man's being tried only by the courts-martial of his own navy.

The defendants in the several cases before the Mixed Courts belonged either to the Greek or the French forces. The Greek government was in exile. The Vichy French Government was a prisoner and that set up at Algiers after the landing of the Americans was cut off from the mother country. None of these governments was in a position to oppose effectively the exercise of jurisdiction over its soldiers and sailors by the Mixed Courts of Egypt. As has been said, Great Britain has a treaty, and the United States an executive agreement, with Egypt, conceding exclusive jurisdiction over their forces; but, even in the absence of a treaty or agreement, it is not to be supposed that any nation able to prevent it will permit its soldiers or sailors to be withdrawn from its control by another power in time of war and in a theater of operations, whatever a court may say about the matter. If international law lays down that this may be done, it runs the risk of justifying the charge sometimes (though in general erroneously) brought against it, that it is divorced from reality.

The decisions of the Mixed Courts are based upon a resolution which does not have the force of law, which according to its title applies only in time of peace but which was applied by those courts to a time of war in fact, the courts applied to land troops a resolution relating only to naval forces, and the decisions disregard the military necessities of the situation and lay down a rule which powerful nations do not and will not follow in time of war. For these reasons, notwithstanding the profound respect which this writer feels for the Mixed Courts, he is forced to the conclusion that their decisions in these cases are unsound.

The question may next be considered whether Article 20 of the Stockholm resolutions of the Institute of International Law states a sound and workable

rule of law, as limited by the Institute itself, i.e., to time of peace and to naval personnel forming part of the crew of a friendly foreign warship.

It is well settled that a crime committed by a member of the crew on board a warship of nation A in a harbor or territorial waters of nation B is justiciable only by the naval courts-martial of A, unless A waives its exclusive jurisdiction.<sup>14</sup> It may reasonably be argued that, for such a man at such a time, the rail of his ship is the equivalent of the frontier between the two countries, and that, if the visiting sailor goes ashore on liberty, he is in the same situation as a soldier stationed at Plattsburg Barracks, New York, who enters Canada on a pass and commits an offense while in Montreal, and is not entitled to immunity from the local courts because he entered the friendly foreign country as a mere visitor or tourist and not on duty. Furthermore, the sailor's situation differs from that of the soldier in a foreign country in that the sailor's duties, including combat, are in the usual case performed on board his ship, whereas the soldier's are not all performed in his camp.

On the other hand, there are practical difficulties in accepting the rule laid down in Article 20 of the Stockholm resolutions, even in time of peace. As the present case shows, it is not always clear whether a particular case occurred "in time of peace." Even if the time be indisputably one of peace, the situation may be such that, because of strained international relations, because the man arrested occupies a key position on board, or for other reasons, it is from a military standpoint as necessary that he rejoin his ship promptly as it is in time of war. Suppose for example, that the United States had had, what unfortunately it apparently did not have, advance information of the intention of the Japanese naval air forces to attack Pearl Harbor, and had sent an urgent radio message to one of our warships, then in a friendly foreign port in the Pacific, to proceed at once to a fleet rendezvous. Several of the personnel of the ship having important duties on board, have been arrested by the local police while ashore on liberty and charged—perhaps unjustly—with the commission of offenses there. It is clear that this is a time of peace. Does the supposed superior right of the local court to try the offenders override the urgent military need for their presence aboard their ship? According to Article 20 of the Stockholm resolutions, the answer must be in the affirmative. If so, the ship must wait in port and miss the rendezvous, or sail to the rendezvous and to battle without men long trained and sorely needed for just that eventuality.

My conclusion is that, as limited by the title to time of peace, and by its terms to members of the crews of friendly foreign warships, the rule laid down by Article 20 of the Stockholm resolutions is supported by the great

<sup>14</sup> Hackworth, *Digest*, Vol. II, p. 408; Oppenheim, *International Law*, 5th ed., Vol. I, pp. 666, 667; Hyde, *International Law*, 2d ed., Secs. 252, 253; *The Schooner Exchange v. McFaddon*, 7 Cranch 116, 144, 145; *Chung Chi Cheung v. The King*, 1939 A.C. 160.

weight of authority; but there are cogent military reasons, even in time of peace, against the limitation of the exemption of the sailor ashore to those occasions when he is there on duty.

### *China*

An agreement was made between the United States and China by exchange of notes at Chungking on May 21, 1943, for the exemption of personnel of the armed forces of the United States in China from the criminal jurisdiction of that country.<sup>15</sup> The note of the United States went on to say, as did our note to Great Britain on the same subject,<sup>16</sup> on which it was obviously modeled, that the immunity therein conceded might be waived in particular cases, that the service courts and authorities of the United States in China would be willing and able to try and punish offenders, that such trials would be public and within a reasonable distance from the scene of the offense, and that coöperation would be arranged in making investigations and collecting evidence. Furthermore, it was stated that:

... the Government of the United States will be ready to make like arrangements to ensure to such Chinese forces as may be stationed in territory under United States jurisdiction a position corresponding to that of the United States forces in China.

The Chinese note confirmed the above understanding.

### *Brazil*

No agreement between the United States and Brazil has been made concerning jurisdiction over the forces of the one in the territory of the other, but the Brazilian Supreme Court has given a most interesting opinion on the subject.

A sailor of the United States Navy named Gilbert was on duty as sentinel at the gate of a base, which with the permission of the Government of Brazil, our navy occupied in that country. A Brazilian civilian attempted to enter the base, resisted the sentinel's efforts to stop him, was shot by the sentinel, and in consequence died a few days later. The Brazilian Supreme Court, in a decision rendered on November 22, 1944, affirming a lower court, quoted Article 299 of the Bustamante Code<sup>17</sup> and several Brazilian legal writers,<sup>18</sup> and held that no Brazilian court, civil or military, had jurisdiction

<sup>15</sup> The notes are printed in full in English and Chinese in Department of State, *Executive Agreement Series*, No. 360.

<sup>16</sup> *Executive Agreement Series*, No. 355.

<sup>17</sup> Annexed to the Convention on Private International Law adopted at Havana, Feb. 20, 1928; Final Act of the Sixth International Congress of American States, p. 16. Article 299 cited is quoted in this author's prior article, this JOURNAL, Vol. 36 (1942), p. 547.

<sup>18</sup> Among these is Lafayette, *Princípios de Direito Internacional*, Rio de Janeiro, 1902, Vol. I, par. 97, p. 161 (translation supplied):—

The special permission for foreign military forces to pass through the national territory or remain for a time within it includes virtually the exemption of these forces from territorial jurisdiction. In truth subject to the local sovereignty, they would escape in fact from the authority and direction of their own government and find them-

over the defendant. The opinion of the court which was unanimous, concluded:—

... it is my duty to judge correct the present refusal of the Brazilian authorities to acknowledge jurisdiction and to declare competent the military courts of the United States to try and judge the American sailor in question.

*British Empire*

*Great Britain and Northern Ireland*

The United States of America (Visiting Forces) Act, 1942,<sup>19</sup> is still in force, and recognizes the complete exemption of members of the armed forces of the United States in the United Kingdom from the criminal jurisdiction of the British courts and the exclusive jurisdiction over them of our own courts-martial. There have also been issued by the British Government statutory orders<sup>20</sup> granting to our forces certain rights pertaining to military justice, such as the right to compel the attendance of witnesses before our courts-martial and to have our military prisoners confined in British prisons or detention barracks.

The Act of Parliament above cited provides<sup>21</sup> that the United States may waive its exclusive right to jurisdiction over any particular case. In order that the two might be tried jointly such a waiver was made as to the soldier in a case which received considerable publicity, in which an American named Hulten and an Englishwoman named Jones jointly murdered a cab-driver.<sup>22</sup> As far as this writer is aware, in no other case has an American soldier or sailor been tried in a British criminal court.

Criminal jurisdiction over members of the armed forces of Allied nations

selves under the power of a foreign government, which would in effect make them useless as agencies of defense of the State to which they belong.

The exemption, however, from the territorial sovereignty limited by their *raison d'être* includes only that which concerns the command, direction and discipline of the forces.

In this order of ideas it is clear that the military authority retains the right to try and punish crimes and delinquencies committed by officers and soldiers, not only when perpetrated by one against the other, but also when against the inhabitants of the country.

<sup>19</sup> 5 & 6 Geo. 6, c. 31. The title of the act is "An Act to give effect to an agreement recorded in Notes exchanged between His Majesty's Government in the United Kingdom and the Government of the USA, relating to jurisdiction over members of the military and naval forces of the USA." The notes mentioned in the title are printed in the schedule annexed to the act and also in U. S. Department of State, *Executive Agreement Series*, No. 355. This act and the legal position of members of the United States forces in the United Kingdom are discussed in this JOURNAL in the present writer's prior article, Vol. 36 (1942), p. 539, at pp. 556-559, and by Dr. Egon Schwelb, Vol. 38 (1944), p. 50. The subject is also treated by Prof. Arthur L. Goodhart in *American Bar Association Journal*, Vol. 28 (1942), p. 762; but the present writer finds himself unable to agree with some of the things there said.

<sup>20</sup> Statutory Rules and Orders, 1942, Nos. 966, 1679, 2192.

<sup>21</sup> By the proviso to Sec. 1 (1).

<sup>22</sup> File CM 275747, Office of the Judge Advocate General, U. S. Army.

other than the United States in the United Kingdom is regulated by the Visiting Forces (British Commonwealth) Act, 1933,<sup>23</sup> the Allied Forces Act, 1940,<sup>24</sup> and orders in council issued in implementation of those Acts of Parliament; it has been described in detail by several writers.<sup>25</sup> The Allied Forces Act admits the jurisdiction of Allied military courts only "in matters concerning discipline and internal administration."<sup>26</sup> It expressly declares the concurrent jurisdiction of the local British courts to exist.<sup>27</sup> It undertakes to forbid courts-martial of the visiting forces to try certain cases at all.<sup>28</sup> These legislative provisions show that British domestic law does not concede to the forces of Allied nations other than the United States in Great Britain exemption from the criminal jurisdiction of the local courts, nor even criminal jurisdiction over their own personnel in their own courts-martial in all cases. The rights which British statute law says that the visiting forces may exercise are less than those acknowledged to exist by all British writers on international law, including Lawrence<sup>29</sup> and Oppenheim,<sup>30</sup> who take a comparatively narrow view of such rights, and less than those declared to exist in a like case by the highest court of the British Empire.<sup>31</sup>

Dr. Egon Schwelb, a competent international lawyer who has written extensively on this subject, has said:<sup>32</sup>

The position does not conform with any precedent and with any scheme visualized by the authorities on international law, quoted above. The position of the Allied Forces does not, in some respects, come up to the rules of international law regarding extra-territoriality even in that restricted sense in which it is recognized even by those writers who are not in favour of extensive extra-territoriality.

In the debate on the Allied Forces Act in the House of Commons, Sir Donald Somerville, at that time the Attorney General of England, said:<sup>33</sup>

I quite agree with the honorable gentleman that these foreign governments might say, "You do not in this bill go as far as international law."

<sup>23</sup> 23 Geo. 5, c. 6.

<sup>24</sup> 3 & 4 Geo. 6, c. 51.

<sup>25</sup> This writer's previous article already cited, this JOURNAL, Vol. 36 (1942), p. 539, especially at pp. 556, 557; Kuratowski, "Military Courts of Foreign Governments in the United Kingdom," in *Transactions of the Grotius Society*, Vol. 28, p. 1; Schwelb, "Jurisdiction over the Members of the Allied Forces in Great Britain," in *Czechoslovak Year Book of International Law*, 1942, p. 147; Schwelb, "Status of U. S. Forces in English Law," this JOURNAL, Vol. 38 (1944), p. 50; Schwelb, "Status of Soviet Forces in British Law," this JOURNAL, Vol. 39 (1945), p. 330.

<sup>26</sup> Allied Forces Act, 1940, Sec. 1 (1).

<sup>27</sup> Sec. 2 (1).

<sup>28</sup> Sec. 2 (3).

<sup>29</sup> *Principles of International Law*, 6th ed., Sec. 107, p. 246.

<sup>30</sup> *International Law*, 4th ed., Vol. I, Sec. 445.

<sup>31</sup> *Chung Chi Cheung v. The King*, 1939 A. C. 160.

<sup>32</sup> *Czechoslovak Yearbook of International Law*, 1942, p. 169. Dr. Schwelb said the same thing on another occasion. See *Transactions of the Grotius Society*, Vol. 28, p. 24.

<sup>33</sup> Hansard's *Debates*, Vol. 364, No. 106, Aug. 21, 1940, column 1405.

The Attorney General also made the admission:

When we have our forces in foreign territory (we) ask for, and always get complete permission to apply our own military code.<sup>34</sup>

Since Great Britain has granted to the United States forces the fullest immunity it does not become an American to criticize her; but even the friendliest commentator can not help noting the inconsistency of the British position as to her and our allies and regretting that Great Britain did not fully concede and implement the rights of those allies under international law. The disparity between the rights conceded to the United States and those conceded to the other Allies having troops in Great Britain is the more regrettable because the United States was at the time a great and powerful nation, whose aid was needed by Britain, whereas the other allies, whose rights were not so fully conceded, were smaller and weaker countries whose territory was occupied by the enemy and whose kings, governments, and troops were homeless exiles in Great Britain.

#### *Crown Colonies*

Section 3 (1) of the United States of America (Visiting Forces) Act, 1942, provides that the King may by Order in Council direct that the act shall have effect in any British colony, protectorate, or mandate. Pursuant to that section an Order in Council was issued November 24, 1942,<sup>35</sup> which carried the Act of Parliament into effect in practically all British Crown Colonies except those in which United States bases were established under 99-year leases in exchange for the transfer of fifty destroyers by the United States. In the latter, criminal jurisdiction is still regulated by Article IV of the Base Lease Agreement of March 27, 1941.<sup>36</sup> This results in the

<sup>34</sup> Columns 1404, 1405. When the Attorney General of England officially makes such a statement as that quoted in the text, its correctness may be accepted. However, examination of the history of Great Britain's military contacts with friendly powers confirms it. The important part of the agreement which concedes complete exemption to British forces in France during the first World War is quoted in this writer's earlier article in this JOURNAL, Vol. 36 (1942), p. 549. The agreement with reference to British forces in Egypt is quoted in the same article, p. 553. As to British forces in Ethiopia, see the "annexure" to the treaty between the two countries concluded December 19, 1941: *Department of State Bulletin*, Vol. 12, pp. 200, 203. The status of British forces in the United States is discussed in later sections of the present article. Nor will it do to say that British forces have been serving in countries having a less advanced system of criminal justice, to which British soldiers and sailors ought not to be subjected. That may be true as to Egypt and Ethiopia but it is not true of France and the United States. Conversely, Norwegians, Dutchmen, and Belgians in Great Britain would not admit, nor would Englishmen contend, that the former's courts-martial are so inferior to British courts that the British population would not be adequately protected if soldiers and sailors of those nations serving in Britain were to be subject to the exclusive jurisdiction of their own military tribunals.

<sup>35</sup> Statutory Rules and Orders, 1942, No. 2410.

<sup>36</sup> The agreement is printed in full in H. Rep. Doc. 15E, 77th Cong., 1st Sess.; Department

anomaly that in Barbados our armed personnel are subject solely to the jurisdiction of their own courts-martial whereas in near-by St. Lucia, Trinidad, and Antigua they have only the more limited exemption provided by the agreement just mentioned.

The ancillary rights pertaining to military justice mentioned as having been granted to our forces in the United Kingdom were also granted by Order in Council<sup>37</sup> to those forces in the Crown Colonies other than those colonies in which leased bases are established.

### *Australia*

As has been pointed out in this writer's prior article in this JOURNAL,<sup>38</sup> the Commonwealth of Australia by Order in Council promptly conceded to the United States exclusive criminal jurisdiction over our soldiers and sailors in that country. Except for one amendment slightly broadening the immunity of our personnel,<sup>39</sup> that order remains in force unchanged.

There has been an interesting decision of the Supreme Court of New South Wales as to the civil liability of an Australian officer serving with our armed forces. *Wright v. Cantrell*<sup>40</sup> was a civil action for slander in stating to the plaintiff in the hearing of others, "You have been drinking and have no business to bother with the crew"; and for libel in issuing a document, referring to the plaintiff, containing the words, "Reason for discharge—drunkenness." Both parties were Australians working under the United States armed forces, the plaintiff a civilian sea captain, and the defendant an officer in the Australian navy, paid by the Government of that country, but lent to the United States for duty in employing and discharging personnel of ships used by our armed forces.

The case came up to the Supreme Court of New South Wales on demurrer to the defendant's pleas. Though the defendant was an Australian and an officer of the navy of that country, the court treated the case on the same footing as if he had been an American officer, since he was acting under the orders of military officers of the United States in connection with the operations of our army. The case was not within the scope of the Order in Council mentioned above, because they relate only to criminal jurisdiction, and this was a civil suit for damages. The court therefore undertook to decide the case on general principles of international law as recognized in Australia. After considering the case of the *Schooner Exchange*<sup>41</sup> and many other authorities, the court denied the existence of complete immunity of the visiting forces, but held that the host country must be deemed to waive in favor of the Allied forces any provisions of its laws inconsistent with the

of State, *Executive Agreement Series*, No. 235; and this JOURNAL, Vol. 35 (1941), Supplement, p. 134. Art. IV is printed and discussed in this writer's prior paper, this JOURNAL, Vol. 36 (1942), pp. 553-555.

<sup>37</sup> Statutory Rules and Orders 1942, No. 1576.

<sup>38</sup> Vol. 36, pp. 555, 556.

<sup>39</sup> Statutory Rules, 1942, No. 457.

<sup>40</sup> 44 State Reports N.S.W. 15, 61 Weekly Notes 38 (1944).

<sup>41</sup> 7 Cranch 116.



purpose of their visit and to concede to its officers all authority necessary to maintain discipline; but the court decided that it did not follow from these principles that the members of the visiting forces were exempt from civil suit. It therefore rejected the defendant's claim of immunity to the jurisdiction of the court, and also rejected his claim of absolute privilege. The Supreme Court remanded the case to the court below for trial, which resulted in favor of the defendant, though whether because of the existence of a conditional privilege or because of the truth of the statements made by the defendant, this writer is not informed.

The learned court and this writer are not so far apart as to the general principles of law involved as they are with respect to the application of those principles to the facts of this case. The question presented was whether the defendant was under the circumstances of the case immune, not to the criminal jurisdiction of the local courts, but to their civil jurisdiction. In the case of the *Schooner Exchange*, Chief Justice Marshall referred to a waiver of "all jurisdiction"<sup>42</sup> over visiting forces, and the word "all" must be deemed to include civil as well as criminal jurisdiction. In *Coleman v. Tennessee*,<sup>43</sup> the Supreme Court of the United States said:—

It is well settled that a foreign army permitted to march through a friendly country, or to be stationed in it, by permission of its government or sovereign, is exempt from the *civil* and criminal jurisdiction of the place . . . (*italics supplied*).

In *Dow v. Johnson*,<sup>44</sup> the Supreme Court repeated the foregoing with approval. It is true that in the *Coleman* and *Dow* cases the court was dealing with a hostile occupation and not with the presence of troops of one ally on the soil of another, but its reasoning is applicable to both situations. *Dow v. Johnson*, like *Wright v. Cantrell*, was a civil action against an officer for damages alleged to have been caused to the plaintiff by orders given or acts performed by the defendant in his official capacity. General Dow, the defendant, though served with a summons, did not appear in the civil court, and judgment was given against him by default. The Supreme Court said:

The Sixth District Court of the Parish of New Orleans did not seem to consider that it was at all inconsistent with his duty as an officer in the army of the United States to leave his post at the forts, which guarded the passage of the Mississippi, nearly a hundred miles distant, and attend upon its summons to justify his military orders, or seek counsel and procure evidence for his defence. Nor does it appear to have occurred to the court that, if its jurisdiction over him was recognized, there might spring up such a multitude of suits as to keep the officers of the army stationed in its district so busy that they would have little time to look after the enemy and guard against his attacks.<sup>45</sup>

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It is manifest that if officers or soldiers of the army could be required to leave their posts and troops, upon the summons of every local tribunal, on pain of a judgment by default against them, which at the

<sup>42</sup> 7 Cranch 140.

<sup>43</sup> 97 U. S. 509, 515.

<sup>44</sup> 100 U. S. 158, 165.

<sup>45</sup> 100 U. S. 160.

termination of hostilities could be enforced by suit in their own States, the efficiency of the army as a hostile force would be utterly destroyed. Nor can it make any difference with what denunciatory epithets the complaining party may characterize their conduct. If such epithets could confer jurisdiction, they would always be supplied in every variety of form.<sup>46</sup>

So far as the law of the United States is concerned, the cases cited make it certain that the exemption of the visiting forces extends to civil suits as well as criminal prosecutions, and the Supreme Court gives cogent reasons why this should be so.

Notwithstanding the eloquent language of the Supreme Court in the passage just quoted, for reasons which he has already stated<sup>47</sup> and which are also ably set forth by the Supreme Court of New South Wales in its opinion in *Wright v. Cantrell*, this writer does not believe that the exemption should extend to all civil suits. But it should extend at any rate to a suit for damages based on an act or omission of the defendant in the line of his duty, and *Wright v. Cantrell* is a suit of that class. In acting or failing to act, the defendant is the representative of the country which he serves and the suit is in substance against it. It is derogatory to the dignity and safety of the nation which the defendant serves that its officer, performing duties upon which the success of military operations may depend, should have the propriety of his performance of them called in question in the court of a foreign even though friendly nation. If the plaintiff is successful, the nation which the defendant serves must either pay the judgment, in which case it is clear that the suit was in reality against it, or else decline to do so and remain subject to the accusation that it has allowed its officer to suffer because of the performance of his duty. The knowledge by a member of the visiting forces that he is liable to suit in a foreign court by any disgruntled inhabitant of the host country with whom he deals will not make for that prompt and vigorous performance of duty so necessary in time of war.

It may be remarked that the treaty between Great Britain and Egypt, already mentioned earlier in this paper, expressly stipulates for the immunity of the British armed forces from civil suits arising out of the performance of their official duties, a provision the benefit of which was enjoyed by the Australian forces serving in that country.

It is concluded that to refuse immunity to the defendant in a suit arising out of the discharge of his official duties, such as *Wright v. Cantrell*, is to deny to the members of the visiting forces a protection necessary to the proper performance of their mission in the host country, and that such denial is inconsistent with the dignity and safety of the nation which they serve. It is believed that, conformably with the general principles which

<sup>46</sup> 100 U. S. 165.

<sup>47</sup> Vol. 36, this JOURNAL, pp. 561-565.

the Supreme Court of New South Wales laid down, it might and should have decided the case in favor of the defendant.

This does not mean that an inhabitant of the host country injured by the wrongful action of a member of the visiting forces within the scope of his employment is or should be without remedy. The United States Congress has passed acts providing for the payment of all legitimate claims arising out of acts or omissions of our armed personnel,<sup>48</sup> and it is believed that other belligerent nations have done likewise. If this is not so in any particular case, the person injured may present his claim through diplomatic channels.

### *New Zealand*

By an order in council dated April 7, 1943,<sup>49</sup> the Government of New Zealand recognized the exclusive criminal jurisdiction of our courts-martial over our own armed personnel in that country, and granted numerous ancillary privileges valuable to our forces, such as the arrest of our personnel by New Zealand police on request of their own commanding officer, the right to compel the attendance of civilian witnesses before our courts-martial, and to have them punished for contempt of or perjury before such courts, and the detention of our military prisoners in local prisons and detention barracks.

### India

The agreement between the United States and India with reference to criminal jurisdiction over our forces in the latter country, like that between the United States and the United Kingdom, is embodied in an exchange of diplomatic notes.<sup>50</sup> The correspondence began with a note, dated at New Delhi on September 29, 1942, from "the Secretary to the Government of India in the External Affairs Department" to "the Secretary in charge of the Office of the Personal Representative of the President of the United States of America to India." The first gentleman proposed to his confrère that an agreement be made between the two countries like that previously made with respect to our forces in the United Kingdom by exchange of notes between Mr. Eden, the British Foreign Minister, and our Ambassador at London,<sup>51</sup> and inclosed a draft of an ordinance which the Government of India proposed to issue to implement the agreement. By note of October 10, 1942, our representative agreed to the foregoing. In a separate note bearing the same date the American representative inquired whether the proposed ordinance would be effective in the Indian native states, to which the Secretary to the Indian Government answered on October 16:

<sup>48</sup> Act of Jan. 2, 1942, as amended April 22, 1943, and July 31, 1945; 31 U. S. Code 224d.

<sup>49</sup> The United States Forces Emergency Regulations 1943 Serial Number 1943/56.

<sup>50</sup> U. S. Department of State, *Executive Agreement Series*, No. 392.

<sup>51</sup> See note 19.

I am desired to say that it is intended that the Ordinance, when promulgated, should be brought to the notice of the Residents in the Indian States, who will be informed that His Excellency the Crown Representative has decided that no Criminal proceedings shall be taken in any State court against any member of the U. S. A. armed forces. For all practical purposes therefore the position will be identical in British India and in the States.

Pursuant to the agreement thus made the Government of India issued two ordinances, both dated October 26, 1942.<sup>52</sup> No. LVI, called the Allied Forces Ordinance, 1942, does not mention the United States, but applies to any naval, military or air force of any foreign power or "authority" allied with his Majesty present in British India, and concedes to such forces substantially the same rights and privileges in respect of military justice as are conceded in Great Britain by the Visiting Forces (British Commonwealth) Act, 1933,<sup>53</sup> and the Allied Forces Act, 1940.<sup>54</sup> Like those acts, it undertakes to reserve the concurrent jurisdiction of the local courts over members of the visiting forces, and to deny to those forces the right to try their own men in certain cases.<sup>55</sup> No. LVII, entitled the Allied Forces (United States of America) Ordinance, 1942, is substantially the same as the United States of America (Visiting Forces) Act, 1942, and gives complete immunity from the criminal jurisdiction of the courts of British India to our personnel, unless that immunity be waived in a particular case.

#### Canada

On April 15, 1941, before the United States entered the war, the Canadian Government promulgated an Order in Council, the Foreign Forces Order, 1941,<sup>56</sup> dealing with the status of friendly foreign armed forces in Canada. This followed the pattern of the Visiting Forces (British Commonwealth) Act, 1933,<sup>57</sup> and the Allied Forces Act, 1940,<sup>58</sup> of the United Kingdom. It provided for the sitting of foreign courts-martial in Canada and their jurisdiction over matters concerning discipline and internal administration of their own forces but forbade them to try any case of murder, manslaughter, or rape and further said that local criminal courts should have concurrent jurisdiction with them. The order also gives visiting forces certain valuable ancillary privileges, such as have been granted in other countries of the British Empire. The order by its own terms applies to the forces of Belgium, Czechoslovakia, the Netherlands, Norway, and Poland; and goes on to say that it may be applied to the forces of other countries by a future order in council. It was so applied to troops of Yugoslavia.

Because of the urgent need for their presence to build and operate landing fields for our military planes, to work on the Alaska Highway, the Canol project, and for other duties, our troops were, with the consent of the Govern-

<sup>52</sup> Ordinances Nos. LVI and LVII of 1942, published in the *Gazette of India*, October 26, 1942.

<sup>53</sup> 25 Geo. 5, c. 6.

<sup>54</sup> 3 & 4 Geo. 6, c. 51.

<sup>55</sup> Section 12.

<sup>56</sup> P. C. 2546.

<sup>57</sup> 23 Geo. 5, c. 6.

<sup>58</sup> 3 & 4 Geo. 6, c. 51.

ment of Canada, sent into that country soon after the United States became a belligerent without any agreement as to their status. An Order in Council dated June 26, 1942,<sup>59</sup> which expressly states that such action is "an interim measure," designates the United States as a power to which the Foreign Forces Order, 1941, shall apply. The regime thus established could not be satisfactory to the United States for the duration of the war, because the limitations on the powers of foreign courts-martial in Canada and the provision for concurrent jurisdiction of the local courts were inconsistent with the rights of friendly visiting forces as described by Chief Justice Marshall in the case of the *Schooner Exchange*<sup>60</sup> and other authorities, and with the position taken by this Government in its dealings with its allies in the first World War and in the present war.

The Canadian authorities were desirous of meeting the wishes of the United States, but had some difficulty in selecting the means of doing so. They first issued a new Order in Council<sup>61</sup> excepting the United States from the application of the proviso to Section 3 of the Foreign Forces Order. That proviso forbade the courts-martial of visiting forces to try anybody for murder, rape, or manslaughter. The new order further provided:

The application of the Foreign Forces Order, 1941, as aforesaid, to the forces of the United States of America shall not be construed as prejudicing or curtailing in any respect whatsoever any claim to immunity from the operation of the municipal laws of Canada or from the processes of Canadian courts exercising either criminal or civil jurisdiction by members of the forces of the United States of America founded on the consent granted by His Majesty's Government in Canada to such forces to be present in Canada.

Section 55 of the Supreme Court Act of Canada<sup>62</sup> authorizes the Governor-General in Council to call upon the Supreme Court of the Dominion for advisory opinions. Pursuant to that statute the Canadian Government, almost contemporaneously with the issue of the Order in Council last quoted,<sup>63</sup> asked the Supreme Court the following questions:—

1. Are members of the military or naval forces of the United States of America who are present in Canada with the consent of the Government of Canada for purposes of military operations in connection with or related to the state of war now existing exempt from criminal proceedings prosecuted in Canadian criminal courts and, if so, to what extent and in what circumstances?

2. If the answer to the first question is to the effect that the members of the forces of the United States of America are not exempt from criminal proceedings or are only in certain circumstances or to a certain extent exempt, has Parliament or the Governor General in Council acting under the War Measures Act, jurisdiction to enact legislation

<sup>59</sup> P. C. 5484.

<sup>60</sup> 7 Cranch 116.

<sup>61</sup> P. C. 2813, April 6, 1943.

<sup>62</sup> Revised Statutes of Canada, 1927, c. 35.

<sup>63</sup> On April 9, 1943, P. C. 2931.

similar to the statute of the United Kingdom entitled the United States of America (Visiting Forces) Act, 1942?

The first question, it will be observed, is one of international law as received and applied in Canada, the second one of Canadian constitutional law. Far from opposing the exemption of United States forces from the jurisdiction of Canadian courts, the legal representatives of the Dominion filed an able "factum," which we in the United States would call a brief, maintaining such exemption and urging the Supreme Court to answer the first question in the affirmative, and, if it should reach the second question, to answer that in the affirmative too.

As the reference to the Supreme Court was a domestic Canadian affair, to which the United States was not and could not properly be a party, no representative of the United States appeared before the court. However, at the request of the Canadian Government two unsigned memoranda were prepared and handed to that Government, setting out what the United States conceived to be the principles of international and military law applicable to our forces in Canada. The Department of Justice of Canada had these memoranda printed and laid before the court.

The court ordered the Attorneys-General of the nine provinces of Canada to be notified of the reference. Four of them appeared and opposed the exemption of United States forces.

Five judges considered the case and on August 3, 1943, rendered four separate opinions,<sup>64</sup> no one of which was the opinion of the court. Let us take up in turn the answers which the learned justices gave to the first question, as to the exemption of United States forces in Canada.

The first opinion was that of Chief Justice Duff, in which Justice Hudson concurred. The Chief Justice began with the statement that, under the law of England and of Canada a soldier is subject to all the duties and liabilities of an ordinary citizen, and that this principle, except when changed by legislation, applies to all armies, domestic or foreign. He then referred to the several acts of the British Parliament with respect to visiting forces, and to the statements of the Lord Chancellor in the House of Lords and the Attorney-General of England in the Commons as to the unusual character of the United States of America (Visiting Forces) Act of 1942 of the United Kingdom.<sup>65</sup> From these bases he reached the conclusion that, in the absence of legislation, friendly visiting forces in Canada enjoy no exemption from the criminal jurisdiction of the local courts, though in practice Canadian criminal courts do not exercise jurisdiction in respect of acts committed within the lines of the visiting forces or of offenses by one member of such forces against another.

Justices Kerwin and Taschereau, in separate opinions, took the opposite view. The former cited with approval the opinions of Chief Justice Marshall

<sup>64</sup> *Reference re Exemption of U. S. Forces from Canadian Criminal Law*, [1943] 4 Dominion L. R. 11.

<sup>65</sup> 5 & 6 Geo. 6, c. 31.

in the case of the *Schooner Exchange*<sup>66</sup> and of Lord Atkin in that of *Chung Chi Cheung*,<sup>67</sup> and the works of French writers on international law; and, following those authorities, concluded:<sup>68</sup>

The Government of Canada having invited into the Dominion the military and naval troops of the United States of America as a part of the scheme of defence of the north half of the Western Hemisphere and, therefore, not merely for the benefit of the United States but for that of both parties and, in fact, for the benefit of all the allied nations in the present conflict, the invitation must be taken to have been extended and accepted on the basis that complete immunity of prosecution in Canadian criminal courts would be extended to members of the United States forces.

In an extremely able opinion Justice Taschereau reviewed judicial decisions, treatises, and international agreements, and concluded:<sup>69</sup>

There seems to be a strong preponderance of authority in favour of the view that there exists a rule of international law amongst the civilized nations of the world, granting immunity to organized forces visiting a country with the consent of the receiving Government.

The learned justice relied especially upon the decision of the Judicial Committee of the Privy Council in *Chung Chi Cheung v. The King*,<sup>70</sup> in which that tribunal, the final court of appeal for the British Empire, upheld the prior right of China to try a sailor for a murder on board a Chinese public armed vessel in the territorial waters of the British colony of Hong Kong, unless that right should be waived by China. Justice Taschereau continued:<sup>71</sup>

If the receiving Sovereign is presumed to waive his jurisdiction as to members of the crew of a foreign ship, can it not be said that the same presumption exists as to land troops visiting a foreign country?

This view, I think, has been implicitly accepted by the Judicial Committee, and is in accordance with the doctrine of the authors, the practice followed by the nations of the world and by the Supreme Court of the United States.

Justice Rand called Marshall's opinion in the case of the *Exchange* "a judgment of characteristic power." On the merits of the question, he took a middle position, holding members of United States forces exempt from Canadian criminal jurisdiction as to offenses committed in their camps or on their ships, except such offenses as are committed against Canadians or their property, and only to the extent that United States courts-martial exercise jurisdiction over such offenses.

All of the judges concurred in answering the second question in the affirmative, namely in holding that the Parliament of Canada might pass an act conceding the immunity of United States forces to the criminal jurisdiction

<sup>66</sup> 7 Cranch 116.

<sup>67</sup> [1939] A. C. 160.

<sup>68</sup> At p. 33.

<sup>69</sup> P. 39.

<sup>70</sup> [1939] A. C. 160, especially at pp. 174, 176.

<sup>71</sup> P. 39.

of the local courts, or that the Governor General in Council might issue an order to the same effect.

Though they all referred to the decision of the Supreme Court of the United States in the case of the *Schooner Exchange*,<sup>72</sup> and quoted a number of French writers, the writers of the several opinions based their conclusions mainly upon English precedents and authorities. Chief Justice Duff and Justice Hudson directed their attention to the British statutes and orders in council with respect to visiting forces and concluded that they showed that the supposed rule of international law conceding the immunity of visiting forces to local jurisdiction did not exist, or, if it did, was not recognized and adopted by the law of England or Canada. Justices Kerwin and Taschereau, on the other hand, relied upon authoritative writers on international law, the agreements made during World War I, and above all on the decision of the Judicial Committee of the Privy Council in the case of *Chung Chi Cheung*,<sup>73</sup> and concluded that international law, as accepted in Great Britain and Canada, recognized the exemption of visiting forces from the local jurisdiction.

In a sense both pairs of judges were right. There is an irreconcilable inconsistency between the statement of the rights of a visiting force made by authoritative writers on international law (including those of British nationality) and by the Judicial Committee in the *Chung Chi Cheung* case and the rights claimed by Britain when her forces have been on foreign soil, on the one hand, and, on the other hand, the rights in fact conceded to visiting forces by British legislation other than the United States of America (Visiting Forces) Act of 1942.<sup>74</sup>

Pursuant to the authority which in its answer to the second question the Supreme Court held that he possessed, the Governor-General in Council on December 20, 1943, issued a new order<sup>75</sup> with reference to the legal position of the armed forces of the United States in Canada, which conceded all that the United States asked. It provided that when any member of such forces shall be detained by any Canadian authority for an offense the offender's commanding officer shall be notified forthwith. If that officer or the military or naval attaché of the United States at Ottawa shall request the release of such person he shall be released and no criminal action shall be prosecuted against him before any court in Canada. The order also provides for the compulsory attendance of Canadian witnesses before United States courts-martial in Canada.<sup>76</sup>

<sup>72</sup> 7 Cranch 116.

<sup>73</sup> [1939] A. C. 160.

<sup>74</sup> 5 & 6 Geo. 6, c. 31. The statement in the text is merely another way of saying what the Attorney General of England admitted in the House of Commons. See this article, above, p. 272. <sup>75</sup> P. C. 9694.

<sup>76</sup> The promulgation of the above Order in Council was followed by diplomatic correspondence dealing with the application of the Order to certain situations. The correspondence has been mimeographed as inclosures 2, 3, and 4 to a letter of The Adjutant General, U. S. Army, dated 6 April 1944, to certain Commanding Generals (AG file 250.4 (5 April 44) OB-S-E-M).



Another interesting Order in Council was issued July 27, 1942<sup>77</sup> adding to the Foreign Forces Order, 1941, certain new sections with respect to the disciplinary position of individual members of friendly foreign forces serving in Canadian units or on Canadian naval ships. So far as this writer is aware, there have been no members of our forces so serving, and therefore the added sections do not concern the United States. Of those sections the most important is as follows:—

15. (1) In respect of a member of an associated force while he is serving in Canada with a unit or formation of the Naval, Military or Air Forces of Canada or while when serving in any of such Forces he is in any of His Majesty's Canadian ships, the Canadian Service Laws relating to the government, administration and discipline of the said Force wherein said member is serving shall *mutatis mutandis* apply to him while so serving as if he were a member of such Canadian Force.

As a matter of international law, the foregoing is permissible if the nation of whose forces the visiting soldier is a member consents thereto; but, as military jurisdiction is personal and not territorial,<sup>78</sup> this writer is unable to see any legal basis for the provision in the absence of such consent.

The order under consideration further says:

17. Where any member of an associated force is tried by court-martial or other court under Canadian Service Laws, the court-martial may include officers of the said associated force to whom Section 15 of this Order applies.

Military courts having both British and American members have been set up by the Allied Military Government in Italy and Germany, and the Allies have established an International Military Tribunal for the trial of major war criminals;<sup>79</sup> but the section above quoted provides for a court for which, so far as this writer knows, there is no precedent that is to say, a mixed court-martial for the trial of Allied soldiers. Its legality depends upon the co-existence with the Order in Council of authority flowing from the Allied nation for its officers to sit on the mixed court-martial, since an officer of the Army or Navy of one nation may not, without the consent of his own government, accept from another nation a delegation of power to sit upon a court-martial. This writer does not know whether such authority was granted.

The situation resulting from the several Canadian Orders in Council is substantially the same as that in Great Britain. In both countries members of the United States forces are subject to the jurisdiction of their own courts-martial, and enjoy full exemption from that of the local criminal courts, unless that exemption be waived by a representative of their own government.

<sup>77</sup> P. C. 6566.

<sup>78</sup> Digest of Opinions of the Judge Advocate General, U. S. Army, 1912, p. 511, par. VIIIB; introductory sentence of the Articles of War, 10 U. S. Code 1471; (British) Army Act, sec. 159. (British) Manual of Military Law, Chap. V (ii), especially sec. 15.

<sup>79</sup> *Department of State Bulletin*, Vol. 13, p. 222 (Aug. 19, 1945); this JOURNAL, Vol. 39 (1945), Supplement, p. 215.

Of this situation no citizen of the United States can complain. On the other hand, though members of the armed forces of other Allied nations may be tried by their own courts-martial, a Canadian order undertakes to make them subject to the concurrent jurisdiction of the local courts and to forbid their own courts-martial to try three grave crimes at all. For reasons more fully already stated in this paper, this writer regrets that Canada makes this discrimination among her allies and has not recognized what he considers the rights accorded by international law to her smaller allies.

### *Other Countries*

Besides those herein enumerated, there are many other friendly countries in which armed forces of an ally have been stationed during the present war. With some of them there have been agreements, sometimes made by military rather than diplomatic representatives, dealing, *inter alia*, with criminal jurisdiction over visiting forces.<sup>80</sup> Some of these agreements have not yet been made public. Either pursuant to such agreements, or to others of a less formal character, or without any agreement, members of United States forces who have committed offenses in such countries have in fact been tried by their own courts-martial, and not by the local courts.

### *United States*

What is the legal status of members of friendly foreign armed forces in the United States? It has been the position of the Government of the United States that, following the principles of international law laid down by Chief Justice Marshall in the case of the *Exchange*,<sup>81</sup> when the United States has consented to the admission of a foreign force, the courts-martial of that force may lawfully meet in the United States, try members of that force, and impose and execute sentences, and the members of such forces are exempt from the jurisdiction of the local courts, without any further consent by the United States, agreement, executive order, or statute. Friendly visiting forces possess such privileges under international law, and international law is a

<sup>80</sup> Among such agreements, for detailed considerations of which space is lacking, are that between the United States and the Danish minister at Washington concerning our forces in Greenland (Department of State, *Executive Agreement Series* 204; this JOURNAL, Vol. 35 (1941), Supplement, p. 129), and that between Great Britain and Ethiopia (*Department of State Bulletin*, Vol. 12, pp. 200, 203). The form, though not the content, of the Greenland agreement, and the authority of the Danish minister to make it, were discussed in this JOURNAL, Vol. 35 (1941), p. 506, by Professor Herbert W. Briggs.

By several notes passing between the Belgian Ambassador at Washington and the Secretary of State, bearing dates between March 31 and August 4, 1943, an executive agreement similar to that made with China was effected with Belgium with respect to forces of the United States in the Belgian Congo (Department of State, *Executive Agreement Series*, No. 395). In April 1943 the government of Iraq passed a law conceding to United States forces on its soil immunity from local criminal jurisdiction and taxation. The text of the law is not available.

<sup>81</sup> 7 Cranch 116.

part of the law of the United States.<sup>82</sup> Therefore the United States has enacted no statute, made no agreement, and issued no executive order expressly conceding these privileges; but, without such action, foreign courts-martial have sat in the United States, tried cases, and imposed sentence. There have been occasional cases in which members of friendly foreign forces have been arrested by local police and brought before state or municipal courts. Probably some such cases have gone to trial without the question of immunity being raised. When such claim has been made by the representatives of the nation which the arrested person served, the officers of the federal government have made appropriate representations to the state's attorney, the court, or the governor of the state, and in every such case the accused person has been turned over to his own forces with a view to trial by court-martial.

There are, however, certain ancillary privileges with reference to military justice which have been granted to visiting forces in foreign countries, as stated in preceding sections of this paper, which the visiting forces needed and which could not be granted to them otherwise than by legislation. Accordingly a bill was drawn and urged upon Congress by the Department of State, speaking not only for itself but for the Departments of War, Justice, and the Navy. This bill was passed and approved June 30, 1944.<sup>83</sup> Its title is "Act to implement the jurisdiction of service courts of friendly foreign forces within the United States, and for other purposes." It will be observed that the title itself is an implied but none the less clear recognition by Congress of the existence without legislation by it of the jurisdiction of service courts of friendly foreign forces within the United States. Consistently with that view and with Marshall's doctrine laid down in the case of the *Exchange*, the act does not undertake to grant to the foreign forces a right to convene courts-martial or an exemption from local courts.

Section 1 consists of definitions. Section 2 authorizes any person in the civil, military, or naval establishments of the United States having authority to arrest, upon a specific or general request of the commanding officer of a foreign force, to arrest any member of such force and deliver him to such force for trial. Section 3 provides for compulsory attendance of witnesses before foreign courts-martial, and for punishment of perjury before or contempt of such a court. Section 4 provides that members of and witnesses before such courts shall have the same immunities and privileges as members of and witnesses before courts-martial of the United States. Section 5 authorizes the confinement of military prisoners sentenced by foreign courts-martial in penitentiaries, disciplinary barracks, or guardhouses of the United States. The sixth and last section of the act provides that it shall be operative with respect to the forces of any foreign state only after a finding and declaration by the President that the privileges therein provided are necessary for the

<sup>82</sup> *The Paquete Habana*, 175 U. S. 677, 700.

<sup>83</sup> 58 Stat. 643, 22 U. S. Code 701-706.

maintenance of discipline. By a proclamation dated October 11, 1944,<sup>84</sup> the President made such a finding as to the forces of the United Kingdom and Canada. It is presumed that he would have made a like finding for the benefit of any other allied power having sufficient troops in the United States to make it worth while. The War Department of the United States has issued a memorandum<sup>85</sup> to our own forces implementing and explaining the act. It is understood that the Department of Justice has also issued instructions to United States Attorneys and Marshals on the subject.

### Conclusion

The foregoing survey of the history of the last three years as to jurisdiction over friendly foreign forces shows that when our troops have been on allied territory the United States has uniformly obtained exclusive criminal jurisdiction over them in its courts-martial. Great Britain has done the same as to her forces on friendly foreign soil. Some of our smaller allies, whose governments and forces have been in exile, have not been so fortunate. Though their courts-martial have been permitted to sit, some of the host countries have undertaken to limit the powers of those courts and have insisted on the concurrent jurisdiction of the local criminal courts over the visiting forces.

The courts of several countries have considered the problem. They have all quoted or cited Chief Justice Marshall's opinion in the case of *The Exchange*,<sup>86</sup> nearly always with agreement, and often with praise; but have shown considerable reluctance to apply Marshall's doctrine against their own country, and a disposition—perhaps unconscious—to find the particular case before the court not within the scope of that doctrine.

This writer asks nothing for his own country or army which he is unwilling to concede to others. Provided the visiting forces have an efficient court-martial system, there is no practical reason why a host country should insist on trying visiting soldiers in its own courts. The fact that such nations as France and the United States have conceded full exemption from local criminal jurisdiction to their allies on their soil, and that Great Britain and her dominions have done so as to the troops of the United States, shows that there is nothing inconsistent with the dignity of a state in making such a concession. The real reason for the immunity is that it is necessary for military efficiency. That this is so may not clearly appear when the visiting forces are far from the battle front, but becomes more evident the closer they approach it. In this day when a plane can travel nearly half way round the world and drop a bomb which will wipe out a city, the country which considers itself safely remote from danger may find that its soil has in a moment become the battlefield.

In his earlier article, this writer endeavored to set forth the reasons why

<sup>84</sup> Proclamation 2626, 9 Fed. Register 12403.

<sup>85</sup> Memorandum No. 650-45, War Department, 19 February 1945, Jurisdiction over British and Canadian Forces in the United States.

<sup>86</sup> 7 Cranch 116.

the immunity of the visiting forces to the local jurisdiction is necessary.<sup>87</sup> They were, however, far better stated by Marshall over a century and a quarter earlier. This article, therefore, can best close, as the former one began, with a quotation from the great Chief Justice:<sup>88</sup>

In such case, without any express declaration waiving jurisdiction over the army to which this right of passage has been granted, the sovereign who should attempt to exercise it, would certainly be considered as violating his faith. By exercising it, the purpose for which the free passage was granted would be defeated, and a portion of the military force of a foreign independent nation would be diverted from those national objects and duties to which it was applicable, and would be withdrawn from the control of the sovereign whose power and whose safety might greatly depend on retaining the exclusive command and disposition of this force. The grant of a free passage, therefore, implies a waiver of all jurisdiction over the troops, during their passage, and permits the foreign general to use that discipline, and to inflict those punishments which the government of his army may require.

<sup>87</sup> This JOURNAL, Vol. 36 (1942), p. 539, especially at pp. 5-8, 549, 560.

<sup>88</sup> 7 Cranch 116, at p. 139.

## PENDING PROJECTS OF THE INTERNATIONAL TECHNICAL COMMITTEE OF AERIAL LEGAL EXPERTS

By STEPHEN LATCHFORD <sup>1</sup>

The delegates to the International Civil Aviation Conference held at Chicago from November 1 to December 7, 1944, adopted a resolution stating that as the CITEJA <sup>2</sup> had made considerable progress in the development of a code of private international air law, and that as the further elaboration of this code, through the completion of pending CITEJA projects and the initiation of new studies in the field of private air law, would contribute materially to the development of international civil aviation, they recommended that the various governments represented at the Chicago Conference give consideration to the desirability of bringing about the resumption of the CITEJA sessions at the earliest possible date. They further recommended that consideration be given to the desirability of coördinating the activities of CITEJA with those of the provisional and permanent international civil aviation organizations provided for at the Chicago Conference.<sup>2a</sup>

In pursuance of the recommendation made by the delegates to the Chicago Aviation Conference with regard to the resumption of the work of the CITEJA, the French Government invited various governments to be represented at the 14th session of the CITEJA, which took place in Paris from January 22 to 29, 1946. Thirty-two countries were represented at that session, being a much larger attendance than was common at CITEJA meetings prior to the war. Owing to limitations of space it is not possible to discuss in detail in this article the work of the January, 1946, session of the Committee, which was its first plenary session since September 1938, although sessions of CITEJA commissions were held in Paris as late as January 1939. However, the agenda of the 14th session, when CITEJA commissions also met, included some of the projects discussed in the present article, which

<sup>1</sup> Adviser on Air Law, Aviation Division, Office of Transport and Communications Policy, Department of State; Chairman of United States Section of the CITEJA; Vice Chairman of the United States Delegation to the Fourth International Conference on Private Air Law; and an Adviser to the United States Delegation to the International Civil Aviation Conference held at Chicago in 1944.

The writer expresses appreciation of the assistance rendered in the preparation of this article by Dr. Arthur L. Lebel, Member of the CITEJA; Miss Alberta Colclaser; and Miss Eleanor Finch, Secretary to the United States Section of CITEJA; all of the Aviation Division, Office of Transport and Communications Policy, Department of State.

<sup>2</sup> Initials of the French name of the organization, *Comité International Technique d'Experts Juridiques Aériens*.

<sup>2a</sup> Resolution VII. For texts of resolutions, agreements and convention adopted at the Chicago Conference, see *Final Act and Related Documents of the International Civil Aviation Conference*, Department of State, Publications, No. 2282, Conference Series, No. 64.

was prepared before the January 1946 session. The action taken by CITEJA upon these projects at that session has been indicated below:

The CITEJA is an international drafting committee which has actually been functioning since 1926. It was established pursuant to a resolution adopted at the First International Conference on Private Air Law held at Paris in 1925. The Secretary General of the Committee reported that as of March, 1939, twenty-seven countries, including the United States, were officially members of the CITEJA and contributing toward its annual expenses. The purpose of the present article is to give an historical description of the projects on which the CITEJA has made substantial progress. The Committee has a number of topics on its agenda which have not been developed sufficiently to be included within the scope of such a description. The topics discussed herein, with the exception of aggregate or overall limitation of liability of operators of aircraft, have been made the subjects of draft international conventions developed by the CITEJA subcommittees known as the First, Second, Third and Fourth Commissions. When a project of a commission was finally approved by the CITEJA in plenary session it was held over for submission to a periodic international conference on private air law. There have been four of these diplomatic conferences, the fourth having been held at Brussels in September 1938. This article does not deal with the conventions which have been adopted and signed at such conferences.<sup>3</sup>

*Proposed Convention Relating to the Liability of Operators of Aircraft for Damages Resulting from Aerial Collisions*

The liability of operators in international air traffic for damages resulting from aerial collisions was under consideration by the Third Commission for several years. A draft convention was finally adopted at the plenary session of the CITEJA held in Bern, Switzerland, in September 1936<sup>4</sup> and was submitted to the Fourth International Conference on Private Air Law, held at Brussels in September, 1938. This draft set forth the conditions under which the operators of aircraft would be liable for damages in the event of

<sup>3</sup> For a fuller description of the functions of CITEJA and a historical description of CITEJA draft conventions on which final action has been taken at periodic diplomatic conferences on private air law, see Stephen Latchford, "The Growth of Private International Air Law," in *The George Washington Law Review*, Volume 13 (1945), page 276; also "Private International Air Law," in *Department of State Bulletin*, Vol. XII (1945), page 11.

<sup>4</sup> For a translation of the draft as adopted at Bern in September 1936, see Department of State, *Treaty Information Bulletin*, No. 92 (May 1937), p. 30; *The Journal of Air Law*, Vol. VIII (1937), p. 320; and published report of United States Delegation to the Fourth International Conference on Private Air Law, Brussels, 1938 Department of State, *Conference Series*, No. 42, p. 48.

See also Arnold W. Knauth, "Aviation and Admiralty," in *Air Law Review*, Vol. VI (1935), p. 226, in which the proposed CITEJA Collisions Convention is discussed.

It is of interest to compare the CITEJA draft with the Maritime Collisions Convention, signed at Brussels on September 23, 1910 (*Foreign Relations of the United States, 1911*, p. 19 and Department of State, *Treaty Information Bulletin*, No. 21 (June, 1931), p. 22.

aerial collisions, such liability being limited to the value of the negligent aircraft, figured on the basis of 250 francs per kilogram of weight of the aircraft. This limitation was subject to further detailed provisions establishing a minimum of 600,000 francs and a maximum of 2,000,000 francs<sup>5</sup> liability of the aircraft operator. The draft also provided for the apportionment of the amount of liability between injuries to persons and damage to property (two-thirds to persons and one-third to property). Differentiation was made between the cases in which only one of the aircraft involved in the collision was negligent and cases where there was concurrent negligence. If the collision were the result of the negligence of one of the aircraft the liability for injuries caused to the other aircraft and to the persons and property on board would rest upon the aircraft guilty of negligence. If the collision were the result of concurrent negligence the liability of each one of the aircraft for the injuries caused to aircraft, persons, and property would be in proportion to the degree of negligence shown. However, if the circumstances were such that a proportion could not be determined, or if the degrees of negligence should appear to be equal, the liability would be shared in equal parts. The draft convention also made provision for determining the amount of liability of the operators of colliding aircraft for damages caused to third parties on the surface.

Acting under instructions from the Secretary of State the United States delegation to the Fourth International Conference on Private Air Law took the position that the adoption of a convention on aerial collisions would be premature, and urged that consideration of the pending draft be postponed. However, the American point of view was not accepted, and the Conference at first intended to make a detailed study of the existing CITEJA draft. Numerous proposals and comments on the draft were submitted, particularly by the United States delegation which interposed many detailed objections to it.

In urging that the adoption of a convention on aerial collisions be postponed the United States delegation called attention to the complicated nature of the problems involved and the lack of sufficient experience in the matter of aerial collisions from which to determine the practicability of the provisions of the draft. It was felt that if the rules relating to liability for aerial collisions were codified without more experience the convention might result in hindering rather than helping international air navigation. As an illustration of

<sup>5</sup> United States currency equivalents under the proposed collisions convention at the present time on the basis of \$.066335 to the franc and the 1934 valuation of the dollar are:

250 francs . . . . .	\$ 16.58
600,000 francs . . . . .	39,801.00
2,000,000 francs . . . . .	132,570.00

The French franc as referred to elsewhere in this article has the same United States currency equivalent as that given above.



the complications involved the United States delegation called attention to the fact that there would be, to a certain extent, an overlapping between the liability provisions of the proposed collisions convention and those of the convention dealing with the liability of the air carrier in international transportation adopted at the Second International Conference on Private Air Law, held at Warsaw in 1929, and of the convention relating to damages caused by aircraft in flight to persons and property on the surface adopted at the Third International Conference on Private Air Law, held at Rome in 1933.<sup>6</sup>

As the result of the many objections to the collisions draft the presiding officer of the Brussels Conference submitted a resolution providing that the entire matter, including the proposals and observations that had been submitted at Brussels, be referred to the CITEJA for study. This resolution, which was entirely in accordance with the point of view of the United States delegation, was adopted unanimously. The reasons given for this decision were as follows:

The Conference not having been able, because of the multiplicity of new proposals and the lack of time available, to undertake a careful examination of the draft convention for the unification of certain rules relating to aerial collisions, which had been submitted to the Conference, decides to refer consideration of this draft to the next diplomatic conference. Furthermore, in view of the fact that several states have submitted remarks and proposals on that draft, the Conference decides to refer these remarks and proposals to the CITEJA so that the latter may study them and, possibly, also prepare new proposals to be submitted to the Fifth International Conference on Private Air Law.<sup>7</sup>

The CITEJA has not had an opportunity to adopt in plenary session any new text on aerial collisions. However, at the CITEJA meeting held in Paris beginning on January 22, 1946, there was a review by the Third Commission of the subject of collisions, which will be considered further at the meeting of the CITEJA commissions scheduled to be held in Paris beginning on July 9, 1946.

<sup>6</sup> For a description of the Warsaw and Rome Conventions see "The Growth of Private International Air Law," in *The George Washington Law Review*, Volume 13 (1945), page 276.

<sup>7</sup> The unsettled political situation arising from the Munich Conference and the desire of the delegates to leave Brussels at the earliest possible moment appear to have been important factors in the decision to postpone consideration of the draft convention. As of interest in this connection, the United States delegates to the Brussels Conference concluded their report to the Secretary of State with the following observation:

While it is not within our province as delegates to an international air-law conference to make comments on questions of a political nature, it is believed that we might appropriately make the observation that the Delegates to the Brussels Air-Law Conference were in session at a time when there was a tense situation in Europe, due to the threatened outbreak of war, and that this situation was in striking contrast with the spirit of cooperation and goodwill exhibited by the assembled delegates at Brussels, representing nations in many parts of the world, in their successful efforts to reach an amicable agreement on outstanding questions of international importance.

*Aggregate or Overall Limitation of Liability of Operators of Aircraft*<sup>8</sup>

The Third Commission of the CITEJA had the subject of aggregate or overall limitation of liability under consideration and reached important decisions on the matter at its session at Bern, Switzerland, in September, 1936.<sup>9</sup> The immediate question under consideration had to do with the situation where in a single accident the operator of an aircraft might be held liable under two or more private air law conventions. The reporter for this subject submitted for consideration at Bern the following alternative systems:

*First System*

Possible, addition to the draft collisions convention of an article providing that there shall be a single maximum indemnity to be paid by the operator of the aircraft for all the damages caused by the fact of the collision (damages to the colliding aircraft and the occupants thereof and damages to third parties on the surface). The reporter thought that provisions for priority in the settlement of claims of injured third parties on the surface as had been suggested by some experts might be inequitable so far as concerned other injured persons, in that the damages recoverable by such other injured persons might be inadequate, but proposed a formula for such priority in the event that it should be desired by the Commission. The reporter suggested that this first system might be completed by the incorporation in the then proposed salvage at sea convention<sup>10</sup> of a maximum liability within the amounts set forth in the Rome Convention on liability to third parties on the surface. It was further suggested by the reporter that the principle of aggregate limitation of liability might be extended to include the Warsaw Convention of 1929.

*Second System*

This system would be the approval by the Fourth International Conference on Private Air Law of a protocol providing in effect that in a single accident, where there might ordinarily be simultaneous damages under several private air law conventions, the air transport operator or carrier in international air navigation would nevertheless not be liable beyond a single amount which would be a sum within the limits of 600,000 and 2,000,000 francs, the minimum and maximum limitations of liability found in the Rome Convention of 1933 on liability to third parties on the surface, and in the then proposed convention on aerial collisions.

The United States delegation at the CITEJA session at Bern in 1936 stated that, while the study of the problem of aggregate limitation of liability

<sup>8</sup> Also referred to as a "global limitation," whereby there would be a decrease of the total liability under two or more private air law conventions in connection with a single accident.

<sup>9</sup> See *U. S. Aviation Reports*, 1937, page 296, for report of United States delegation on the Bern session.

<sup>10</sup> This has reference to a draft convention on assistance and salvage of aircraft and by aircraft at sea, developed by CITEJA, on which final action was taken at the Fourth International Conference on Private Air Law, held at Brussels in September, 1938.

with a view to arriving at an ultimate solution was not believed to be premature, sufficient data on which to base an ultimate conclusion was not yet available. The delegation pointed out that its studies of the question had revealed a number of serious complexities which would require careful consideration, among them being the following:

(1) Whether all the pertinent conventions should be included in the aggregate limitation of liability.

(2) What priorities, if any, should be provided for, and whether a lien should be given to third parties on the surface.

(3) The difficulties arising in a particular case where a country has ratified two or perhaps three but not all of the several conventions that might be involved.

(4) A lack of uniformity as to the standards of limitation and the indefiniteness as to possible amounts of recovery under the several pertinent conventions.

The private air law conventions referred to as being pertinent were the Warsaw Convention of 1929, Rome Convention of 1933 on liability to third parties on the surface, and the then proposed conventions on aircraft salvage at sea and aerial collisions. After hearing the views of other experts at Bern, the Reporter for this subject expressed doubt whether either of the two systems he had proposed would be practicable. He suggested in this connection that the only solution might be to provide for some plan of aggregate limitation in the proposed convention on aerial collisions, with the possibility, however, of including in the plan of aggregate limitation provisions of the Rome Convention of 1933 on liability to third parties on the surface.

A member of the CITEJA from Poland shared the view of the United States delegation that it was too early to make any general commitment on the subject of aggregate limitation and made the comment that the Third Commission should not go into an accounting technicality at that time for the purpose of establishing a new rule of law.

There was finally presented for a vote of the delegations the question whether the limits of liability in the proposed collisions convention and the Rome Convention referred to above should remain cumulative. By a vote of six to four of the delegations it was decided to preserve the rule of cumulation of liability with respect to these two conventions. The United States delegation voted with the majority. The Third Commission had, in the course of its discussions at Bern, already eliminated the other private air law conventions from any consideration of the general question of aggregate limitation of liability. The United States delegation had expressed the view that a thorough study of the entire question of aggregate limitation should be made; that all private air law conventions imposing liability should be taken into consideration; and that the subject should be dealt with in a separate convention if the principle of aggregate limitation should eventually be adopted. It was therefore thought at the time of the vote referred to above

that the United States delegation's views would better be sustained by a vote that at least would leave the entire question in *statu quo* rather than to make a definite commitment that aggregate limitation should apply to some but not to all the private air law conventions. The practical result of the Commission's decision, which was concurred in by the CITEJA in plenary session at Bern, is understood to have been an indefinite postponement of any decision on the principle of aggregate limitation. The subject of overall or aggregate limitation of liability will be considered further at the meeting of CITEJA commissions scheduled to be held in Paris beginning July 9, 1946.

*Proposed Convention on Assistance and Salvage of Aircraft by Aircraft on Land*

The CITEJA began consideration of the subject of assistance and salvage in July 1930. Prior to the CITEJA session at The Hague in 1935 that committee had been proceeding on the assumption that any draft developed would deal with both salvage at sea and salvage on land. However, it was decided at The Hague in 1935 that land salvage should be dealt with as a separate subject.

At the meeting of the Third Commission in Paris in January, 1939, the Reporter presented the third draft of a proposed convention on land salvage. Although the United States delegation participated in the discussions on the various articles of the draft with a view to assisting in the improvement of the text, it nevertheless submitted observations in writing, developing the position previously taken by United States delegations, which had raised the basic question whether there was any great interest in this subject or any particular need for proceeding with the development of the land salvage project. It was understood that neither the British nor the German members of the CITEJA had any more interest in this subject than the United States experts. However, the Italian and French delegations felt that it would be desirable to proceed with the study of land salvage.

In June, 1939, the Reporter presented a fourth preliminary draft, Article 2 of which reads in part:

(1) Any person exercising the functions of commanding officer aboard an aircraft shall be bound to render assistance to any person who is embarked on board an aircraft and is in danger of being lost, on land, provided that the aircraft in distress is situated in one of the zones defined in Article 3 below and that such assistance may be rendered without serious danger to the aircraft, her crew, her passengers, or other persons.

(2) For the purposes of this convention, assistance shall mean any help which may be given to a person who is on land in danger of being lost, under the circumstances set forth in paragraph (1) of this article, even by merely giving information to another possible salvor.

(3) The obligation of assistance shall not exist unless the aircraft is in the course of a flight or ready to depart, and unless it is reasonably possible for it to render useful aid.

Article 3 of the fourth preliminary draft reads in part:

(1) The zones stipulated in paragraph (1) of Article 2 shall be zones known to be devoid of all normal means of assistance and relief. Their boundaries shall be determined by the States within whose territories they are included.

In addition, the fourth preliminary draft on land salvage, like the third draft, contains a number of basic principles of the aircraft salvage at sea convention adopted at Brussels in September, 1938, including provisions for the payment of indemnity for expenses incurred and damages sustained by the salvor in rendering assistance. This principle of payment of indemnity in aircraft salvage cases is a new one which was developed by CITEJA and incorporated in the Brussels Aircraft Salvage at Sea Convention of 1938. "Indemnity" is to be distinguished from "remuneration" awarded to the salvor for the saving of lives and property.

It will be recalled that the aircraft salvage at sea convention, which applies to assistance by aircraft to other aircraft and to surface vessels and to assistance by surface vessels to aircraft, is not applicable to military, customs, or police aircraft and vessels. The proposed land salvage convention would accord to such government aircraft the right to receive assistance without any obligation to assist, and without being subject to the jurisdiction of the courts in suits for indemnity or remuneration. Under the Brussels aircraft salvage at sea convention of 1938 government aircraft or vessels other than military, customs, and police aircraft or vessels are obligated to assist and have the right to receive assistance, but are not subject to the jurisdiction of the courts. Likewise in the proposed land salvage convention, government aircraft other than military, customs, and police aircraft would be obligated to assist and would have the right to receive assistance, but would not be subject to the jurisdiction of the courts. It is of interest to note that the Brussels Maritime Salvage Convention of 1910 "does not apply to ships of war or to Government ships appropriated exclusively to a public service."

The following is a résumé of certain of the written observations on land salvage submitted by the United States delegation at the meeting of the Third Commission in Paris in January, 1939:

In contemplating any zoning scheme that might be suggested, aside from the practical difficulties involved there arises the fear that such a scheme might eventuate in further restricting the freedom of international air navigation already affected by the creation of national air space reservations (prohibited areas).

The draft convention would impose upon aviators in or near the designated zones a duty, under sanctions, to render assistance, the expense of which would have to be borne by the aviators in difficulties in those areas. The draft therefore places another expense upon an industry more or less dependent on government support and already heavily burdened with ordinary and developing expenses. This element of added cost is regarded as being of fundamental importance to air carriers

especially to those in the United States which, in a number of instances, have received substantial help from searching and aiding parties without compensation.

To crystallize in law a right to an award for such services would appear to be highly questionable from a practical point of view at this stage in the establishment of air transportation. It is suggested that airmen may be depended upon to assist their fellow aviators in misfortune without the imposition of legal sanctions.

The aircraft salvage at sea convention presents an entirely different situation. As to the sea there is a well-established, ancient maritime law, and the problem was to adapt the operations of aircraft over seas to existing maritime law. Aeroplanes are peculiarly liable to total loss at sea and the need for encouraging the most rapid service of assistance and salvage is readily perceived.

In any consideration of this project one should not lose sight of the fact that the ability of modern aircraft to render any useful aid under the terms of the proposed convention would be extremely limited.

It may be of interest to add that at the meeting in Paris in January, 1939, the United States delegation also called attention to the coast-guard services provided by individual governments for the benefit of persons on board surface vessels without expense to the shipping industry and referred to the possibility of having analogous "aviation-guard services" provided without expense to the aviation industry by the governments exercising sovereignty over regions where ordinary means of assistance would not be available to aircraft in distress. The delegation further suggested that there might be some cases where an international patrol service could be provided by the collaboration of several governments, in much the same way that certain governments have cooperated in maintaining the North Atlantic ice patrol service for the benefit of shipping and without expense to the shipping industry. The United States delegation thought that, if aircraft salvage on land were important enough to require attention, the problem might first be approached through the organization of an air patrol service, which, however, in the view of the delegation, would be a matter of public law and not one of private air law.<sup>11</sup> During the CITEJA meetings held in Paris in January, 1946, the Third Commission of CITEJA reviewed the subject of land salvage. This was immediately followed by the adoption by CITEJA in plenary session of a proposed land salvage convention based on the Third Commission's project.

The Convention on International Civil Aviation concluded at the Inter-

<sup>11</sup> See Arnold W. Knauth, "The CITEJA meeting in Paris in January, 1939," in *The Journal of Air Law and Commerce*, Vol. X (1939), p. 167, in which Mr. Knauth commented on the discussions concerning land salvage.

For a translation of a preliminary draft on land salvage prepared for consideration by the Third Commission in Paris in May, 1937, see *The Journal of Air Law*, Vol. VIII (1937), p. 350 and *U. S. Aviation Reports*, 1937, p. 376. Modifications of this draft were subsequently made by the Third Commission.

national Civil Aviation Conference, held at Chicago from November 1 to December 7, 1944, also deals with the question of assistance to aircraft in distress. Article 25 of the Chicago Convention, which is not yet in force, provides that each of the contracting states shall, insofar as it may find this to be practicable, furnish measures of assistance to aircraft in distress in its territory and allow, subject to control by its own authorities, the authorities of the state in which the aircraft is registered or the owners of such aircraft to furnish such measures of assistance as the circumstances may require. When undertaking search for missing aircraft each contracting state undertakes to collaborate in any coördinated measures which may, pursuant to the Chicago Convention, be recommended from time to time. It will be observed that this provision of the convention differs from the salvage conventions developed by CITEJA in that the convention adopted at Chicago does not place an obligation on individuals to assist aircraft in distress but imposes certain obligations in this respect upon the contracting states.

Annex L of the technical annexes as adopted in provisional form at the Chicago Aviation Conference contained detailed provisions relating to the investigation of accidents as well as assistance to and search for aircraft in distress in territory of a contracting state and indicated that special consideration would be given to the conditions under which search and rescue would also be conducted on the high seas and in uninhabited areas.<sup>11a</sup> It is believed to be quite evident that careful consideration will have to be given to the bearing which search and rescue measures adopted within the field of public international air law will have, not only on the Brussels sea salvage convention of 1938, but also on the draft convention on land salvage adopted by CITEJA in January 1946.

*Proposed Convention on the Legal Status of the Aircraft Commander*

A draft convention on the status of the aircraft commander was adopted provisionally by the CITEJA at its Sixth Session, held at Paris on October 23 and 24, 1931.<sup>12</sup> The following are among the more important provisions of the draft:

The aircraft commander shall be the person vested with the powers of safety, discipline, and authority on board the aircraft. Any aircraft capable of carrying at least  $X^{13}$  persons or  $X^{13}$  tons of goods must have on board a person especially invested with the powers of a commander. On other air-

<sup>11a</sup> The Interim Council of the Provisional International Civil Aviation Organization (PICAO) provided for at the Chicago Aviation Conference, now functioning at Montreal, Canada, has divided Annex L into two sets of international standards and recommended practices, one set relating to investigation of accidents, and the other to search and rescue activities.

<sup>12</sup> For a translation of the convention see *The Journal of Air Law*, Vol. VIII (1937), p. 339; *U. S. Aviation Reports*, 1937, p. 394.

<sup>13</sup> The number has not yet been determined.

craft the appointment of the commander shall be optional. In the absence of an appointed commander, the functions shall be performed by the navigator or, in his absence, by the pilot. In the absence of a special agency, the pilot has only the powers of safety, discipline, and authority contemplated by the proposed convention. The choice of the commander and the granting of the special agency referred to shall devolve upon the operator of the aircraft.

The commander shall be the master on board. He shall have disciplinary powers over the navigating personnel (crew) as long as he requires their services, and authority with respect to the passengers as long as they are on board the aircraft. He shall have the right, even without special agency: (a) to make the necessary purchases for the trip undertaken; (b) to make the necessary repairs to the aircraft; (c) to take all necessary steps and incur all necessary expenditures to safeguard the baggage and goods carried; (d) to negotiate loans in order to give effect to the powers indicated under (a), (b) and (c); (e) to hire and dismiss members of the crew. The powers of the commander may be enlarged by a special agency. They may also be restricted; however, the use of such restriction as a defense against third parties is conditioned upon proof, by the operator, that the third parties have had knowledge of the restriction. The commander shall not have the right to sell the aircraft or to encumber it with mortgages or other real rights (claims *in rem*), without a special agency. Representation of the operator by the commander, as well as the powers to perform the acts mentioned in clauses (a), (b), (c), (d) and (e) above shall last as long as the commander exercises his duties in connection with a specific trip.

The question whether the draft convention on the status of the commander should be combined with the draft relating to the legal status of the aircraft navigating personnel has been reserved by the CITEJA for future consideration. The subject of the legal status of the aircraft commander will be considered further at the meeting of the CITEJA commissions scheduled to be held in Paris beginning on July 9, 1946.

#### *Proposed Convention on the Legal Status of the Aeronautic Navigating Personnel*

The Fourth Commission of the CITEJA had the subject of the legal status of aeronautic navigating personnel under consideration for several years. The purpose of the draft convention is to define certain principles governing the making of the contracts of employment of the navigating personnel of aircraft, the jurisdiction of the commander of the aircraft over the personnel while in foreign countries, the rights of the crew as far as concerns their welfare during their stay in such countries, and the obligation of the employers to repatriate members of the crew upon termination of their services.

When the draft convention was under consideration the United States delegation stated that there was no reason why the benefits of the draft convention should be limited to personnel employed by regular air transport lines and proposed that these benefits also apply to the crews of non-com-



mercial aircraft since there was a tendency on the part of private individuals to employ on such aircraft large enough crews to warrant such broader application of the provisions of the convention. The American proposal was adopted by a vote of seven delegations to six.

There was protracted discussion whether the draft should contain an article determining what national laws should govern the contract of hire. A Norwegian member of the CITEJA contended that the proposed convention should not undertake to settle questions that might arise under the conflict of laws. He thought that this was a matter for the determination of the courts. However, his view did not prevail and the United States delegation participated in the submission of proposals on the subject which resulted in an agreement on an article the text of which appears in the latest draft of the Reporter as Article 2. This article reads:

Subject to compliance with the provisions of this Convention, the contract of hire of the navigating personnel shall be governed by the laws of the State of registration of the aircraft on board which the member of the navigating personnel undertakes to perform one of the duties provided for in Article 1.<sup>14</sup>

However, if the contract of hire relates to duties to be performed on more than one aircraft registered in different States, it shall be governed by the laws of the State of the employer.

The intent of the parties may eliminate the laws mentioned above by having the laws of one of the High Contracting Parties govern the contract.

The laws of the place where the contract of hire is entered into may, furthermore, impose upon the parties certain requirements considered in such place as being of a public character.

As regards the discipline on board, the laws of the State where the aircraft is registered shall be applicable.

In the course of the discussions on the draft the Reporter was asked to clarify the provision that the "absence" of a written contract would not affect the existence or validity of the contract of hire. The United States delegation desired to know whether the use of the word "absence" meant that there could be an oral contract. The Reporter stated that the contract would have to be in writing and that the absence of a written contract might mean only a question of enforcing penalties under the national law for not having the contract in writing. This question is dealt with in the latest draft of the Reporter as follows:

Absence, irregularity, or loss of the written contract shall affect neither the existence nor the validity of the contract of hire which shall nonetheless be subject to the rules of this convention.

<sup>14</sup> Article 1 reads: "For the purposes of this Convention navigating personnel shall mean any persons (including the aircraft commander) who are assigned to the handling of the aircraft or to perform other services on board, and who are hired and paid for such purposes."

This provision seems to be somewhat ambiguous and will doubtless require clarification if it is to be retained.

The following is a brief summary of several of the more important provisions of the latest draft as prepared by the Reporter in June, 1939, on the basis of decisions reached by the Fourth Commission in Paris in May, 1938.

The contract of hire must be in writing and contain various clauses relating to the conditions of employment, including a statement as to the service for which the person has been hired, the amount of wages, and the length of employment. In case of necessity the commander of the aircraft may temporarily assign any member of the navigating personnel to perform services other than those for which he has been hired. Any contract of hire which expires during the course of a trip will be extended up to the next scheduled stop of the aircraft. If a replacement of the person whose services are considered to be indispensable cannot be made at that stop the contract will continue in force until such replacement becomes possible.

Subject to the rights and obligations of the parties and to the obligation to repatriate, the commander of the aircraft shall have the right, for serious reasons which he shall show, to disembark any member of the navigating personnel at any place where normal means of repatriation are available. Any member of the navigating personnel may, while abroad, demand his immediate disembarkation in the cases and under the conditions provided for by the laws of the state of registration of the aircraft on which he has embarked. Any member of the navigating personnel disembarked during the life of or upon the termination of his contract of hire has the right to be repatriated. Repatriation shall be construed as the right to be brought back to one's own country or to the place of hire, and shall be considered as having been accomplished through the furnishing of employment on another aircraft destined to a place to which repatriation can properly be made, or the furnishing by the employer of a sum of money necessary to cover the cost of repatriation. The laws of the state where the aircraft is registered shall indicate by whom the cost of repatriation is to be borne. However, the cost of repatriation cannot be charged against the person repatriated except where the causes of dismissal of the person concerned are imputable to him. Such causes may not include either an accident occurring in the service of the aircraft or sickness not caused by a voluntary act or negligence of the person repatriated. All expenses incident to travel, such as lodging, subsistence, and medical care, are to be included in the cost of repatriation. The provision for medical care was made pursuant to a proposal of the United States delegation. If a person is to be repatriated as a member of a crew, he shall be entitled to remuneration for the services rendered during the trip.

It may be of interest to note that a difference of opinion arose between the International Labor Office and the CITEJA as to which organization should have jurisdiction in the drafting of a convention on the conditions of employment of the navigating personnel of aircraft. It was finally arranged to have a representative of the ILO participate in the CITEJA discussions of the

various articles of the proposed convention.<sup>15</sup> The project relating to the legal status of the aircraft navigating personnel will be considered further at the meeting of the CITEJA commissions to be held in Paris in July 1946.

*Draft Convention on Ownership of Aircraft and the Aeronautic Register*

At the first meeting of the CITEJA in Paris in 1926 the task of drafting a convention on the ownership of aircraft and the aeronautic register was assigned to the First Commission. Preliminary drafts of the convention were considered by that Commission from 1927 to 1931 inclusive and at plenary sessions of the CITEJA in 1929, 1930, and 1931. The final draft was approved by the CITEJA in 1931, but was never presented to an international conference on private air law. The CITEJA at its thirteenth plenary session, in 1938, returned the draft convention to the First Commission for reexamination.

The final draft provides that aircraft registered in a State and used in international navigation (registration establishing the nationality of the aircraft under public air law) shall be recorded by the owner in a public register<sup>16</sup> maintained for the purpose of giving notice of title and property claims, and that aircraft recorded in one State cannot be recorded in another State unless the owner proves that the first recording has been cancelled. Such recording of title may be made on the ordinary register which establishes the nationality of aircraft under public air law or on a separate register especially maintained for the purposes of the proposed convention. If aircraft are subject to mortgages, liens or other property claims, the property record may not be transferred unless the creditors agree to the transfer or unless proof is offered that the debts secured by the encumbrances have been paid. Where the creditors consent to the transfer, the charges entered on the first property record are transferred to the new property record. Provisional recording of title may be made of aircraft under construction or not yet placed on the register which establishes the nationality of the plane. Aircraft engines, tools and everything intended for the permanent use of the aircraft are considered an integral part of the plane even though temporarily detached from it, subject to the rights of third parties acquired in good faith. The proposed convention specifies the information to be recorded on the aircraft property record and provides that all recorded transfers of title, assignments, cessions and renunciations of property rights shall be valid as to third parties from the date of recording. Any defect in the title of a recorded owner may

<sup>15</sup> For a translation of the preliminary draft convention on the legal status of the navigating personnel prepared for consideration at the meeting of the Fourth Commission in Paris in May, 1937, see *The Journal of Air Law*, Vol. VIII (1937), p. 342. This draft was considerably modified at sessions of the Fourth Commission.

<sup>16</sup> Registration, or recording, under the draft convention, unless otherwise indicated, is to be distinguished from registration under public air law, by which the nationality of aircraft is determined. For the purpose of clarity the aeronautic register which is the subject of this Convention might be described as the aircraft property record.

not be invoked against anyone who has acquired such title in good faith from the recorded owner. Recordings on the special property record must be reproduced on the certificate of registration by which the nationality of the plane is determined.

During the consideration by the CITEJA of the draft convention long discussions were held on the following questions: (1) whether the engine and other detachable parts of the plane should be regarded as integral parts of the plane for the purpose of recording title, mortgages, and other claims; (2) whether recording of title and other property rights established such rights or was merely declaratory thereof, that is, whether recording was absolute proof of title or a presumption subject to rebuttal. On the first question it was decided, although there was strong dissent, that the engine and other detachable parts were integral parts of the aircraft for the purposes of the proposed convention. In the discussion on the second question the CITEJA did not reach a clear conclusion and the draft convention apparently does not deal specifically with all the effects of the registration or recording of a defective title through fraud or otherwise, although it would seem from the language of Article 9 of the proposed convention that third parties acquiring in good faith from the recorded owner acquire a valid title.<sup>17</sup>

The delegates to the International Civil Aviation Conference held at Chicago adopted a resolution calling attention to the desirability of having the various governments reach a common understanding on the legal questions involved in the transfer of title to aircraft and recommended that consideration be given to the calling of an international conference on private air law for the purpose of adopting a convention dealing with this matter.<sup>18</sup> The resolution recommended that the proposed conference include in the bases of discussion the CITEJA draft Convention on the Ownership of Aircraft and the Aeronautic Register.

In view of a resolution adopted by the Interim Council of PICAO at Montreal in November 1945 in favor of having draft conventions adopted by CITEJA in plenary session referred in due course for final action to PICAO, a procedure concurred in by the CITEJA at its January 1946 session, the 1931 CITEJA draft conventions relating to (1) aircraft mortgages, discussed below, and (2) the aeronautic register will be referred by CITEJA to the Secretariat of PICAO at Montreal for appropriate disposition in accordance with the new procedure.

#### *Draft Convention on Aerial Mortgages, Other Real Securities, and Aerial Privileges*

The subject of mortgages and other property rights with reference to aircraft was assigned to the First Commission at the first meeting of the

<sup>17</sup> For a translation of the draft convention as adopted by the CITEJA in 1931, see Department of State, *Treaty Information Bulletin*, No. 40 (January 1933), p. 33; see also *The Journal of Air Law*, Vol. VIII (1937), p. 325.

<sup>18</sup> Resolution No. V in the Final Act of the Chicago Conference.

CITEJA in 1926, and was considered by succeeding sessions of the Commission and by the CITEJA in plenary session in connection with the draft convention on the ownership of aircraft and the aeronautic register, the provisions of which are closely related to the draft on mortgages, other real securities, and aerial privileges.<sup>19</sup> The latter draft, as well as the one on ownership and the aeronautic register, was approved at the Sixth Session of the CITEJA in 1931, but was never submitted to a periodic international conference on private air law.<sup>20</sup>

The draft convention on mortgages defines an aircraft mortgage as a real security (claim *in rem*), whatever its name and origin, which is recorded in the aircraft property record and which assigns the aircraft to the payment of a debt, the amount of which is also recorded. Article 2 of the draft convention provides that aircraft mortgages duly established under the law of the state on whose register the aircraft is inscribed shall produce the effects determined by the proposed convention. It is not entirely clear from the text of Article 2 whether the word "register" as used therein refers to the aircraft property record or the register which determines the nationality of the aircraft. It is believed, however, that Article 2 refers to the register which establishes the nationality of the aircraft. Priority among the mortgages is determined by the order of recording on the aircraft property record.

Claims having preference over mortgage debts are given priority in the following order: (1) airport charges and other charges for public air navigation services arising from the last flight; (2) compensation due for salvage or assistance; (3) amounts due for repairs made by the commander of the aircraft or by his order in the course of a trip for the purpose of the actual preservation of the aircraft. The draft convention also provides that in case of the sale of aircraft under a creditor's attachment or in execution of a judgment and in the case of attachment before judgment, such procedures must be noted in the aircraft property record. In case of judicial sale the recorded owners and creditors must be notified in advance of the sale. Such sale operates to transfer title and to subject any charges on the aircraft to the laws of the place of execution. No mortgage or transfer of title made after notice of attachment or of execution proceedings is valid against the attaching or judgment creditor. A mortgage extinguished by judicial sale under the laws of a contracting state must be released by the competent authorities of the State where the mortgage is recorded, upon receipt of a certified copy of the adjudication.

The question whether there could be an aircraft mortgage was a difficult one in view of the fact that at the time of the discussions the laws of only three states namely France, Italy, and Finland recognized the existence of

<sup>19</sup> The word "privileges" as used in the convention relates to preferred claims or liens.

<sup>20</sup> At its Thirteenth Session in Brussels in 1938 the CITEJA decided to reconsider the draft convention on aerial mortgages.

aircraft mortgages.<sup>21</sup> In answer to the objections to giving an international status to aircraft mortgages from the point of view of national laws, it was maintained in the CITEJA discussions that the purpose of the draft convention was to establish the aircraft mortgage as an international instrument of credit and that the only two conditions required for internationally establishing such an instrument would be the reciprocal recognition of such mortgages as exist under national laws and their recording in a public register.

With regard to the definition of mortgages and analogous real securities there were lengthy discussions as to the nature of the encumbrances to be covered by the convention, and the general opinion was that the term "aircraft mortgage" should include all liens and encumbrances established by national laws and by judicial acts, as well as by contracts between the parties. The question was raised whether the "floating charge" recognized in British law came under the definition of a mortgage and would be affected by the convention. The general view was that the "floating charge" would not be affected.

Another important part of the CITEJA draft which was discussed at length was the article relating to priority among the claims having preference over mortgage debts. The provisions of the Brussels Convention on Maritime Liens, of 1926, were taken as the basis for the original draft article on this subject. The provisions finally agreed upon appear as Article 7 of the draft convention approved by the CITEJA in 1931. With the purpose of limiting such preferred claims as much as possible in order to preserve the mortgage creditor's interest, the list of preferred claims in the 1931 draft includes only three categories: airport fees, salvage claims, and claims for repairs. The question whether lienors other than those asserting claims for airport fees, salvage services, and repairs, should have priority over the mortgage creditors and preferred creditors was the subject of much discussion. Because of the great diversity of national laws regarding the right to assert a lien, the CITEJA decided to omit any specific mention of the general right of lien in the draft convention.

At the Fifth Session of the CITEJA in October, 1930, the Reporter proposed to abandon the project under consideration for the reasons that, in his opinion, international regulation of aircraft mortgages could not be achieved at that time and that the proposed convention did not provide sufficient

<sup>21</sup> Section 503 of the United States Civil Aeronautics Act of 1938, as amended (52 Stat. 1006; 54 Stat. 1235; 49 U.S.C. 523) provides for the recording of all conveyances affecting title to or interest in any civil aircraft of the United States or any portion thereof, in order to be valid against third parties taking in good faith. It also provides that the records shall show the interest transferred, the interest of the vendor, if any, and amount of indebtedness secured by the conveyance. It is of interest to compare this section of the 1938 Act with the provisions of the CITEJA draft convention on aircraft mortgages. A translation of the CITEJA draft convention appears in Department of State, *Treaty Information Bulletin*, No. 40 (January 1933), p. 33; also in *The Journal of Air Law*, Vol. VIII (1937), p. 330.

security for the mortgage creditor. The Reporter's proposal was not adopted, however, and, as stated above, the completed draft was approved at the 1931 session of the CITEJA.

The delegates to the recent International Civil Aviation Conference at Chicago included in Resolution No. V, mentioned above, a recommendation that the CITEJA draft Convention on Mortgages, Other Real Securities, and Aerial Privileges be included in the bases of discussion at a possible early international conference on private air law, which would deal with legal questions involved in the transfer of title to aircraft.<sup>21a</sup>

*Draft Convention on Collaboration of the CITEJA in the Interpretation and Execution of International Conventions on Private Air Law*

The attempt to draft a convention on the collaboration of CITEJA in the interpretation and execution of conventions on private air law resulted from the introduction of a resolution by the French delegation at the Third International Conference on Private Air Law held in Rome in May, 1933. The resolution would have conferred upon the CITEJA the power to give its opinion on or interpretation of texts of private international air law conventions when requested by a public administration or an international organization, without prejudice, however, to the right of interpretation exercised by the judicial authority before which a dispute might be brought. This resolution had been introduced as a consequence of several requests presented to the CITEJA by the International Air Traffic Association<sup>22</sup> for interpretation of provisions of the Warsaw Convention of 1929. The resolution as originally introduced at Rome in 1933 was opposed by the United States, British, and Netherlands delegations, and was amended by the Rome Conference to take the form of a *vœu* expressing the wish of the Conference that the CITEJA study the question whether, to what extent, and in what manner it could "give its opinion on the interpretation" of international conventions on private air law when requested to do so under the conditions outlined in the resolution as originally presented to the Rome Conference.

The CITEJA referred the matter to the First Commission in October, 1933, and that Commission, after having considered several preliminary drafts, prepared a project on interpretation and execution of private air law conventions for submission to the Twelfth Plenary Session of CITEJA held at Bucharest in September, 1937. That project provided that the CITEJA

<sup>21a</sup> For a statement as to the present status of this proposed convention see last paragraph of preceding discussion regarding ownership of aircraft and the aeronautic register.

<sup>22</sup> An organization, generally referred to as IATA (International Air Traffic Association), composed principally of European air transport operators, concerned with technical questions relating to air traffic and operating problems. This organization has been superseded by the International Air Transport Association organized on April 19, 1945 at Habana, Cuba, also referred to as IATA.

should furnish an advisory opinion on the meaning of the provisions of international conventions on private air law when requested to do so by a state represented on the CITEJA or by any official organization of an international character. However, when the First Commission's draft was presented at Bucharest the Reporter also submitted a substitute project drafted by him after consultation with certain members of the CITEJA. The substitute project provided that if the CITEJA were requested by "any person" to interpret the terms and provisions of a convention on private international air law, in the preparation of which it had contributed, it should confine itself to the furnishing of the pertinent documents; but that if the CITEJA were consulted by one or more states represented thereon, it should render an opinion, with the reasons therefor, which would have the status of a legal consultation only. The substitute project retained that portion of the First Commission's draft which provided for the organization by the CITEJA of a permanent commission which would prepare the opinions, subject to the approval of the CITEJA. The substitute draft also retained the provision in the Commission's draft that, if an international conference at which an international convention on private air law was adopted should so request, the CITEJA would prepare "a text of execution" of the convention. Any text of execution adopted by CITEJA would be binding only on the states which accepted it. It may be of interest to observe that the Reporter at Bucharest encountered difficulties in the presentation of his substitute project because it had not been passed upon by the First Commission. For this reason the CITEJA in plenary session at Bucharest referred the whole question back to the First Commission for further study.

When the question of interpretation was considered by the First Commission prior to the Bucharest meeting of the CITEJA in plenary session the United States delegation had opposed the granting to it of the power of interpretation. The position of the United States was supported by CITEJA members from several countries including the British and German delegations. This opposition was based on the contention that the interpretation of international conventions is a function of the courts; that the proposed interpretative powers of the CITEJA would be inconsistent with its duties as an international drafting committee; and that interpretations by the CITEJA, although purporting to be of an advisory nature only, would give that body the appearance of having far greater power than was contemplated at the time of its organization as a drafting committee.

It was generally agreed in the meetings of the CITEJA that any opinions rendered by it interpreting the provisions of conventions that have been adopted and signed at international conferences on private air law could not bind governments or judicial bodies; that such opinions would be merely advisory in character, which the CITEJA would not be obligated to render and which the requesting parties would not be bound to accept. These consid-



erations were advanced by those in favor of the proposed convention. The opponents maintained that there would be little value and some danger in CITEJA interpretations; that the rendering of an opinion by the CITEJA in a case where the interpretation of a convention was before a court might, in effect, constitute an intervention in the decision of the case.

The two projects submitted to the CITEJA at Bucharest in 1937 were considered at a meeting of the First Commission held in Paris in May 1938. The Commission decided by a vote of eight to seven delegations to abandon discussion of a proposed convention on interpretation. At the plenary session of the CITEJA in Brussels in September, 1938, the Reporter for the subject of interpretation questioned the decision reached at Paris in May 1938, on the ground that the members of the Japanese delegation which voted in favor of abandoning the project were present only as observers. The presiding officer at Brussels ruled that the point raised by the Reporter was immaterial since a tie vote (the vote having been eight to seven delegations) would have defeated the project. The Reporter did not submit any report at the Brussels meeting but merely requested a further postponement of the subject. This procedure was agreed to by the CITEJA. At a meeting of the First Commission in Paris in January, 1939, the United States delegation called attention to the fact that the Commission's rejection of the project had not yet been formally reported to the CITEJA. In June, 1939, the Reporter submitted a report in which he stated in effect that in view of the opposition that had been encountered he did not feel that any useful purpose would be served by submitting any further text to the First Commission.<sup>23</sup> However, notwithstanding this statement by the Reporter in 1939, new projects on this subject, submitted by another Reporter, were considered by the First Commission of the CITEJA at Paris in January, 1946. Two proposed conventions based upon the First Commission's project as developed at that meeting were adopted by CITEJA in plenary session in January.

<sup>23</sup> For a translation of the draft convention on the interpretation and execution of private air law conventions as submitted to the First Commission at Paris in May 1937, see *The Journal of Air Law*, Vol. VIII (1937), p. 357. This text was submitted to the CITEJA at Bucharest in September, 1937, with a few minor changes, including the substitution of the word "execution" for "application," and with Article 5 taking the form of a *voeu*. Article 5 as submitted at Paris in May 1937 read:

To make it possible to follow the application of the international conventions, every signatory government is requested to communicate to the Secretariat General of the CITEJA as soon as possible, every legislative, regulatory, administrative or judicial document, relative to such application.

The following observation by the late Professor John H. Wigmore appears as a footnote to the text appearing in *The Journal of Air Law*:

The proposal in this Draft is hardly consistent with the traditions of United States law and policy. The amendment of an international convention is a matter for the Governments only. The interpretation of its terms is a matter for judicial decision in either a national or an international tribunal.

*Summary of Decisions Reached by CITEJA at Its Session in January, 1946*

In order to bring the CITEJA program up to date so far as possible, it is thought to be of interest to give the following brief summary of decisions reached at the 14th plenary session in Paris in January, 1946.

Heretofore the contribution of each state toward the expenses of CITEJA has been only a nominal sum. An increased budget was agreed upon in order to enable the CITEJA to function in a satisfactory and effective manner in connection with its future duties and responsibilities.

The following proposed conventions were adopted by CITEJA in plenary session and have been referred by it to the PICAQ Secretariat for the action of PICAQ:

- (1) A statute relating to the functions of CITEJA.
- (2) Two projects conferring upon CITEJA certain powers in connection with interpretation of private international air law conventions.
- (3) A project conferring upon CITEJA certain powers to formulate texts of execution or application of such conventions.
- (4) A project relating to assistance and salvage of aircraft on land.

The CITEJA also adopted a revision of the Warsaw Convention of 1929 relating to the liability of the air carrier for damages to passengers and property in international transportation. This revision will likewise be referred by CITEJA to the PICAQ Secretariat for the subsequent action of PICAQ. There appears to be some uncertainty whether any final revision agreed upon by the Assembly will be in the form of a protocol to the existing Warsaw Convention or will constitute a new convention superseding the existing convention.

In addition, the CITEJA decided at the January, 1946, session to refer to PICAQ a proposed international convention relating to aircraft mortgages, and a draft convention for establishing a special aeronautic register (aircraft property record) for recording property rights in connection with the transfer of title to aircraft. These two draft conventions were, as stated earlier in this article, adopted by CITEJA in 1931, but no action was ever taken on them by any of the international conferences on private international air law.

Meetings of CITEJA commissions will be held in Paris beginning on July 9, 1946. The following subjects are still on the agenda of the CITEJA:

- (1) Liability of air transport operators in the event of aerial collisions;
- (2) Aviation insurance;
- (3) Abandonment;
- (4) Legal status of the aircraft navigating personnel and the commander of the aircraft;
- (5) Arbitration;
- (6) Aggregate or overall limitation of liability (global limitation);
- (7) General average;

- (8) Tourist aircraft;
- (9) Chartering of aircraft.

It is expected that most, if not all, of these subjects will be considered at the July, 1946, sessions of the CITEJA commissions.

Meetings of several CITEJA commissions and a plenary session of CITEJA will be held at Cairo beginning on November 4, 1946. It is expected that any of the projects completed at the July sessions in Paris will be considered at the plenary session to be held in Cairo. It will be noted that by meeting on three separate occasions in 1946 the CITEJA will be departing from the practice followed prior to the war when meetings were held only twice a year, generally in the Spring and Fall.

In connection with the foregoing survey of CITEJA projects on which substantial progress has been made, the following developments pertaining to CITEJA are believed to be of interest.

In view of the large number of countries represented at the 14th plenary session of CITEJA in Paris in January, 1946, the various governments represented at the International Civil Aviation Conference held at Chicago in 1944 doubtless took cognizance of the recommendation of that Conference concerning the resumption at the earliest possible date of the CITEJA sessions which had been suspended because of the outbreak of war. As stated in an early part of this article thirty-two countries were represented at the 14th session of CITEJA in January, 1946, in contrast with an average attendance by representatives of from fifteen to twenty countries prior to the war.

As indicated earlier also, the delegates to the Chicago Aviation Conference recommended that consideration be given to the matter of coordinating the activities of CITEJA with those of the provisional and permanent international civil aviation organizations provided for at Chicago.<sup>24</sup> At a meeting of the Interim Council of PICAQ at Montreal on November 23, 1945, the Interim Council approved a recommendation of its Air Transport Committee that the President and the Secretariat of the PICAQ establish a procedure for considering CITEJA matters in collaboration with the Secretariat of CITEJA. This plan of collaboration was concurred in by CITEJA at its 14th plenary session in January, 1946. As indicated elsewhere in this article, the Interim Council also approved a recommendation on November 23, 1945, that in the future the Assembly of PICAQ be considered as the international conference for the purpose of concluding private air law conventions based upon drafts adopted by CITEJA. The CITEJA at its 14th session in January, 1946, agreed likewise in principle to this recommendation.

<sup>24</sup> For a description of these organizations, see Richard K. Waido, "Sequels to the Chicago Aviation Conference," in *Law and Contemporary Problems*, Vol. XI, No. 3 (Winter-Spring 1946), p. 609; also H. Alberta Colclaser, "The New International Civil Aviation Organization," in *Virginia Law Review*, Vol. 31, No. 2 (March 1945), p. 457.

The effect of this new procedure will obviously be to eliminate the practice of having some government call an international conference on private air law to conclude conventions based upon CITEJA projects, as has been the practice in the past. The question of a possible merger of the CITEJA activities with those of the permanent International Civil Aviation Organization under the Chicago Civil Aviation Convention when it comes into force was before the Interim Council at Montreal, which took no immediate action in the matter. However, the CITEJA, at its 14th session, went on record as being in favor of having its Secretariat and the Secretariat of PICAQ make a study of the question whether it would be feasible to bring about an ultimate merger of the CITEJA activities with those of the permanent International Civil Aviation Organization.<sup>25</sup>

The various CITEJA projects will have a vital relationship to the international operations of aircraft, particularly in view of the great increase in such operations on a worldwide basis predicted for the postwar era. While international agreements within the field of public air law, establishing the right of entry and of transit by foreign aircraft, are of great importance, the numerous articles written on the subject have placed little or no emphasis upon the private international law aspects of international aviation. The application of the legal principles of private air law conventions can facilitate or burden international aviation, depending upon the soundness and practicability of such conventions.

<sup>25</sup> See Stephen Latchford, "Coordination of the CITEJA with the New International Civil Aviation Organizations," in *Department of State Bulletin*, Vol. XII (1945), page 310.

## TRANSFER OF CIVILIAN MANPOWER FROM OCCUPIED TERRITORY

By JOHN H. E. FRIED

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One of the methods by which National Socialist Germany hoped to win the war consisted of the deportation of non-Germans, mainly citizens of occupied territories, as a labor force in support of the German war effort. The hope was not fulfilled but this policy, carried out on an enormous scale, enabled the Third Reich to wage war much more ruthlessly and for a much longer period than would have been possible otherwise.<sup>2</sup> With hostilities ended and their lands devastated, several of the United Nations now intend to obtain at least partial reparation of the damage caused to them by transferring Germans as a labor force for reconstruction work.

The political, economic, and ethnological effects of both policies are bound to influence European and world affairs greatly for a long time to come.

In the following pages an attempt is made to analyze the two policies from the standpoint of international law. The fundamental differences between them must be clearly recognized, not only by jurists whose profession it is to discern, but by people at large—including, first of all, the Germans. Otherwise there is reason to fear that the subject may become a perturbing and equivocal one, apt to confuse public opinion, disturb the understanding among the United Nations, be exploited by National Socialist apologists and propagandists, and to lead to retrogression in the conduct of international affairs.

Voluntary migration, whether for employment or for settlement, whether organized or unorganized, is, of course, a regular and important aspect of international relations.<sup>3</sup> International conferences on emigration and immigration were held in Rome in 1924 and in Havana in 1928. The International Labor Organization has, from its beginning, endeavored to improve the situation of migrants and to foster international coöperation on their behalf.<sup>4</sup>

<sup>1</sup> The opinions expressed in this article are those of the author and do not necessarily reflect the opinions or policies of the International Labor Office or of the International Labor Organization.

<sup>2</sup> International Labor Office, *The Exploitation of Foreign Labor by Germany* (Studies and Reports, Series C, No. 25), Montreal, 1945 (in the following pages cited as *Report*).

<sup>3</sup> See lists of bilateral Government agreements containing provisions on recruitment of bodies of workers, on supervision over contracts of employment of migratory workers, and on individual migration for employment, International Labor Office, *The International Labor Code 1939*, Montreal, 1941, cited hereafter as *Code*, p. 526, n. 1, p. 523, n. 2, and p. 527, n. 1.

<sup>4</sup> The International Emigration Commission, appointed by the Governing Body of the I.L.O. and consisting of government, employers', and workers' delegates from 18 countries,

Under special circumstances—or, to be more exact, for particularly important purposes—international law recognizes the right of governments to organize compulsory migration, that is, the transplantation of groups irrespective of the consent of the individuals of which such groups are composed. An example is found in the Convention of Lausanne of January 30, 1923, regarding the exchange of Greek and Turkish populations. Under it Turkish nationals of Greek Orthodox religion who were established in Turkey (except persons established in Constantinople before October 30, 1918) were to be moved into Greece, and Greek nationals of Moslem religion who were established in Greece were to be moved into Turkey. A Mixed Commission, composed of representatives of the two governments, and of three neutral members appointed by the Council of the League of Nations, was given full power to take the measures necessary for the execution of the Convention.<sup>5</sup>

Compulsory transfer of population entails, of course, a most serious interference with the persons concerned. So grave a step can only be justified if the public conscience considers the purposes to be achieved by it as compelling. In the Greek-Turkish case the measure was designed to solve very thorny minority problems and, thereby, to promote international peace. The achievement of this purpose was considered so important that the community of nations approved the uprooting and transplantation of several hundred of thousands of persons. In the wake of the Second World War plans for voluntary or compulsory exchange as well as unilateral transfer of groups of population are about to be carried out on a very much larger scale. Compulsory mass migration in various European and Asiatic areas will, it appears, be one of the characteristic features of the immediate post-war

formulated in 1921 a number of detailed resolutions concerning standards of emigration and immigration policy. Several International Labor Conferences adopted Conventions and Recommendations dealing with this subject. The session of 1939 adopted a Convention and Recommendations containing rules for the protection of migrants and defining the role which the governments of the sending and the receiving countries ought to assume in regulating migration: *Code*, pp. 519 ff. For general studies on migration laws and movements see: International Labor Office, *Studies and Reports*, Series O, Nos. 1-4, Geneva, 1925-1929. On migration for employment see same series, No. 5, "The Migration of Workers: Recruitment, Placing, and Conditions of Labor" (1926); on migration for settlement, No. 7, "Technical and Financial International Cooperation with regard to Migration for Settlement" (1938). For lists of articles on migration published in the *International Labor Review* see *Code* p. 519, n. 1, p. 520, n. 2, and p. 522, n. 1.

<sup>5</sup> The completion of the scheme took more than a decade. The most important agreements signed by Greece and Turkey during that period included the Agreement of Athens (Dec. 1, 1926) concerning the simplification of the administration of the population transfer, the Agreement of Ankara (June 10, 1930) delegating to the neutral members of the Mixed Commission the right to decide upon matters upon which the two governments were unable to agree, and the Agreement of Dec. 9, 1933, providing for the liquidation of the Mixed Commission. The latter submitted a final report on its work on Oct. 19, 1934.

period.<sup>6</sup> In these cases, the measures will be carried out for the same purposes—to solve minority problems deemed otherwise insoluble, or to limit their number or gravity and, thereby, to remove causes of dangerous friction.

On the other hand, important as the purpose is, it is not the only prerequisite to be fulfilled in order to make the organized displacement of persons and groups legal under international law. Since these measures involve governmental actions carried out on foreign territory and concerning foreign nationals the right to do so must be acquired either by treaty or in another way legally bestowing such right on the state or states in question. Finally it is an evident obligation to obey, in the execution of such measures, the standards of decency and humanity in civilized intercourse. Thus, international law accepts the displacement of persons and groups from country to country under three conditions: that the authorities carrying out such measures do so under a rightful title; that they act for a legitimate purpose; and that in the execution of the measures involved they obey the standards of decency and humanity generally valid in the relations between nations.

#### I. TRANSFER OF CIVILIAN MANPOWER FROM TERRITORY UNDER BELLIGERENT OCCUPATION<sup>7</sup>

##### *The Hague Convention*

Realizing that military occupation of enemy territory is a frequent aspect of warfare, the Hague Peace Conference of 1899 adopted provisions concerning "the rights of the military authority over the territory of the hostile state" (Sec. III of the "Regulations respecting the laws and customs of war on land," annexed to the "Convention with Respect to the Laws and Customs of War on Land"). The relevant articles provide:

Art. 42. Territory is considered to be occupied when it is actually placed under the authority of the hostile army. The occupation applies only to the territories where such authority is established, and can be exercised.

<sup>6</sup> Such population transfers differ in two points from those here considered: they involve permanent migration for settlement, and not temporary migration for employment.

The fact that it is, above all, the *purpose* which determines the legality or illegality, under the law of nations, of the transportation of persons from one country to another, can be seen, e.g., from the international arrangements endeavoring to prevent that women (and children) even *with their free consent*, be transported from one country to another for immoral purposes. (Cf. International Agreement for the suppression of the white slave traffic, signed at Paris, March 18, 1904 (League of Nations, *Treaty Series*, vol. 1, pp. 85 ff.); International Convention of May 4, 1910 (Martens-Triepel, *Nouveau Recueil Général de Traité*, 3e série, Tome VII, pp. 252 ff.); and International Convention of Sept. 30, 1921 (*ibid.*, Tome XVIII, pp. 758 ff.), especially Art. 7.)

<sup>7</sup> As Sir Arnold D. McNair ("Municipal Effects of Belligerent Occupation," in *The Law Quart. Rev.*, Jan. 1941, p. 33) said, following Dana in his edition of Wheaton's *International Law* (1866), the term belligerent occupation is much more precise than the term military occupation.

Art. 43. The authority of the legitimate power having actually passed into the hand of the occupant, the latter shall take all steps in his power to reestablish and insure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.

Art. 44. Any compulsion on the population of occupied territory to take part in military operations against its own country is forbidden.

Art. 46 (1). Family honor and rights, the lives of individuals and private property, as well as religious convictions and liberty of worship, must be respected.

Art. 52 (1). Neither requisitions in kind nor services can be demanded from communes or inhabitants except for the necessities of the army of occupation. They must be in proportion to the resources of the country, and of such a nature as not to imply for the population any obligation to take part in military operations against their country.

One of the tasks of the Hague Peace Conference of 1907 was to reconsider that Convention and the annexed Regulations. Among the many amendments submitted, only one dealt with the treatment of civilian populations in occupied territory. It was proposed by the German delegate, Maj. Gen. von Gündell, and read: "It is forbidden to compel *ressortissants*<sup>8</sup> of the hostile party to take part in the operations of war directed against their own country even if they were enrolled in its services before the commencement of the war." The Conference realized the importance of this German proposal. There was considerable discussion, and several counter proposals were made,<sup>9</sup> but at the 4th plenary meeting of August 17, 1907, it was carried with only slight alterations: "A belligerent is likewise forbidden to compel the nationals of the adverse party to take part in the operations of war directed against their country, even when they have been in his service before the commencement of the war." The provision goes further than Art. 44 of the 1899 version which it replaced.<sup>10</sup>

On the proposal of Maj. Gen. von Gündell, the Conference also added the following clause to the Convention which became its Art. 3: "A belligerent party which violates the provisions of the said Regulations shall, if the case demands (*s'il y a lieu* in the authentic French version) be liable to make

<sup>8</sup> The term was used in order to include non-citizens over whom a state claims jurisdiction by virtue of domicile: A. Pearce Higgins, *The Hague Peace Conferences*, Cambridge, 1909, p. 266, n. 1.

<sup>9</sup> The Austro-Hungarian delegation, backed by the Russian delegation, wanted to insert after the word "to take part" the words "as combattants." This would have completely changed the meaning of the new provision by suggesting that a belligerent should be permitted to compel enemy citizens to give assistance in the operations of war against their country, except actual military service: *Proceedings of the Hague Conferences*, Carnegie Endowment for International Peace, New York, 1921, pp. 106-127, 240. See also A. S. de Bustamante y Sirren, *La Seconde Conférence de la Paix* (transl. by G. Scelle), Paris 1909, p. 256.

<sup>10</sup> The amendment was added to Art. 23 of the Regulations. Art. 44 of the 1907 version contains provisions not connected with the topic of the present study.



compensation (*sera tenue à l'indemnité*). It shall be responsible for all acts committed by persons forming part of its armed forces." This was a significant step forward; for, by expressly stipulating that a state whose armed forces violate the Hague Regulations must give indemnification, it converted a general principle—that a law-breaker—into a contractual liability.<sup>11</sup>

Reparations exacted for violations of the Hague Regulations rest, therefore, to the extent just mentioned, on a positive provision which was proposed by Germany. Despite the "teeth" which were thus put into the Convention the Second Peace Conference either kept unchanged or even tightened the protection of the civilian population in territories under belligerent occupation.

Deportation of civilians from such territories had been so alien to modern warfare that it was not even discussed at the Hague Conferences. In fact, representatives of smaller nations showed reluctance to have the prerogatives of an invader defined in the Regulations since this might be interpreted as legalizing his position. For example, a member of the U. S. delegation to the first conference reported that Belgium urged the omission of some provisions concerning occupation, "because they had the character of sanctioning in advance rights of an invader and of thus organizing the regime of defeat; that rather than to do this it would be better for the population of such territory to rest (only) under the general principles of the law of nations." He added that "the provisions were retained upon the theory that, while not acknowledging the right, the possible fact (of invasion) had to be admitted and that wise provision required that proper measures of protection for the population and of restrictions upon the occupying force should be taken in advance."<sup>12</sup>

Bluntschli, the leading German-Swiss authority on international law of his time, wrote in 1866: "The modern international law of civilized nations acknowledges no absolute right of the war-making power over either the peaceful inhabitants of enemy territory or even the members of the armed forces of the enemy state."<sup>13</sup>

The German manual for war on land, *Kriegsbrauch im Landrecht*, issued

<sup>11</sup> Prior to the amendment some writers considered the Convention and the Regulations as a *lex imperfecta* and erroneously even doubted their obligatory character. Such doubts were dissipated by the amendment: "The change in Art. 3 (1907) is important; a sanction is now provided for the Regulations. . . . This would appear to determine the obligatory character of the Regulations": A. Pearce Higgins, work cited, p. 260.

<sup>12</sup> Report of Capt. Crozier, quoted in *Instructions to the American Delegates to the Hague Peace Conferences and their Official Reports*, New York, 1913, p. 49.

<sup>13</sup> He continued: "The alleged right of the victor to be master (*se-fügen*) over the life and death and the personal liberty of the vanquished, is contrary to the rights of man and the natural limitations of all state prerogatives and, therefore, also contrary to all war prerogatives": *Das Moderne Kriegsrecht der civilisierten Staaten als Rechtsbuch dargestellt*, Nördlingen, 1866, p. 13. This latter sentence was left out of the 1872 edition, and following it, in the French edition (*Le droit international codifié*, trans. by M. L. Lardé, Paris, 1899, p. 330).

by the German general staff, declared in the edition of 1902 that, contrary to concepts of former times, the inhabitants of an invaded territory "are considered as persons endowed with rights (*Rechtssubjekte*) whom the exceptional character of the state of war makes subject to certain restrictions, burdens, and coercive measures, and who are obliged to provisional obedience toward the power actually in control, but who otherwise may live free from vexations and, as in time of peace, under the protection of the laws."

When, at the 1907 Conference, the Japanese delegate proposed to outlaw the internment of citizens of occupied territories, the Belgian, Bernaert, president of the commission reconsidering the 1899 Convention, declared such provision superfluous because internment of citizens of occupied territories was understood to have been outlawed by that Convention. After the Italian delegate had supported this view, the Japanese delegate withdrew his proposal on the ground that Bernaert's statement had made it clear that the hostile state can intern only prisoners of war but not civilians and the commission went on record in this sense.<sup>14</sup>

While the articles of the Hague Regulations dealing with the law of belligerent occupation do not mention deportation, they manifestly forbid them *argumento a minori ad majus* since they outlaw much smaller encroachments upon the liberty and dignity of the populations. In addition, both versions of the preamble to the Convention in respect to the laws and customs of war on land stipulate: "Until a more complete code of the laws of war can be issued, the High Contracting Parties think it expedient to declare that, in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and the rule of the principles of the laws of nations as they result from the usages established between civilized nations, from the laws of humanity, and the requirements of the public conscience." This clause makes the principles of the law of nations, as they result from the usages established between civilized nations, from the laws of humanity, and the requirements of the public conscience, a part of the laws of war established by the Hague Conventions.

#### *The Precedent of 1916-17*

Had there been any doubt about the illegality of the deportation of peaceful civilians from territories under belligerent occupation, they were dissipated when, during World War I, Germany entered upon such a policy in occupied Belgium. General von Bissing, who was then in charge of the German administration in Belgium (except in the so-called *zone d'étape*) at first vigorously objected to the demand of the Reich War Ministry and the German Supreme Command for compulsory mass transfer of Belgian work-

<sup>14</sup> *Actes et documents de la 21ème Conférence Internationale de Paix*, Vol. III, pp. 108-110. French edition (*Le droit internationale codifié*, trans. by M. L. Larcé, Paris, 1899, p. 330).

ers into Germany because this would be contrary to the law of nations.<sup>15</sup> But by order of May 15, 1916, he introduced forced labor for "recalcitrant unemployed" Belgian workers and stipulated that they were liable to be transferred to the places where work was to be assigned to them.<sup>16</sup>

The Order, entitled "concerning the unemployed who, out of laziness, are shunning work," ostensibly aimed at reducing expenses for unemployment relief; and, in order to prevent Belgians from declaring that they were not in need of such relief, the Order made it a punishable crime not to declare one's indigence. However, this Order was not used by the Germans to deport Belgians to places outside their own country.<sup>17</sup>

These deportations began after the German Supreme Command had issued its famous order of October 3, 1916, "concerning restrictions of public relief." Shortly before, an expert opinion (*Rechtsgutachten*) of the Reich Chancellery had declared that "under the law of nations, the intended deportation (*Ausschiebung*) of idle (*arbeitschene*) Belgians to Germany for compulsory labor can be justified if (a) idle (*arbeitschene*) persons become a charge of public relief; (b) work cannot be found in Belgium; (c) forced labor is not carried on in connection with operations of war. . . . Hence, their employment in the actual production of munitions should be avoided."<sup>18</sup> The wording of the Order endeavored to make the deportations appear partly as a police measure directed against vagrants and idlers and partly as an economic measure to combat unemployment in Belgium.<sup>19</sup> These pretences deceived nobody and were at once abandoned by the German authorities<sup>20</sup> but indicated awareness of the illegality of the procedure.

Probably no other German war measure, with the possible exception of the unrestricted submarine campaign, caused such world-wide indignation. "The whole civilized world stigmatized this cruel practice as an outrage."<sup>21</sup> The declarations of protest referred either to general principles of international law and humanity or specifically to the Hague Regulations. For example, a note signed by 49 members of the Universities of Liège, Louvain, and Brussels called the measure "not only contrary to the principles of the

<sup>15</sup> *Report*, pp. 283-4.

<sup>16</sup> *Bulletin officiel des lois et arrêtés pour le territoire Belge occupé*, No. 213, May 20, 1916, quoted in J. Pirenne et M. Vauthier, *La Législation et l'Administration Allemandes en Belgique*, Paris-New Haven 1925, p. 193.

<sup>17</sup> Fernand Passelecq, *Les Déportations Belges à la Lumière des Documents Allemands*, Paris 1917, p. 4.

<sup>18</sup> L. von Köhler, *Die Staatsverwaltung der besetzten Gebiete, Band I: Belgien*, Stuttgart-New Haven, 1927, p. 152.

<sup>19</sup> Art. 1 read: "Persons who are able to work may be subjected to forced labor even outside their domicile if, on account of gambling, drunkenness, illness, lack of work, or laziness, they are compelled to have recourse to the assistance of others for their own subsistence or for the subsistence of their dependents." J. Pirenne-M. Vauthier, work cited, p. 188.

<sup>20</sup> *Cri d'alarme des évêques Belges à l'opinion publique, da-t Malines, Nov. 7, 1916*, quoted in Passelecq, p. 93.

<sup>21</sup> Oppenheim-Lauterpacht, *International Law*, 5th ed., London 1935, p. 353.

Belgian public law but to rules which have become sacred international law by agreement between nations." The city councillors of Brussels, referring to Art. 43 of the Hague Regulations, protested that "among Belgian laws none is more precious and more sacred than that which guarantees to every Belgian citizen his personal liberty, extending, particularly, to the realm of labor." Mr. Vandervelde, president of the International Socialist Bureau, pointing to the revised Art. 23, called the deportations "the most odious, most unjustifiable assault against human freedom and dignity."<sup>22</sup> On December 2, 1916, a storm broke in the Reichstag, the opposition faction of the Social Democratic Party accusing the Reich government of breach of international law.<sup>23</sup> The U. S. Department of State protested in a *note verbal*

against this action which is in contravention of all precedent and of those humane principles of international practice which have long been accepted and followed by civilized nations in their treatment of non-combatants in conquered territory.<sup>24</sup>

The Netherlands Government based its official recriminations on the incompatibility of the deportations with the "precise stipulations" of Art. 52 of the Hague Regulations.<sup>25</sup> Professor James W. Garner pointed out that if a belligerent were allowed to deport civilians from occupied territory, in order to force them to work in his war industries and thereby to free his own workers for military service, this would make illusory the prohibition to compel enemy citizens to participate in operations of war against their own country. "The measure must be pronounced as an act of tyranny, contrary to all notions of humanity, and one entirely without precedent in the history of civilized warfare."<sup>26</sup> Another authority on international law declared that<sup>27</sup>

If the IVth Hague Convention of 1907 does not include a precise text concerning the displacement of the civilian non-combatant population, it still results from the spirit of that Convention that such a measure is in complete contradiction to the concept of wartime occupation; the concept which has taken the place of the outmoded theory of conquest which made the conqueror the sovereign of the conquered

<sup>22</sup> Quoted in same, pp. 362, 382.

<sup>23</sup> Umbreit-Lorenz, *Der Krieg und die Arbeitsverhältnisse*, Berlin-New Haven 1923, p. 123; *Report*, p. 285.

<sup>24</sup> G. H. Hackworth, *Digest of International Law*, Vol. VI, Washington, D. C., 1943, p. 399.

<sup>25</sup> Passelecq, *Déportation et Travail Forcé des Ouvriers et de la Population Civile de la Belgique Occupée, 1916-1918*, Paris, 1928, p. 389. For a fuller discussion of the actions of the neutrals, see same, pp. 286-303; for texts of other declarations of protest: pp. 93-103, 309-367, 380-383.

<sup>26</sup> This JOURNAL, Vol. XI, No. 1 Jan., 1917, p. 106, and J. W. Garner, *International Law and the World War*, New York, 1920, Vol. II, p. 183.

<sup>27</sup> Prof. Ernest Nys, of the University of Bruxelles, statement of Nov. 6, 1916, quoted in Passelecq, p. 234.

country. In the wars of our time the peaceful populations possess rights; the victor is the provisional administrator, he is bound to respect the rights of the peaceful inhabitants.

Whereas in World War II the National Socialist regime continued to deport and exploit foreign workers until the very end, Imperial Germany retracted in view of this avalanche of protest. After secret negotiations through diplomatic and church channels, an appeal to repatriate the deportees and to stop further recruitments was submitted to the Emperor by Cardinal Mercier and other Belgian dignitaries in February 1917. William II acceded, with certain restrictions. From the middle of February 1917, Belgians were no longer deported from the Belgian "Government General," and it was promised that, by 1 June 1917, deportees who would not volunteer to remain in Germany were to be repatriated. However, recruitment of workers for employment in Belgium and in occupied Northern France continued, especially in the *zone d'étape*. These "Civilian Labor Battalions" were the forerunners of the foreign forced labor groups employed all over Europe later during the second world war.<sup>28</sup>

Although the illegality, under existing international law, of deportation of civilians from territories under belligerent occupation was not doubted, the Tenth International Red Cross Conference adopted the following resolution in 1921:

Deportation of civilians is only permitted in individual cases, for individually committed delicts which have been duly defined and which necessitate such measure. The measure may be carried out only on the basis of a judicial sentence (*sentence judiciaire*). Mass deportation applying to entire categories of inhabitants, shall not be decreed.<sup>29</sup>

At the international conference which met in Geneva in 1929 to deliberate on a new convention on prisoners of war various delegates wished to deal also with the position of civilian deportees in time of war. It was finally decided to leave the subject to another conference which, indeed, was supposed to be convoked in Geneva in 1940. But the outbreak of war interfered.

It must be noted, however, that long after the end of the first world war, republican Germany officially upheld the "unemployment theory" which the Kaiser's Government had unsuccessfully tried to apply. The German Constituent Assembly created a parliamentary commission to investigate into the charges made against Germany of having violated international law during the war. On July 2, 1926, the third subcommission of this body issued a majority report stating that the deportations had been in con-

<sup>28</sup> Report, pp. 71-81.

<sup>29</sup> *Compte rendu de la Xème Confér. Internat. de la Croix Rouge*, Geneva 1921, quoted in G. Werner, *Les Prisonniers de Guerre*, Académie de Droit International, Recueil des Cours, 1928, Tome 21, p. 34.

formity with the law of nations, and more particularly with the Hague Regulations provided "that the workers in question did not find sufficient opportunity to work in Belgium and that the measure was indispensable for reestablishing or maintaining order and public life in the occupied territory." The report admitted that in the execution of the measure many mistakes were made and that the deportees had to undergo hardship—facts which it called regrettable and contrary to international law, but for which the German Government could not be held responsible because it had not ordered them. With consternation, Mr. Vandervelde, then Belgian Minister of Foreign Affairs, declared that his country had erred in its belief "that at least on this point, the war policy of the Kaiser's Government would no longer find defenders."<sup>30</sup>

To be sure, the minority report of the third subcommission squarely condemned the deportations. The acrimonious debate that followed in the Reichstag and in the German press revealed the militancy and strength of the forces backing the majority report and the politically precarious situation of those supporting the standards of democratic world opinion in Weimar Germany even in the post-Locarno period.

#### *The German Deportation Policy During the Second World War*

In World War I deportation of enemy civilian manpower was a subordinate aspect of Germany's system of warfare. In World War II it was one of the cornerstones. It is no exaggeration to say that the Reich waged in 1939–1945 war to a very large extent through the exploitation of enemy manpower conscripted from the civilian population of territories held under belligerent occupation.

Some contingents of foreign workers came from non-belligerent states and from states which were Germany's allies or satellites.<sup>31</sup> It is not possible to enter here into an examination of (a) the constitutional situation in these sending countries in order to determine whether the foreign authorities actively supporting, or, at least, benevolently assisting, the German deportation measures had the power to do so, and (b) whether and to what extent the German authorities, after having received concessions in the form of bilateral treaties, kept within the concessions or overstepped them. One decisive point can, however, be cleared up without answering these questions. Even assuming that Germany had acquired a rightful title for deporting workers, for example from Italy (before July, 1943), and even leaving aside the fact that the purpose of these procedures was to help the Third Reich to carry on a *bellum injussum*, namely, an aggressive war outlawed by conventional international law, it would still remain true that Germany was

<sup>30</sup> Belgian Chamber of Representatives, session of July 14, 1927. *Documents Legislatifs, Chambre des Représentants*, No. 333. Passelecq, pp. 416–433.

<sup>31</sup> For numerical estimates, *Report*, pp. 264–267.

not entitled to disregard the basic rules of decency and humanity with respect to these labor deportees. As it was, both with respect to the methods of recruitment in their home countries and the treatment meted out to them at their German-assigned places of employment, the citizens of the allied and satellite States fared hardly better than many categories of deported enemy nationals.<sup>32</sup>

The deportations carried out by Imperial Germany are dwarfed in magnitude by those undertaken by Hitler's Germany. In 1914-1918 the number of labor conscripts ran into tens of thousands, in 1939-1945 into millions. An official Belgian investigating commission stated that 58,500 Belgians were deported from the Belgian "Government General" (Belgium minus the *zone d'étape*) into Germany. (This figure must be considered as a minimum.)<sup>33</sup> In a memorandum to the Reparations Commission the Belgian Government reached a total of 160,000 deportees because it added those deported within German-occupied Belgium or to German-occupied France.<sup>34</sup> But Fritz Sauckel, Hitler's Commissioner-General for Manpower, declared on June 30, 1943, that the number of foreign workers (including employed prisoners of war) in the German economy amounted at the end of May 1943, to 12,100,000.<sup>35</sup> This, it must be remembered, was not an over-all total as were the Belgian figures for the first war. It was a total for one particular moment when the importation of foreigners certainly had reached a peak; but hundreds of thousands of labor conscripts had already died or returned to their home countries on account of invalidity, etc., and other hundreds of thousands were still to be brought into the Reich during the 23 months of war yet to come.

As to the duration of the individual deportation during the first war, the Belgian Government memorandum just mentioned calculated that it averaged seven months, of which, again on the average, five months were spent on forced labor. For 1939-1945 no comparable statistics are, as yet, available. But it is known that for the majority of deportees the duration of their forced employment is to be counted in years; as long as a foreigner was, in the eyes of the German manpower administration (*Arbeitseinsatzverwaltung*), able to work he had little chance to be released.

Bad as the treatment of the deportees had been in the first war, it was incomparably worse in the second. The ever-repeated recruitment drives brought cruel persecutions and countless indignities to the workers and their families. As the war proceeded and the German need for manpower became ever more insatiable, the terroristic methods used from the outset (Fall of 1939) in Poland and (Summer of 1941) in Soviet Russia were applied with

<sup>32</sup> Report, in general.

<sup>33</sup> Passelécq, p. 397.

<sup>34</sup> *Mémoire sur les dommages de guerre, subis par la Belgique*, Ch. VI, part 1, entitled *Rémunération aux déportés*, quoted in the case of *Jules-Hector Loriaux c. Etat allemand*, in *Recueil des décisions des tribunaux mixtes*, Paris, 1924-25, Vol. V, p. 684.

<sup>35</sup> Report, pp. 61, 54-64, 264-267.

increasing frequency in other German-occupied territories. Incontestable reports speak of the many deaths caused by the policy of transporting deportees in open freight cars or in locked unheated cattle cars, without provisions for their most elementary needs. At their destinations, the foreign workers were at the mercy of the German manpower administration service, the Labor Front, the various police and SS authorities and the (often armed) factory guards.<sup>36</sup> There was no "protective Power" to look after their interests as in the case of prisoners of war covered by the Geneva Convention of 1929. Nor was the International Red Cross Committee able to extend to labor deportees the humanitarian work it was doing for prisoners of war. A typical example can be found in the report of September 1944 of a delegate of the International Red Cross Committee from the emergency camp in Pruszków (Poland) for evacuees from Warsaw. The International Red Cross tried somewhat to improve their plight but on the worst aspect of this evacuation, the report could merely state that of 238,218 persons arriving at Pruszków between August 6 and September 18, 1944 (when the exodus had not yet ended) 128,371 had been found fit for work and immediately transported to Germany.<sup>37</sup>

Most of the foreigners were overworked and underfed. They were systematically used for the most exhausting<sup>38</sup> and most dangerous work, often being given no safety appliances. The majority of them lacked even the most essential clothing. Their mass quarters were, as a rule, utterly inadequate, as were the medical and health services and the hygienic conditions.<sup>39</sup>

Inhumane "corrective" and punitive measures were applied to the foreigners who possessed no rights of defense. Labor deportees and persons who had tried to escape recruitment constituted a huge portion of the population of the Gestapo prisons<sup>40</sup> and concentration camps, both inside and outside the Reich. It must be added that the inmates of concentration

<sup>36</sup> As late as April 21, 1945, Reich Minister Goebbels exhorted the factory guards "immediately to arrest rebellious foreign workers or, better still, to render them harmless" (*Deutsches Nachrichten Bureau*, Apr. 22, 1945).

<sup>37</sup> *Revue Internationale de la Croix Rouge*, Oct. 1944, p. 780.

<sup>38</sup> After the first war the "Allied Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties" urged the creation of an Allied tribunal for the trial, amongst others, of "the crime of forced labor in mines where persons of more than one (non-German) nationality were forced to work": *Bulletin of International News*, London, Feb. 3, 1945, p. 98.

<sup>39</sup> *Report*, in general.

<sup>40</sup> The Congressional report on German concentration camps of May 16, 1945, stated that the surviving population of the Buchenwald camp, as of April 16, 1945, was about 20,000 of whom 1,800 were Germans, the others foreigners, namely 4,380 Russians, 3,800 Poles, 2,900 Frenchmen, 2,105 Czechs, etc. (*Atrocities and other Conditions in Concentration Camps in Germany*, Report of the Committee requested by Gen. D. D. Eisenhower, in the Congress of the U. S., 79th Congr., 1st Sess., Doc. No. 47, Washington, D. C., 1945, p. 6). The present paper was completed before the Nuremberg trial; much additional information on the treatment of deported labor has been brought to light there.



camps and even of the special "extermination camps" were forced to work, under indescribable conditions, on road building or in war factories situated in or near the camps. At the entrance of Oswiecim Camp, there was a huge poster with the inscription *Arbeit Macht Frei* (Work Makes Men Free).<sup>41</sup>

### *Taxation of Deportees*

Some remarks are in order on the taxation of the labor recruits—an aspect of Germany's deportation policy which has gone almost unnoticed but which is noteworthy from the standpoint of international law both of war and of finance. The majority of the workers namely the Russians and Poles, had to pay special discriminatory income (wage) taxes, called "Eastern Tax" (*Ostarbeiterabgabe*) for the Russians and "Social Equalization Tax" (*Sozialausgleichsabgabe*) for the Poles. The Eastern Tax especially was so high that large categories of workers received no wage at all after the employer had deducted the tax and the standard rate for their mass shelter and mass canteen. The other foreigners paid, as a matter of principle, the same income (wage) tax as comparable German workers. In addition, many of them had to pay fees to the German Labor Front; also these taxes and contributions were automatically deducted by the employer. The total amount thus collected by Germany from the deportees amounted to several billion Reichsmark.<sup>42</sup>

Any examination of this taxation must start from the fact that the Hague Regulations strictly limit the right of the occupant to levy taxes, dues, and tolls from inhabitants under belligerent occupation in two respects; if the occupant collects taxes from the enemy population, he "shall do it, as far as possible, in accordance with the rules in existence and the assessments in force"; and—an even more stringent limitation of his discretion—he must use the money thus collected "to defray the expenses of the administration

<sup>41</sup> Report, p. 255. See Executive Office of the President, War Refugee Board, *Report on German Extermination Camps*, Washington, D. C., Nov., 1944, pp. 1-40.

A directive of the Main Economic Board of the SS, dated Dec. 28, 1942, pointed out that of 136,000 prisoners sent to 16 concentration camps between June and November 1942, no fewer than 70,610 died and 9,267 were executed during this six-months period (*News from Europe*, London, July 24 1945, p. 1). The proportion of foreigners is not given in that document, but a clue can be found in Gestapo reports, discovered by Allied troops during the last stages of the war, showing that during the first six months of 1944 the Gestapo arrested about 205,000 persons in the (pre-1938) "Old Reich" and 105,000 in the rest of "Greater Germany"; of the 205,000 arrests in the "Old Reich," 146,000 (71.2%) were for "labor evasion and slowdown" (*Tribune*, London, Apr. 27, 1945, p. 3). It is safe to assume that the majority of these 146,000 were foreign workers and that in the outlying territories their percentage was even higher than in Germany proper.

Statistics on the death rate among the deportees are not yet available. But it is indicative that in 1914-1918, according to official Belgian investigations, 2.5% of the Belgians deported to Germany had died "during the course of deportation," lasting on the average seven months: Passelecq, p. 398. This corresponds to a yearly death rate of 4.25% which is higher than that of the armed forces of the belligerents

<sup>42</sup> Report, pp. 118-136.

of the occupied territory on the same scale as that to which the legitimate Government was bound.<sup>43</sup> Thus, as a result of the basic doctrine of the Hague Regulations, that the occupant may act only as place-holder for the absent legitimate Government, he is only entitled to levy taxes to procure the money needed for the administration of the occupied territory. The exception to this rule, contained in Art. 49, merely serves to emphasize this principle: "If, besides the taxes referred to in the preceding article, the occupant levies other money contributions in the occupied territory, this can only be for military necessities or the administration of such territory."

Patently, under these rules Germany was not entitled to compel the foreign workers while they were still in their homelands to pay taxes to the Reich Treasury or fees to the Labor Front (which was a huge financial organization of the National Socialist Party). Nor could Germany do so after having them deported. If the levying of those contributions was illegal it could not be legalized through preceding it by another illegality, namely deportation. If Germany was forbidden to levy these taxes and fees in the occupied homelands of the workers it was all the more forbidden to do so after it had abducted the workers. To prove the illegality of the taxation of the illegally deported workers one need not invoke the doctrine *ex injuria jus non oritur*;<sup>43</sup> it results from codified international law, whether the contributions were exacted in the occupied countries or elsewhere, and whether they were exorbitant or "normal."

Can the objection be made that if this is so the foreign workers would have been, as far as taxation was concerned, in a more favorable situation than their German fellow workers? It cannot. The point is that the capacity of the foreigners to pay taxes was one of the assets of which, according to the Hague Regulations, Germany was allowed to avail itself

<sup>43</sup> On the applicability of this doctrine see Lauterpacht, *Legal Problems in the Far Eastern Conflict*, New York, 1941, pp. 135-147, where Prof. Lauterpacht concedes that the doctrine *ex injuria jus non oritur* cannot be said to apply in international relations without qualification. However, there is no doubt that the trend is toward its wider application in international law, particularly in so far as the legal position of an aggressor state is concerned. See, for example, Art. 2 of the Draft Convention on Rights and Duties of States in Case of Aggression of the Research in International Law (Harvard Law School); "A State does not acquire rights or relieve itself of duties by becoming an aggressor. In particular, . . . (d) An aggressor does not have the rights which under international law would accrue to a military occupant in time of war in respect of property titles, taxes, requests, contributions, or forced loans, in territory held in military occupation. (e) An aggressor does not have the rights which under international law would accrue to belligerent forces in invaded territory." In the same spirit, Art. 5 (b) of the Neutrality Draft Convention No. 2 of the Research in International Law declares: "A law-breaking State cannot pass title to any property or levy taxes, requisitions or contributions within any territory which it holds in military occupation." Principles of this character were repeatedly declared to govern the attitude of the United States with respect to *faits accomplis* created by or resulting from aggressions and other acts of law-breaking States; they follow from the Stimson doctrine. (See this JOURNAL, Vol. 26 (1932), p. 342.)

only for the specific purposes mentioned above. As it was, the German taxation policy added to Germany's illegal advantage of exploiting the productive capacity of millions of enemy citizens, the illegal advantage of exploiting their tax-paying capacity as well; and it caused their respective home countries not only to be illegally deprived of their citizens' productive capacity but also to be illegally deprived of their tax-paying capacity. Any contributions levied from these foreigners should have gone to their respective occupied home countries.<sup>44</sup>

Except to the extent provided in the Hague Regulations, the occupant does not possess taxing jurisdiction over the inhabitants of territory under belligerent occupation. The illegal transportation of these persons into German territory did not give Germany taxing jurisdiction over them.<sup>45</sup> The special problem of the taxation of enemy citizens deported from territory under belligerent occupation has, it appears, not been treated by Courts or by authorities on international law. But the general question as to whether an alien who was brought against his will into another State's territory is to be considered under the jurisdiction of that State, was answered in the negative, by the Supreme Court of the United States in 1870.

If the legislature of a state should enact that citizens or property of another state or country should be taxed in the same manner as the persons and property within its own limits and subject to its authority, or in any other manner whatsoever, such a law would be as much a nullity in conflict with the most explicit constitutional inhibition. Jurisdiction is as necessary to valid legislation as to valid judicial action.<sup>46</sup>

In terms of American precedent, *Cook v. U. S.* [1933], 288 U. S. 102, 121-122 is also pertinent. The Supreme Court stated that a state has no power to subject a vessel to its own laws if the vessel is seized in violation of an international treaty. Not only the courts of the state, but the state itself, has no jurisdiction in such case. "Our Government, lacking power to seize, lacked power, because of the treaty, to subject the vessel to our law. To hold that adjudication may follow a wrongful seizure, would go far to

<sup>44</sup> In fact it is interesting to note that, as a propagandist gesture, the Germans sent the Labor Front contributions of some foreign groups to the German-dominated "Labor Fronts" that had been established in their respective countries (*Report*, p. 123).

<sup>45</sup> While it is a rule of almost universal application that the power of the state, acting through its governmental agencies to tax its citizens, is absolute and unlimited as to persons and property and that every person within the jurisdiction of the state, whether a citizen or not, is subject to this power, yet, as said in *Endicott, Johnson & Co. v. Multnomah County*, 96 Or. 679, at 1109, 1110: "A tax imposed without jurisdiction over other persons or property is void." *Winston Bros. Co. et al. v. State Tax Commission et al.* 62 P. (2d) 7, 10 (Sup. Ct. Oreg., 1936).

<sup>46</sup> *St. Louis v. The Ferry Co.*, Wallace 423, 430. Cf. J. H. Beale, "The Jurisdiction of a Sovereign State," in 36 *Harvard Law Review* (1923), 243: "The sovereign cannot confer legal jurisdiction on his courts or his legislature when he has no such jurisdiction according to the principles of international law."

nullify the purpose and effect of the treaty. . . . The ordinary incidents of possession of the vessel and the cargo yield to the international agreement." Professor Edwin D. Dickinson, calling the principle of *Cook v. U. S.* unimpeachable, comments: "Since this seizure or arrest was made in excess of a state's proper competence and in violation of the rights of a foreign state, there is in consequence no national competence to invoke local process or to subject the thing or person to local law."<sup>47</sup>

Another reason for the illegality of the taxation of the deportees must be mentioned. A tax is a price paid for the fair protection of the person of the taxpayer or his property, as well as his material and immaterial rights. "It must be clear that in so far as international law is concerned the right of a state to impose a personal tax upon an individual depends upon the intimacy and closeness of the relationship that has been established between itself and him."<sup>48</sup> German writers used to speak of the need for "equivalence" between the tax demanded from a foreigner and the services rendered to him by the state levying the tax. For example, in 1934 a member of the Superior Administrative Tribunal of Prussia stated:

Taxation of aliens always requires a special justification. Therefore, we [experts on the law of international finance] have established the doctrine of equivalence: as a matter of principle, a foreigner may be taxed only to the extent to which such taxes form a counter-value for the advantages that he derives from his contact with the regime (*inländische Staatsordnung*). Taxes which go beyond this extent are illegal. To demand (*zwingen*) from a foreigner that he should, without benefiting from the state, enhance the purposes of such state by contributing a part of his own assets, would mean to ask membership fees from a non-member who is prevented from receiving even a limited number of advantages resulting from membership. To subject a foreigner to taxation which is not the counter-value of benefits granted to him, is a usurpation.<sup>49</sup>

<sup>47</sup> "Jurisdiction following Seizure or Arrest in Violation of International Law," this JOURNAL, Vol. XXVIII (1934), p. 231.

In 1929, in its "restatement of the conflict of laws" the American Law Institute proposed the following new provision: "Sec. 83A. *Individual Involuntarily within the State.* A state cannot exercise jurisdiction through the courts over an individual brought into the state by force against his will wrongfully or by act of God until he has had a reasonable opportunity to leave the state": quoted in "Jurisdiction Over Persons Brought into a State by Force or Fraud," in Yale Law Journal, Vol. 39 (1930), p. 895. See also cases cited by Dickinson, p. 235, n. 12, and p. 239, n. 23.

<sup>48</sup> C. C. Hyde, *International Law*, 2nd rev. ed., Boston, 1945, Vol. 1, p. 665 (almost identical in first ed., Boston 1922; Vol. 1, p. 362).

<sup>49</sup> Ernst Isay, *Internationales Finanzrecht: Eine Untersuchung über die äusseren Grenzen der staatlichen Finanzgewalt*, Stuttgart 1934, p. 48. Isay remarks that the equivalence theory can already be found in Grotius. He quotes Helfferich (in Schönberg, *Allgemeine Steuerlehre*, Vol. III) to the effect that the taxation of foreigners can only be justified if conceived as a remuneration (*Entgelt*) for the protection afforded to their persons and their assets (p. 48).

Considering the methods by which the foreigners were brought into Germany, the illegal purpose for which they were used (namely, to help their enemy in his war against their own countries), and the treatment they received, it would indeed be difficult to find any "intimacy and closeness" between them and Germany, or any "equivalence" between their tax payments and the benefits rendered them by Germany.

### *Attempts to Legalize the Deportations*

In many occupied territories Germany did not attempt to justify its deportation policy from the viewpoint of international law but based it on military, geopolitical, or racial arguments, or on the obligation of all Europeans, irrespective of nationality, to support Germany's "war for the defence of European culture."<sup>51</sup> However, with respect to some categories of foreign workers, Germany claimed to have legalized its deportation policy on several grounds.

1) Annexation. Germany unilaterally incorporated or annexed foreign territories which it had invaded and occupied during the war, e.g., Alsace-Lorraine, Luxembourg, and large parts of pre-war Poland. The workers conscripted in these areas—particularly if they were considered, according to National Socialist standards, as Germans,—were not counted amongst the foreign workers. Sir Arnold D. McNair expressed an uncontested principle when he wrote: "A purported incorporation of occupied territory by a military occupant into his own kingdom during the war is illegal and ought not to receive any recognition, e.g., Germany's claim to have annexed Alsace-Lorraine to the Reich during the present war."<sup>52</sup>

2) State treaties. Germany concluded treaties with German-supported authorities in territories occupied during the war. For example, the Vichy Government agreed to the transportation of large contingents of French workers to the Reich (or other destinations as determined by the Reich) and to give other forms of assistance to the National-Socialist war labor policy.<sup>53</sup> France was the only country which, before entering such agreements, signed an armistice; and the Vichy Government was the only one of the German-supported Governments which, for a time, was recognised by some of the United Nations. If these German-French agreements were nevertheless invalid under the law of nations, the other agreements of this class must be considered invalid also.

From the time when Marshall Pétain signed the armistice on June 22, 1940, General de Gaulle and the "Free French" authorities denied its validity, not on grounds of unconstitutionality but as an act of high treason. Similarly, they have contested the validity of the Enabling Act of July 10, 1940, which formed the basis of all acts of the Vichy regime, not so much on

<sup>50</sup> W. Stothfang, in *Hamburger Fremdenblatt*, March 4, 1944, quoted in *Report*, p. 37.

<sup>51</sup> *Legal Effects of War*, 2nd ed., Cambridge 1944, p. 323, note

<sup>52</sup> For provisions concerning social insurance see *Report*, pp. 228-230.

grounds of unconstitutionality but again as an act of high treason. The question of whether the proceedings leading to the passing of the Enabling Act of July 10, 1940, followed the letter of the Constitutional Laws of 1875 is controversial.<sup>53</sup> But the official French attitude after the disappearance of the Pétain Government seems to be that even if it were true that in abrogating the Third Republic the formalities of its own Constitution were scrupulously adhered to this would only be an additional proof of the shrewdness of the conspirators who, under the protection of the invader, wanted to gain power and to help the enemy. The De Gaulle authorities, claiming full jurisdiction over acts committed during the Vichy interlude, found the persons chiefly responsible for the signing of the 1940 armistice and for the passing of the Enabling Act guilty of treason and sentenced them to death. By an Order issued in April, 1945, they also declared French parliamentarians who had voted for the Enabling Act ineligible for the Constituent Assembly unless individually rehabilitated by a special *jury d'honneur*.<sup>54</sup>

However this may be, it is certain that at the time when the German-French deportation treaties were signed, there existed two authorities both contesting to represent France. In such situation the eventual course of history is the final arbiter on the question of who is the rebel and who is the legitimate government. History decided for de Gaulle. But even while it lasted, the Pétain Government did not acquire that measure of stability and independence as to be capable of concluding international treaties. There is no doubt that, from its inception, the Vichy Regime owed whatever authority it possessed to the physical power of Germany; it lacked the required minimum of independence and stability to make it a sovereign government. This fact was not altered by the temporary recognition accorded to Vichy by some nations. Recognition is merely the "assurance given to a new state that it will be permitted to hold its place and rank, in the character of an independent political organism, in the society of nations."<sup>55</sup> The sovereignty of a new state neither depends on, nor can be created by, recognition. Yet, the deportation treaties would have been

<sup>53</sup> K. Loewenstein, "Derise of the French Constitution of 1375," in *American Political Science Review*, Vol. 34, No. 5 (Oct. 1940), p. 894, held that the proceedings "were carried out with a full, and even excessive, sense of legality, and in complete accordance with the requirements of the Constitution which they destroyed." M. Koessler, "Vichy's Sham Constitutionality," in *American Political Science Review*, Vol. 36, No. 1 (Feb. 1945), p. 86, took the opposite view because "the ratification by the (French) nation which the Enabling Act itself required before it was to become operative, was never made." Other writers also deny the legality for various reasons: see literature quoted in Koessler's article.

<sup>54</sup> The *jury d'honneur* was composed of M. Cassin, Vice Pres. of the *Conseil d'Etat*, Vice Admir. Thierry d'Argenlieu, and M. Saillant, Pres. of the *Conseil National de la Résistance* (*Combat*, March 18/19, 1945; *Avants*, March 20, 1945; *Ordre*, Apr. 6, 1945).

<sup>55</sup> Moore's definition, quoted by Hyde, p. 148. On November 8, 1942, Canada severed relations with Vichy because there no longer existed in France any Government with "effective independent existence." Three days later, German troops occupied the hitherto "unc-

illegal under international (and also under domestic French) law even if it is assumed that the Vichy Government was a legal government capable of entering into treaties with other states and that the post-Vichy Government did not have the power to invalidate *ab initio* the acts of the Vichy Government. What taints the deportation treaties is their content. These treaties were manifestly *contra bonos mores*. The German-French armistice (assuming that it was valid) was an armistice in the technical sense; it did not end the state of war between the signatories, but merely aimed at suspending hostilities between them. In fact, this aim was never fully realized: French armed forces continued to wage war against Germany in the name of France. The outcome of the war continued to be uncertain both legally and factually. By the time the war came to an end the circumstances prevailing in June, 1940, were reversed. Until this final outcome, France's allies and, to an increasing extent, French troops stationed in France's overseas possessions or on allied soil and fighting under the authority and command of Free French authorities waged full-fledged war against Germany. In occupied France, the overwhelming part of the population sympathized with the Allied cause. More and more Frenchmen actively fought against the invader. Under such circumstances, it was flagrantly illegal for any French Government to conclude agreements providing for the compulsory mass deportation of French workers for the purpose of aiding Germany's war effort. The principle that neither civilians nor prisoners of war must be compelled to work for the direct war effort of the enemy is basic. It is embodied in the Hague Regulations and in the Geneva Convention relative to the treatment of prisoners of war of 1929. The deportation treaties aimed at exactly this forbidden object and were, therefore, invalid.<sup>56</sup>

cupied" part of metropolitan France whereupon recognition was withdrawn also by the other United Nations which had previously accorded it. Most French-German deportation agreements were signed after these events.

<sup>56</sup> "The requirement that contracts shall be in conformity with law invalidates, or at least renders voidable, all agreements which are at variance with the fundamental principles of international law and their undisputed applications" (Hall, *International Law*, 8th ed., 1924, p. 382); "It is a unanimously recognized customary rule of international law that obligations which are at variance with universally recognized principles of International Law cannot be the object of a treaty" (Oppenheim-Lauterpacht, Vol. 1, p. 706). International law denounces "as internationally illegal agreements which are concluded for the purpose of, and with a view to causing the performance of acts which it proscribes. . . . The obligation of a State to respect the terms of an agreement with another . . . may not come into being if the international society regards the arrangement as gravely injurious to its interests and contemptuous of what its law of nations is deemed to require. . . . In theory, any agreement which purports to do violence to the underlying principles of international law, must, to that extent, be regarded by the family of nations as internationally invalid" (Hyde, pp. 1374-5). See also Shotwell, *The Great Decision*, New York, 1944, p. 202. For a lucid discussion of the legal position of Czechoslovakia under German domination, see E. Taborsky, *The Czechoslovak Cause*, London, 1944.

3) Individual labor contracts. During the first world war, the German occupation authorities and the recruitment agents of the *Deutsches Industriebüro* used strong pressure—ranging from promises of better treatment and higher pay in Germany, to deprivation of food rations and physical violence<sup>57</sup>—in order to induce the Belgian labor recruits to sign individual contracts. The contracts were to prove that the men had voluntarily agreed to going to Germany and being employed there.<sup>58</sup> The practice was repeated during this war on a proportionately larger scale. If the signing of the contract was a genuinely voluntary act on the part of the worker, i.e., if the worker accepted German employment on his own free will, international law was not violated. This, however, refers only to a small minority to which the present analysis does not apply. In the great majority of cases, the foreigners signed under duress. According to a general rule of private international law, a contract entered upon under coercion, is not binding on the coerced party even if expressed in writing.

However, a (written or oral) contract entered into under coercion by one party is not *ipso facto* null and void. The coerced party cannot be compelled to fulfill the contract. But the other party (whether or not it exercised the coercion) cannot free itself from its own obligations under the contract, merely by pleading that the coerced party had not actually willed the contract. This holds true, in particular, when the coerced party has fulfilled its obligations under it and the other party has not. It must be noted that many of the contracts which foreigners signed under duress contained more favorable conditions—e.g., about wages, vacations with pay, reimbursement of travelling expenses, etc.—than were actually granted them once they had arrived at their places of employment.<sup>59</sup> The point

<sup>57</sup> Passelecq, pp. 106, 139, 195/6, 279, 359; J. Pirenne-Vauthier, p. 56.

<sup>58</sup> On April 5, 1922, the Belgian worker Jules-Hector Loriaux brought test action against Germany before the Belgian-German Mixed Arbitration Tribunal set up under Art. 304 of the Treaty of Versailles. He claimed to have been subjected together with other Belgians "à des véritables tortures" in order to sign a labor contract and, owing to the maltreatment, to be permanently incapacitated for work. The Tribunal (decision of June 3, 1924) declared itself incompetent to decide upon the claim insofar as it was based on a forced labor contract because the contract was "based primarily on violence systematically exercised on a whole portion of the civilian population"; such acts of violence constitute "the gravest violation of the law of nations"; but indemnification for the wrong suffered by the claimant was covered by the German reparation payments pursuant to No. 8 of Annex I to Part VIII of the Treaty of Versailles (*Recueil des décisions des Tribunaux Mixtes*, Vol. IV, p. 686). In other cases (which did not refer to deportees) the Mixed Arbitral Tribunals had defined their jurisdiction more broadly, notably the French-German tribunal in *Société Vinicole de Champagne c. Consorts de Mumm*, decision of March 4, 1921, *Recueil*, Vol. 1, p. 23, and the Belgian-German tribunal in *Milaire v. Etat Allemand*, decision of Jan. 13, 1923, *Recueil*, Vol. II, p. 715. In July 1925 the German Government agreed with a federation representing former Belgian deportees to pay them a lump sum indemnification of 24 million francs, subject to the approval of the Mixed Arbitral Tribunal: *The Times*, London, July 14, 1925, quoted in A. J. Toynbee, *Survey of International Affairs, 1924*, London, 1926, p. 401. Also Oppenheim-Lauterpacht, p. 352.

<sup>59</sup> Report, p. 115.



here raised is, therefore, important in connection with claims foreign workers may make on the basis of the contracts.

4) "Transformed" prisoners of war. International law forbids the deportation of civilians from territory under belligerent occupation and their employment on war work for the hostile power. Hence there exist no codified regulations concerning the conditions of employment if such measure is taken nevertheless. Making use of this fact, Germany treated a large portion of its prisoners of war as if they had been civilian "foreign workers." This practice aimed not so much at legalizing German policy as at avoiding obligations under international treaties. It was applied to several hundreds of thousands of prisoners, mainly French, Polish and Russian. To change a person's status from prisoner to civilian "foreign worker" was, in some respects, advantageous from the German point of view. It lent itself to be represented as a conciliatory gesture and at the same time it was construed as releasing the Reich, as far as prisoners covered by the Geneva Convention of 1929 were concerned, from obligations and responsibilities laid down in that convention—for example, to grant them food rations equivalent in quantity and quality to that of the depot troops (Art. II, 1); not to compel officers to work (Art. 27, 1); to abide by the limitations on disciplinary punishments which may be inflicted on a prisoner of war, and by the provisions concerning judicial proceedings against them (Art. 54 ff., 60 ff.); to permit protecting neutral powers to exercise control over the treatment of the prisoners of war, and the International Red Cross Committee to perform its humanitarian work for their protection (Art. 86 ff.); etc. The measure was construed as abrogating the prohibition to employ a prisoner of war on work for which he is physically unsuited (Art. 29) or which is unhealthy or dangerous (Art. 32; -), the provisions concerning working time, weekly rest periods, and pay (Art. 30, 34), and, most important of all, the restrictions concerning the type of work which may be requested from a prisoner of war.<sup>60</sup>

To deprive prisoners who fall under the Geneva Convention of 1929 of these rights and guarantees without actually liberating them, constitutes a gross violation of international law for the convention regulates the rights and duties of the detaining power and the prisoners until the latter are actually liberated and repatriated.<sup>61</sup> If the detaining power could, during hostilities, change the status of the prisoners without releasing them, and thereby free itself from its obligations, the Convention would be meaningless.

<sup>60</sup> His work must have "no direct connection with the operations of the war. In particular, it is forbidden to employ prisoners in the manufacture or transport of arms or munitions of any kind, or on the transport of material destined for combatant units" (Art. 31, 1).

<sup>61</sup> The Convention knows only the following ways of "ending the captivity": a) direct repatriation during hostilities; b) accommodation (*l'hospitalisation*) during hostilities; c) liberation and repatriation after conclusion of an armistice or of peace; d) "liberation on parole" as provided for in Art. 10-12 of the Hague Regulations of 1899 and 1907.

The situation is in the main the same with respect to prisoners of war of a country which, while not a party to the Geneva Convention of 1929, is a party to the Hague Regulations of 1899 and 1907. By concluding the Geneva Convention, "it was not intended to abrogate or replace the (Hague) Regulations . . . but rather to amplify and extend them."<sup>62</sup> The provisions of the Hague Regulations are far less extensive and on important points less benevolent to the prisoners. But they contain (as, indeed, the Brussels Declaration of 1874 contained) many of the essential principles of the Convention of 1929, in particular the prohibition to employ prisoners of war on work connected with the operations of war.<sup>63</sup> The provisions of the Hague Regulations protecting, on the one hand, prisoners of war and, on the other hand, enemy civilians, may not be circumvented by changing the status of prisoners into an in-between situation in which they would lose both the rights of prisoners of war and of enemy civilians.

\* \* \*

Unfortunately the machinery of the immediate past for the enforcement of international law was not able to prevent Germany's war labor policy, just as it was not able to prevent the war. But the fact that the Third Reich saw itself compelled to engage on this labor policy contains an encouraging lesson for the future, and a warning to would-be aggressors.

After most systematic preparation,<sup>64</sup> Germany entered the war much more strongly armed than its opponents, and with its formidable industrial apparatus fully geared for war. In spite of this exceptionally favorable situation the manpower requirements of modern warfare proved so great that Germany had to rely, throughout World War II, on the labor of many subjugated territories.

But it must be realized that it was only Germany's extraordinary military successes, gained in the early phases of the war, which put these foreign resources at its disposal. In the future, with the effective functioning of the United Nations Organisation for immediate concerted action against threatened aggression, a potential aggressor could hardly hope to gain the military successes which would enable him to put a similar policy into practice.

<sup>62</sup> J. W. Garner, in this JOURNAL, Vol. XXVI (1932), pp. 808/9. See also F. W. Heine-mann, *Das Kriegsgefangenenrecht im Landkriege nach moderner völkerrechtlicher Auffassung*, Krefeld 1931, pp. 50, 53.

<sup>63</sup> Art. 8 (1) Hague Regulations. Regarding required standards of food, quarters, and clothing of prisoners of war, see Art. 7. It must also be pointed out that "the principles of the law of nations, as they result from the usages established between civilised nations, from the laws of humanity, and the requirements of the public conscience" (general clause in the preamble to the Hague Convention) apply fully to captives whose legal position is governed not by the Geneva Convention but only by the Hague Convention.

<sup>64</sup> "Without the achievements of the years 1933-1938 we should hardly have been in a position to wage this war in so powerful and manly a fashion as we have done" (declaration of the head of the German Labor Front, Dr. Robert Ley, Nov. 30, 1944, *Deutsches Nachrichten Bureau*, Nov. 30, 1944).

## II. TRANSFER OF CIVILIAN MANPOWER FROM SUBJUGATED TERRITORY

The German wartime deportations of enemy civilians were illegal because Germany lacked a valid right to remove these persons from their lands and because the purpose of the deportations was illegal. Insofar as their treatment fell below the accepted minimum standards of decency and humanity the deportations were also for this reason illegal under international law. We have now to examine whether the legal situation is different with regard to the contemplated employment of German civilians for the reconstruction of war-torn areas of the United Nations.

The employment of Germans can be organized under the following four forms: a) employment of prisoners of war; b) employment of war criminals; c) voluntary employment; d) employment through compulsory conscription of civilians.

The three first-mentioned forms need little comment. Voluntary employment abroad would be a special case of organized temporary migration. That war crimes in the technical sense, i.e., violations of the laws and customs of war, may be punished by forced labor abroad follows from the fact that this is a milder penalty than death, which is an established penalty for the more serious of such offenses. "All war crimes may be punished with death, but belligerents may, of course, inflict a more lenient punishment, or commute a sentence of death into a more lenient penalty. . . . If a belligerent has a right to pronounce a sentence of capital punishment, it is obvious that he may select a more lenient penalty and carry it out even beyond the duration of the war."<sup>65</sup> The charter of the Military International Tribunal of August 8, 1945, agreed upon between Great Britain, the United States, Soviet Russia and France, provides that in addition to "war crimes, namely, violations of the laws and customs of war," also "crimes against peace" and "crimes against humanity" are punishable by "death or such other punishment as shall be determined by [the Tribunal] to be just."<sup>66</sup> One form of punishment can be forced labor. Finally, as far as prisoners of war are concerned, the Geneva Convention of 1929 stipulates (Art. 75, 1) that "the repatriation of prisoners shall be effected as soon as possible after the conclusion of peace." Until the prisoners are repatriated

<sup>65</sup> Oppenheim-Lauterpacht, Vol. II, p. 460/1.

<sup>66</sup> The preamble to the Charter of the Military International Tribunal appropriately points out that "the United Nations have from time to time made declarations of their intention that war criminals shall be brought to justice." These declarations were not limited to war crimes in the technical sense, but referred generally to "barbaric crimes," "atrocities which have violated every tenet of Christian faith," "unheard-of crimes," "barren horror," etc. See Churchill-Roosevelt declaration of Oct. 25, 1941. Declaration on behalf of the Governments of eight Occupied Countries and on behalf of the Free French National Committee, London, Jan. 13, 1942, note of Mr. Molotov of Apr. 27, 1942, Declarations by Mr. Roosevelt of Oct. 7, 1942, and of the United States Government of Aug. 29, 1943, Moscow Declaration of Oct. 30, 1943, (Royal Institute of International Affairs, *Bulletin of International News*, 1942, pp. 50, 961, *Information Bulletin of Embassy of USSR*, Washington, D. C., Apr. 27, 1942, *Department of State Bulletin*, Vol. IX, p. 150), etc.

their rights and duties continue to be ruled by the Convention. They can, therefore, be compelled to work, even after the cessation of hostilities, under the conditions laid forth in the Convention. The Hague Regulations of 1899 and 1907 do not deal with this point; but since the Geneva Convention of 1929 is the more recent and more lenient law it is fair to interpret the Hague Regulations in the sense that prisoners covered by them but not by the Geneva Convention, can also be compelled to work, under the conditions contained in the Hague Regulations, until they are repatriated after the conclusions of peace.<sup>66a</sup>

There remains the question whether Germans who do not fall under either of the categories just mentioned can be recruited for reconstruction work on United Nations territory.

#### *Difference between Belligerent Occupation and Post-Surrender Occupation*

Germany's military defeat, its unconditional surrender, and the collapse and disintegration of its governmental structure resulted in the transfer of sovereignty over Germany to the Allies. Together, these events constituted subjugation,<sup>67</sup> meaning the temporary suspension of Germany as a governmental entity. According to the declared intentions of the Allies, the subjugation was to be of limited, though indefinite, duration; only a portion of the subjugated territory shall be annexed; and at an as yet undetermined date, Germany shall reemerge as a State and sign a peace treaty. The following remarks refer only to the period between May 8, 1945, and Germany's reemergence as a State. This period may be called "the post-surrender period."

Through the subjugation of Germany the outcome of the war has been

<sup>66a</sup> British policy in regard to German prisoners of war held in Great Britain was described as follows by the Secretary of State for War, Mr. Lawson: "Only prisoners of war who are on medical grounds permanently unfit for employment are now being returned to Germany; members of the SS. and suspected war criminals are excluded from such repatriation": *Hansard*, Oct. 16, 1945, col. 971.

It is not generally known that Germany kept Russian prisoners of war and internees for several years after the end of World War I. In 1921 the International Labor Office received protests concerning their treatment in the German internment camps from a Committee of Members of the Russian Constituent Assembly, the International Federation of Trade Unions, and a group of prisoners in the Lichtenhorst camp. With the approval of the German Government a representative of the International Labor Office visited the German camps of Wunsdorf, Cottbus, Lichtenhorst and Zelle, in February, 1922, inquired into the living and working conditions of the inmates, and made suggestions concerning measures for their relief. G. A. Johnston, *International Social Progress*, London, 1924, pp. 220-..

<sup>67</sup> "Subjugation" is not always used in an identical sense but the disagreement is merely terminological. In accordance with Oppenheim-Lauterpacht, Vol. II, p. 470, subjugation is here meant to describe the situation which follows conquest. McNair uses the term somewhat differently when he states: "International law recognizes three stages which normally occur in the process of conquest: (a) invasion; (b) occupation; and (c) transfer of sovereignty by means of a treaty of cession, or as a result of subjugation without cession." ("Municipal Effects of Belligerent Occupation" in *Law Quarterly Review*, Jan. 1941, p. 34.)

decided in the most definite manner possible.<sup>68</sup> One of the prerogatives of the Allies resulting from the subjugation is the right to occupy German territory at their discretion. This occupation is, both legally and factually, fundamentally different from the belligerent occupation contemplated in the Hague Regulations, as can be seen from the following observations.

The provisions of the Hague Regulations restricting the rights of an occupant refer to a belligerent who, favored by the changing fortunes of war, actually exercises military authority over enemy territory and thereby prevents the legitimate sovereign—who remains the legitimate sovereign—from exercising his full authority. The Regulations draw important legal conclusions from the fact that the legitimate sovereign may at any moment himself be favored by the changing fortunes of war, reconquer the territory, and put an end to the occupation.<sup>69</sup> "The occupation applies only to territory where such authority [i.e., the military authority of the hostile state] is established and can be exercised" (Art. 42, 2.<sup>70</sup> In other words, the Hague Regulations think of an occupation which is a phase of an as yet undecided war.<sup>71</sup> Until May 7, 1945, the Allies were belligerent occupants in the then occupied parts of Germany, and their rights and duties were circumscribed by the respective provisions of the Hague Regulations. As a result of the subjugation of Germany the legal character of the occupation of German territory was drastically changed. The occupants do no longer act *in lieu* of "the legitimate sovereign." They themselves exercise sovereignty. There is no legitimate German sovereign who is merely waiting,

<sup>68</sup> The situation created by Germany's subjugation differs fundamentally from the situation created by an armistice. An armistice merely suspends hostilities. If either party seriously violates the armistice the other party has "the right to denounce it and even in case of urgency, to recommence hostilities at once," i.e. without formal denunciation. Under the armistice of Nov. 11, 1918, the German Government in June 1919 actually considered denouncing the armistice and resuming the war. Now, Germany cannot "denounce" the surrender. If it were to resume hostilities its armed forces would not enjoy the protection of the laws and customs of war but could be treated as criminals.

<sup>69</sup> Oppenheim-Lauterpacht, Vol. II, pp. 345, 348. "The legal justification (*Rechtsgrund*) of the *occupatio bellica* lies in the mere fact that the territory is occupied: the occupant takes the territory into possession, not on the basis of a legal title but on the basis of his power." O. Bamberger, *Occupatio Bellica im Landkrieg*, Freiburg i.E., 1906, p. 13.

<sup>70</sup> "The power of the occupant is of a precarious nature and may, therefore, come to an end at any time. A minor battle, nay an unfavorable skirmish can suffice to force him to leave the occupied territory" (S. Cybichowski, *Das Völkerrechtliche Okkupationsrecht in Zeitschrift für Völkerrecht*, 1936, p. 297). At the first Hague Conference the German delegate, Col. von Schwarzkopf, attempted to have this provision eliminated from the Regulations, arguing that an interruption of the occupation due, e.g., to a temporary success of a "rebellion," should not be permitted to curtail the territorial jurisdiction of the occupant (Protocols, Vol. III, p. 117).

<sup>71</sup> Oppenheim-Lauterpacht, Vol. II, p. 278, defines "occupation and administration of the enemy territory" as one of the methods—the other being the defeat of the enemy armed forces—for the achievement of "the purpose of war, namely, the overpowering of the enemy."

merely prevented from exercising his power. Whatever powers German authorities have during the post-surrender period, they must be construed as deriving from and delegated by the Allies. As a consequence of the doctrine that during belligerent occupation the sovereignty of the absent legitimate Government is merely suspended, the occupant must "respect, unless absolutely prevented, the laws in force in the country." But under the post-surrender occupation the abrogation instead of the preservation of National Socialist law is one of the principal aims of the Allies.

The difference between the two types of occupation would be most apparent in case of withdrawal of the occupation forces. Had, for example, the German occupation forces voluntarily withdrawn from the Netherlands during the war, the German occupation regime would automatically have come to an end. But if the present occupation of Germany were not "effective" or if the Allies would withdraw their occupation forces, their prerogatives over Germany would not be affected. During the post-surrender period, neither the extent nor the duration of the rights of the Allies is conditional upon establishing or maintaining an occupation,—whereas this is the first and foremost prerequisite for the exercise of the limited prerogatives of the belligerent occupant. The occupation of Germany is, in legal contemplation, only an incidental aspect of the post-surrender situation. Under belligerent occupation, the occupant's limited powers derive from the physical fact of military occupation; under the post-surrender occupation, the right to occupy derives from the occupant's unlimited powers. It is the essence of the provisions of the Hague Regulations concerning enemy civilians that the belligerent occupant does not possess sovereignty over them; whereas it is the essence of the legal situation prevailing during the post-surrender period that the Allies possess sovereignty over Germany.

### *The Different Purpose*

The formal power of the Allies to issue binding orders for the German population is, however, only one aspect of the problem. In judging the legality, under international law, of the recruitment of German civilians for the reparation of war damages, the purpose of such measure is of equal importance. In fact, whoever would leave the purpose out of consideration and would merely stress the power of the Allies—though this power is not only physical but also legal—to issue binding law for the Germans would paint a distorted picture. The case for the recruitment of German manpower would, indeed, be a weak one if it were based only on the "right of the victor." The public conscience of our age is very alert on this point. It not only, in the words of Mr. Justice Jackson, utterly renounces and condemns aggressive war as an instrument of policy;<sup>72</sup> it even watches very carefully over the use which the law-abiding States make of a victory gained

<sup>72</sup> Statement on the signing of the War Crimes Agreement of Aug. 8, 1945: *The New York Times*, Aug. 9, 1945.

over a law-breaking State. This aversion to aggressive war and the abuse of force—a strong influence in shaping international law—makes it necessary to distinguish carefully between lawful and unlawful purposes in the use of force.

Here, then, lies the most essential difference between the recruitment of foreign workers for German war work on the one hand, and the contemplated recruitment of Germans for Allied reconstruction work on the other hand: it is the difference between the purposes of these measures. In the first case, the purpose was unjustifiable under the law of nations; in the other, the purpose is just. The Third Reich conscripted citizens of countries which it had overrun and against which it continued to wage a war of aggression: it forced the conscripts to help it in this very endeavour. The Allied measure aims at serving a purpose fully acknowledged by international law, namely to obtain at least partial reparation for damages caused by unlawful behaviour.

Why do the Hague Regulations narrowly limit the occupant's right to demand services from the enemy population? Why do the Brussels Draft Declaration of 1874, the Hague Regulations, and the Geneva Convention of 1929 forbid the detaining power to employ prisoners of war on work directly connected with military operations? Why was the German deportation policy in both world wars so unanimously condemned? Because civilised nations consider it illegal for a belligerent to procure for itself an unfair advantage over his opponents by forcing enemy citizens to help in the war against their own countries. International law rejects as immoral any compulsion to perform a protracted series of acts, which, objectively, constitute treason. It is utterly obnoxious to international morality to confront an enemy citizen with the loathsome dilemma of violating his loyalty to his own country, or risking punishment and death. By forcing foreign workers to produce the implements for Germany's war against their own countries Germany conspicuously increased its own war-making capacity; thereby it proportionately increased the loss of lives and wealth of its opponents, and proportionately prolonged its rule over the home territories of the labor conscripts. The work performed by the deportees delayed their own release.

If German manpower is recruited for reconstruction work on behalf of the Allies, the purpose of such measure would not be to secure for Germany's enemies any unfair advantage. The Germans are not asked to perform work detrimental to Germany. There is no collision between their duties toward their own fatherland, and their duties toward their foreign employers or the comity of nations.<sup>73</sup> By contributing, to some extent, to the repair of the

<sup>73</sup> It may be noted that during the Ruhr occupation leading German jurists, backed by the Reich Government and the German Supreme Court, asserted that a collision existed between the moral duty of German citizens to obey instructions of the Reich Government to sabotage the French efforts to exact reparations, and the demands made by the French occupation authorities under the Treaty of Versailles. This dilemma, it was asserted, could

devastations in non-German countries caused by Germany's war of aggression the workers would not only fulfil a moral and legal obligation fully recognized by international law but would by the same token hasten Germany's eventual political recovery. In every respect, the situation is the opposite from the situation which prevailed under Germany's wartime deportation policy.

### *The Conditions of Employment*

Public opinion in the United Nations has agreed on the need for German labor reparations. In the countries which have felt the full impact of the National Socialist methods of warfare the demand is particularly general and elementary. There are indications that the demand finds understanding in Germany itself. Perhaps, there will be much less need for compulsion than is sometimes assumed. Immediately after the end of the last war, the German trade unions spontaneously acknowledged Germany's obligation to help in the rebuilding of the devastated regions of France and Belgium, and declared that German workers were ready to perform on the spot.<sup>74</sup>

The objections which, outside of Germany, are raised against German labor reparations are in the main directed not against the scheme itself but are based on apprehension lest the Germans should receive treatment comparable to that which the Allied workers had received from the Third Reich. On this point President Roosevelt declared in an address to the Foreign Policy Association in New York, in October, 1944: "The German people are not going to be enslaved. Why? Because the United Nations do no traffic in slavery. But it will be necessary for them to earn their way back, earn their way back into the fellowship of peace-loving and law-abiding nations."<sup>75</sup> Pursuant to the generally accepted principles of inter-

rightfully be solved by obeying the Reich Government, rather than the occupying power. The doctrine was upheld before French military courts, e.g., in the trial against Fritz Thyssen and other leaders of the Rhenish Westphalian coal industry accused of having sabotaged the supply of "reparation coal," and in a similar trial against directors and workers of the Krupp Works in Essen. A. Finger, *Der Krupp Prozess*, Stuttgart, 1923, p. 6.

<sup>74</sup> Hedwig Wachenheim, "The Use of German Labor for Reconstruction," in *American Labor Conference News Letter* of May 22, 1945, published by the American Labor Conference on International Affairs, New York, N. Y.

<sup>75</sup> See also testimony of Mr. Bernard M. Baruch before the Senate Committee on Military Affairs on June 22, 1945:

"Mr. Baruch: . . . [Germany's] principal payment will have to be in labor. All the countries seem to want it so, and I would let them have it.

"The Chairman (Sen. Elbert D. Thomas). Mr. Baruch, can we avoid, in using labor reparations, labor slavery?

"Mr. Baruch: . . . I do not think that anyone has in mind the establishment of slave labor; I do not suppose the United Nations will undertake anything of that kind." (Hearings before a Subcommittee of the Committee on Military Affairs, United States Senate, 79th Congress, First Session, pursuant to Senate Resolutions 107 (78th Congress) and Senate Resolutions 146 (79th Congress) authorizing a study of war mobilization problems. Part 1, June 22, 1945, Washington, D. C., 1945, p. 14).



national law, inhuman treatment of the recruited German workers would constitute a violation of the law of nations. But if they are treated according to the generally accepted standards of decency and humanity, Allied measures ordering the recruitment of German manpower for the reconstruction of devastated Allied territories are to be considered in accordance with the demands of international law.

## THE INTERNATIONAL ORGANIZATIONS IMMUNITIES ACT

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On December 29, 1945 the International Organizations Immunities Act entered into force.<sup>1</sup>

### *Purposes of the Act*

This legislation constitutes belated recognition of the need for granting to international organizations of which the United States is a member, and to their personnel, a legal status which is adequate to ensure the effective performance of their functions and the fulfillment of their purposes. It will "not only protect the official character of public international organizations in this country," as the Senate Committee on Finance has stated, "but it will also tend to strengthen the position of international organizations of which the United States is a member when they are located or carry on their activities in other countries."<sup>2</sup> The principal purposes served by the Act are the following: (a) to make possible a consistent and equitable treatment for some of the older organizations now functioning on United States territory, with respect to whose legal status the United States has contracted no conventional obligations, and which will probably not be brought into relationship with the United Nations;<sup>3</sup> (b) to implement commitments or obligations toward UNRRA,<sup>4</sup> FAO<sup>5</sup> and other organizations in being or to be established,<sup>6</sup> and to whose constituent instruments the United States is a

<sup>1</sup> Public Law 291, 79th Cong. Ch. 652, 1st Sess.; the bill which resulted in the act was introduced by Mr. Doughton on Oct. 24, 1945 as H. R. 4489; text below, Supplement, p. 85. On Nov. 21, 1944, Mr. Doughton had introduced a bill (H. R. 5515, 78th Cong., 1st Sess.) which applied only to UNRRA, and which "died" in the Committee on Ways and Means.

<sup>2</sup> Senate Report No. 861, 79th Cong., 1st Sess. [to accompany H. R. 4489], p. 2.

<sup>3</sup> This is of special importance in the case of the Pan American Union, whose Governing Board, by a resolution adopted June 7, 1944, had requested that the Union and its personnel be granted a status similar to that enjoyed by the League of Nations and its staff under Article 7 of the Covenant. See Report of the Special Committee of the Governing Board appointed to Study the Juridical Status of the Pan American Union and of its personnel, Washington, 1944.

<sup>4</sup> Resolutions 32-34 and 36 of the First Session of the Council of UNRRA.

<sup>5</sup> Art. VIII, par. 4, and Art. XV of the Constitution of the Food and Agriculture Organization.

<sup>6</sup> Article IX, Articles of Agreement of the International Monetary Fund; Article VII, Articles of Agreement of the International Bank for Reconstruction and Development; Article XII, Constitution of the Educational, Scientific, and Cultural Organization of the United Nations; Art. 1, Sec. 4, Interim Agreement on International Civil Aviation.

See Philip C. Jessup, "Status of International Organizations: Privileges and Immunities of their Officials," this JOURNAL, Vol. 38 (1944), pp. 658-662; and A. K. Kuhn, "United Nations Monetary Conference and the Immunity of International Agencies," same, pp. 662-667.

party or a signatory; and (c) to establish a minimum or basic standard of treatment for the United Nations and its personnel, subject to such modifications as may be made necessary by the terms of the agreements contemplated under Article 105 of the Charter.

*General Law and Practice of the United States*

Although the United States has recognized the legal capacity of public international organizations, it has taken the position that there exists no obligation under customary international law to extend to such organizations the privileges, exemptions, and immunities accorded to foreign governments. It consequently has declined to grant to their officers and employees any special legal status, whether it be that of foreign diplomatic agents or of non-diplomatic government officials. International organizations have tended to claim a governmental status and to demand at least "foreign government official" treatment for their functionaries, but these demands have been uniformly resisted on the grounds that no basis for such claims has been developed in customary international law, that any special status is as yet dependent upon treaty or upon the municipal law and practice of the state concerned, and that there is, therefore, no justification under the law of the United States for conceding any privileged position to international organizations and their personnel in this country.<sup>7</sup> The general attitude which has been assumed by the United States Government is expressed in an opinion given by the Department of State in reply to an inquiry by the British Embassy as to the status of officials of the League of Nations in the United States:

. . . Under customary International Law diplomatic privileges and immunities are only conferred upon a well defined class of persons, namely those who are sent by one state to another on diplomatic missions. Officials of the League of Nations are not, as such, considered by the Department to be entitled to such privileges and immunities under generally accepted principles of International Law but only under special provisions of the Covenant of the League which can have no force in countries not members of the League.

In the estimation of this Department the executive authorities of this Government would not be warranted, under our law which is declaratory of International Law, in according to officials of the League of Nations diplomatic privileges and immunities in the United States since such persons are not comprehended in the definition of diplomatic officers contained in our Statutes.<sup>8</sup>

<sup>7</sup> For discussion of this point, see L. Preuss, "Diplomatic Privileges and Immunities of Agents Invested with Functions of an International Interest," *same*, Vol. 25 (1931), pp. 695, 696.

<sup>8</sup> U. S. For. Rel., 1929, Vol. I, p. 414; see also Green Hackworth, *Digest of International Law*, Vol. IV, p. 423. On the status of officials of the League in the territories of non-member states, see, in general, Martin Hill, *Immunities and Privileges of International Officials: The Experience of the League of Nations* (to be published shortly by the Carnegie Endowment for International Peace).

Demands by alien officers of international organizations that their position be assimilated to that of officials of foreign governments have arisen most frequently under Section 116 (h) of the Internal Revenue Code, which exempts from Federal income tax the salaries received by such persons as compensation for services rendered in the United States to their respective governments. The international organizations have generally taken the position that since they are associations of states whose funds are contributed by member governments, their officials should have the same exemption from taxation of their income as that enjoyed by the officials of foreign governments in the United States. In rejecting this reasoning, the Treasury has held that international organizations are not "foreign governments" within the meaning of the Code; and that although the income of their officials is, with the exception of the contribution of the United States, derived from the funds of foreign governments, it is nevertheless considered as originating from sources within the United States, since it is received as compensation for personal services performed therein.<sup>9</sup>

#### *Provisions of the Act*

The benefits provided in the International Organizations Immunities Act are extended only to public international organizations "in which the United States participates pursuant to any treaty or under authority of any Act of Congress authorizing such participation or making an appropriation for such participation, and which shall have been designated by the President through appropriate Executive order. . . ." (Title 1, Sec. 1.) The authority granted herein was exercised by the President on February 19, 1946, when he issued an order designating the following organizations as entitled to the privileges, exemptions and immunities conferred by the Act:

- The Food and Agriculture Organization
- The International Labor Organization
- The Pan American Union
- The United Nations
- The United Nations Relief and Rehabilitation Administration<sup>10</sup>

The method of enumerating the principal organizations now functioning or about to be established on United States territory was chosen for reasons of administrative convenience. There are numerous organizations which

The refusal of the United States to grant immunities is not based upon its non-membership in any particular organization, but upon the lack of any statutory basis for the extension of governmental privileges and immunities to any international organization whatever. This is shown by its failure to accord diplomatic status to the offices of the Pan American Union. See Hackworth, *Digest*, Vol. IV, p. 423.

<sup>9</sup> Although they are denied exemption from taxation, officials of the League and other international institutions are, as "distinguished foreign visitors . . . designated by the Secretary of State," granted customs courtesies and free entry privileges. Same, pp. 423, 586.

<sup>10</sup> Executive Order 9638, Fed. Reg. Vol. 11, No. 36 (Feb. 27, 1946), p. 1809.

might fall within the scope of the Act, and the examination of their separate claims prior to issuing the first order would have resulted in delaying considerably the conferring of immunities upon those major organizations which are clearly entitled thereto. The order provides a procedure whereby organizations not included in the first list may submit their applications to the Secretary of State, who, acting on the basis of such information as he may require, shall make appropriate recommendations to the President.<sup>11</sup>

The Act further authorizes the President to withhold or withdraw from any organization, or from its officers and employees, any of the privileges, exemptions or immunities provided therein, or to condition or limit their enjoyment. In the event of abuse of the benefits of the Act by any particular organization or its officers, the President may revoke its designation altogether.<sup>12</sup> The power to withhold or withdraw particular benefits is to be exercised "in the light of the functions" of the organization concerned, and, according to the report of the Senate Committee on Finance, is intended to "permit the adjustment or limitation of the privileges in the event that any international organization should engage, for example, in activities of a commercial nature."<sup>13</sup>

The legal personality of international organizations is recognized in the provision that they shall, to the extent consistent with the instrument creating them, possess the capacity: (a) to contract; (b) to acquire and

<sup>11</sup> In an explanatory statement issued by the Department of State the following requirements for applicant organizations are prescribed:

1. The applicant organization, and its officers and employees, must be doing sufficient business in the United States to warrant granting them the privileges of the legislation, and their activities must be such as reasonably to require the said privileges. In general, this will mean that the organization must have an office and staff located within the United States.
2. The Government of the United States must be a participating member in the applicant organization.
3. The participation of the Government of the United States must be pursuant to a treaty or under the authority of an Act of Congress authorizing such participation or making an appropriation for such participation.
4. The applicant organization must be composed principally of governments, as distinguished from private organization, as members.
5. The applicant organization must not be scheduled for liquidation in the immediate future.

Department of State, Press Release, No. 128, Feb. 20, 1946.

<sup>12</sup> The power of revocation may also be exercised "for any other reason," which presumably would include the cessation of the activities of a particular organization. See Senate Report No. 861, 79th Cong., 1st Sess., p. 2.

<sup>13</sup> Same, p. 2; see also remarks by Senator Taft, *Congressional Record*, Vol. 91, No. 227 (Dec. 20, 1945), p. 12608. The principal utility of this provision would seem to reside in that it permits of adapting the extent of the benefits conferred upon any particular organization to the requirements of the instrument by which it is established and its status defined. Note, for example, that the International Monetary Fund and the International Bank, by reason of differences in the nature of their operations, have differing immunities with respect to judicial process. Art. IX, Secs. 2-4, Articles of Agreement of the Fund; and Art. VII, Secs. 2-4, Articles of Agreement of the Bank; also *supra* cited (note 6, above), pp. 659-660.

dispose of real and personal property; and (c) to institute legal proceedings (Title 1, Sec. 2 (a)). International organizations, their property, and their assets are declared to have the same immunity from suit and from every form of legal process as is enjoyed by foreign governments, except to the extent that such immunity may be expressly waived for the purpose of any proceedings or by the terms of any contract (Sec. 2 (k)).<sup>14</sup> Their property and assets are to be immune from search, unless such immunity shall be expressly waived, and from confiscation; and their archives are to be inviolable (Sec. 2 (c)). They are to be entitled to the privileges, exemptions and immunities accorded under similar circumstances to foreign governments, insofar as concerns: (a) customs duties and internal revenue taxes imposed upon or by reason of importation; (b) the registration of foreign agents; and (c) the treatment of official communications (Sec. 2 (d)). International organizations are further exempted from: (a) taxation from income derived from sources within the United States (Sec. 4 (a, b));<sup>15</sup> (b) social security taxes and the collection of tax at the source on wages (Sec. 4 (c-e)); (c) the Federal communications tax and taxes on transportation of persons and property, and various other taxes (Sec. 4 (f-h), Sec. 5);<sup>16</sup> and (d) all property taxes imposed by or under authority of any Act of Congress, including such as are applicable to the District of Columbia (Sec. 6).<sup>17</sup>

<sup>14</sup> Compare the Canadian *Treaties of Peace (Status of the International Labour Office) Order*, Aug. 14, 1941, Sec. 5 (1) of which provides that the ILO shall have, in the absence of express waiver, immunity from any suit or proceeding "other than a proceeding by way of set-off, counter-claim or cross-action. . . ."

<sup>15</sup> The exemption relating to taxation of income is made effective for taxable years beginning after Dec. 31, 1943, apparently for the purpose of covering UNRRA from the commencement of its activities.

<sup>16</sup> No exemptions from any Federal excise or tax are accorded unless they are specifically referred to in the Act, which is, in this respect, less liberal than the law and practice regarding exemptions accorded to foreign governments and diplomatic officials. See Heckworth, *Digest*, Vol. IV, pp. 570-576.

<sup>17</sup> The bill (H. R. 4489) as originally introduced provided that international organizations should be entitled to the same exemptions from State and local taxes as is enjoyed by the United States Government. This provision was stricken from the bill by the Senate Committee on Finance on the grounds that exemption from such taxes cannot be provided by Federal legislation (in the absence of treaty), and that, therefore, "this matter should properly be dealt with by the State and local authorities." Senate Report No. 361, 79th Cong., 1st Sess., p. 5. In this respect the Act falls short of compliance with the provisions for tax exemption contained in certain agreements now in force. Art. IX, Sec. 9 (b) of the Articles of Agreement of the International Monetary Fund, for example, provides that the Fund shall be "immune from all taxation" in the territory of a member state. It would have been appropriate to have included in the Act provision for exemption from State and local taxation wherever required by the terms of any treaty or other international agreement, thus avoiding all question as to whether treaty exemptions are self-executing. This problem will become acute with the establishment of the seat of the United Nations in this country. Any exemptions from State and local taxation accorded to the United Nations by treaty or other agreement should be implemented by Federal legislation, and should not be left to be dealt with by intercession of the Department of State with the State authorities, by possibly

The remaining provisions of the Act relate to the privileges, exemptions and immunities of persons designated by foreign governments to serve as their representatives in or to international organizations; officers and employees of such organizations; members of the immediate families of the foregoing who reside with them; and, in some cases, their employees, attendants and servants. The Act is based squarely upon the principle of "nationality discrimination," and its benefits are extended to aliens only, except in the case of immunity for official acts, which is granted to all officers and employees.<sup>18</sup> It is expressly provided that "No person shall, by reason of the provisions of this title, be considered as receiving diplomatic status or receiving any of the privileges incident thereto other than such as are specifically set forth herein" (Sec. 8 (c)). The Secretary of State is granted what is in effect a right of *agrégation*, in that no person, whether a foreign government representative, or an officer or employee of an international organization, shall be entitled to the benefits of the Act unless he shall have been notified to and accepted by the Secretary of State, or shall have been designated by him, or is a member of the family or suit, or servant, of one of the foregoing persons (Sec. 8 (a)). He furthermore has the power to declare any person entitled to the benefits of the Act to be *persona non grata*, since he is empowered to require the departure of any person whose "continued presence" in the United States "is not desirable" (Sec. 8 (c)). A final sanction is found in a provision authorizing the Secretary of State to withdraw the benefits of the Act from the nationals of foreign countries which fail to accord corresponding privileges, exemptions, and immunities to citizens of the United States (Sec. 9).

For purposes of the Act representatives of foreign governments in or to international organizations and officers and employees of such organizations are placed upon an equal basis, and are entitled to: (a) immunity from suit and legal process relating to acts performed by them in their official capacities and within the limits of their functions, except insofar as such immunity may be waived by the foreign government or international organization concerned (Sec. 7 (b)); (b) exemption from Federal taxation of income received for official services rendered to a foreign government or an international organization (Sec. 4 (b));<sup>19</sup> (c)<sup>20</sup> exemption from customs duty on

insufficient or conflicting State legislation, or by "agreements of doubtful legal standing between the United Nations and the States of New York and Connecticut.

<sup>18</sup> Such immunity is not personal, and, therefore, is rightly not made dependent upon the nationality of the person concerned; it belongs to all agents of an entity which itself possesses immunity from jurisdiction. See Preuss, as cited (note 7 above, p. 706; and W. E. Beckett, "Consular Immunities," in *British Yearbook of International Law*, Vol. XXI (1944), pp. 38-50.

<sup>19</sup> This is effective with respect to taxable years beginning after Dec. 31, 1943. It will be noted that there is no exemption from Federal taxation other than upon official income, and that there is no exemption from State and local taxation.

<sup>20</sup> United States citizens, in accordance with the principle of "nationality discrimination,"

baggage and effects imported in connection with the arrival of the owner (Sec. 3);<sup>21</sup> (d) exemption from social security taxes (Sec. 4 (c), Sec. 5); and (e) such exemptions with regard to laws regulating entry into and departure from the United States, alien registration and finger-printing, and registration of foreign agents as are accorded under similar circumstances to officers of foreign governments (Sec. 7 (a), c-d).<sup>22</sup>

### *Adequacy of the Act in the Present Situation*

Although the present Act provides a less generous treatment than does the Covenant of the League of Nations and recent Canadian,<sup>23</sup> Chinese,<sup>24</sup> and British legislation,<sup>25</sup> it represents a great advance over the previous law and practice of the United States, in that it constitutes for the first time an adequate recognition of some of the more important obligations which the United States has assumed as "host" to an ever-growing number of international organizations.<sup>26</sup> An examination of the constituent instruments of specialized organizations or agencies now in existence, or which are about to be established, shows that that Act, in adopting as its general standard for international organizations the treatment accorded to foreign governments, conforms almost completely with the legal requirements arising out of such instruments. Whether the Act is adequate to meet the obligations arising

receive no exemption. If they serve abroad as officers or employees of international organizations, they are assimilated to ordinary private persons, and are liable to the Federal income tax on their official income; they are entitled, however, to exclude from gross income the amount of such compensation if they had a bona fide residence abroad during the entire taxable year. Internal Revenue Code, Sec. 116 (a).

<sup>21</sup> This exemption is extended to the families, suites and servants of the foregoing persons. The customs exemption herein provided, which does not apply to articles imported subsequent to entry, is less generous than that which is ordinarily accorded to foreign governmental officials. See Hackworth, *Digest*, Vol. IV, pp. 586-587.

<sup>22</sup> These exemptions are extended to the immediate families and employees of representatives or officers, provided that they reside with them.

The bill, as originally introduced and as reported out by the Senate Committee on Finance, contained also an exemption from selective training and service. This was eliminated on the floor of the Senate, Senator Taft pointing out that there was no necessity for dealing with the matter in the present Act since the President already possessed the power to grant exemption from selective service to resident elders. 91 *Congressional Record*, No. 227, 79th Cong., 1st Sess. (Dec. 20, 1945), pp. 12609.

<sup>23</sup> Order cited above, note 14.

<sup>24</sup> Order No. 4411 of the Executive Yuan relating to the Status, Privileges and Immunities of the International Labor Organization and its Personnel, *Official Gazette of the Executive Yuan*, Vol. VI, No. 3 (Feb. 19, 1945).

<sup>25</sup> Diplomatic Privileges (Extension) Act, 1944 (7 & 8 Geo. 6, Ch. 4); this *JOURNAL*, Vol. 39 (1945), Supplement, p. 163; Diplomatic Privileges (U.N.R.R.A.) Order in Council, 1945 (S. R. & O., 1945, No. 79); Diplomatic Privileges (U.N.I.O., The Refugees Committee and E.A.C.) Order in Council (S. R. & O., 1945, No. 84). For an analysis of British legislation, see Egon Schwelb, in 8 *Modern Law Review* (1945); pp. 50-63.

<sup>26</sup> See Walter R. Sharp, "American Foreign Relations within an Organized World Framework," in *American Political Science Review*, Vol. 28 (1944), p. 944.



from the Charter of the United Nations and from agreements to be concluded under the authority thereof will be briefly considered below.

Several provisions of the Act are open to criticism on the ground that their exercise may in any given case involve the United States in a violation of its international obligations. Presumably the President will designate all organizations with respect to which the United States has contracted obligations relating to privileges, exemptions, and immunities. In practice this will permit of exceptions in the case of minor agencies of a purely technical character which, it may be argued, require no special status in the interest of the effective performance of their functions. The powers of withholding or withdrawing the benefits of the Act and of revoking a designation are, however, expressed in unqualified terms, and are clearly susceptible of abusive or illegal exercise. Section 1 should have been so drafted as to make it clear that the powers granted therein should be exercised in a manner consistent with international obligations, and to exclude the possibility that they might, as a matter of municipal law, be construed to override the requirements of previous treaties and agreements.

The powers granted to the Secretary of State under Section 8 are still more objectionable, and result from a false analogy between the position of international officials and that of foreign diplomatic or governmental agents in the territory of the state where they exercise their functions. The granting of such powers to the local government is incompatible with the independent position which should be guaranteed to international organizations in the interest of the collectivity of their member states. It goes beyond the customary practice of inquiring *officieusement*, and in advance of his appointment, whether the principal official of an organization is acceptable to the government of the host state;<sup>27</sup> and it gives to such government a means of exerting pressure, on the basis of national political interests, upon an organization which has the exclusive right and duty to serve the international interest.<sup>28</sup> Behind the provisions of the present Act it is not difficult to discern the influence of the Department of Justice, always apprehensive in matters which may affect the national security. Section 8, it would appear, is the *quid pro quo* exacted for the relaxation of the usual rules relating to such matters as customs examination, immigration control, and alien registration and fingerprinting. It is believed that the legitimate interests of the United States would be adequately safeguarded by informal representations to the international organization concerned whenever there is reason to believe that the activities of its officials are inimical to the national security.

<sup>27</sup> Suzanne Basdevant, *Les Fonctionnaires internationaux*, Paris, 1934, p. 291.

<sup>28</sup> The power to withdraw the benefits of the Act from nationals of countries which deny like benefits to citizens of the United States, is likewise objectionable, and rests upon a misconception of the status of an international official and of his position in relation to the government of the country in which he exercises his functions. See C. Wilfred Jenks, "Some Legal Aspects of the Financing of International Institutions," in *Transactions of the Grotius Society*, Vol. XXVIII (1943), p. 109.

The fiscal provisions of the present Act follow the marked tendency to embody in recent agreements and legislation the principle of nationality discrimination in respect of exemption from taxation of official income derived from international organizations. Since the right to refuse exemption of the salaries of citizens is expressly provided in the agreements to which the United States is a party, no question of the violation of an international obligation arises. It is understandable that a government should be reluctant to create a "privileged class" of citizens within its midst, and that the Departments of State and of the Treasury should have hesitated to urge before the Congress the passage of legislation in apparent violation of the axiom of political ethics that "every citizen must pay a tax."<sup>29</sup> There is apparent, however, no substantial reason why the established practice of the League of Nations and the International Labor Organization, which exempted all official incomes irrespective of the nationality of the receiver, should now be reversed. Much of the present difficulty in understanding the point of view of the international organizations would disappear if it were recalled that exemption is not accorded in the interests of, or as a concession to, individual officers or employees, but in the interest of the organization, and, ultimately, of all its member states. General exemption of salaries paid by international organizations would relieve their budgets, fed by the contributions of member states, from the burden of paying salaries at the level which would be necessary if income tax were payable. Since states do not in general tax the foreign incomes of their nationals, the principle of nationality discrimination would introduce a most undesirable inequality in the conditions of service. Nationals of the local state would, in effect, suffer a reduction in compensation to the amount levied on their official incomes. In terms of the present Act an American citizen employed by an international organization in the United States would receive less compensation than would an alien employee performing the same services in the same rank and capacity;<sup>30</sup> he would also receive less than would an American citizen employed by an international organization abroad. Even though all countries were to adopt the policy of taxing their own nationals, without regard to residence, inequalities would necessarily result from the widely varying levels of national taxation. Any attempt by the international organization to equalize the situation would create insoluble administrative problems and in the event that the organization should restore to officials or employees the amount of the taxes so imposed it would place the members of the organization other than the taxing state in a disadvantageous financial position.<sup>31</sup>

<sup>29</sup> The emphasis placed upon the fiscal provisions of the Act is indicated by the fact that H. R. 4489 was referred to the Committee on Ways and Means and not to the Committee on Foreign Affairs.

<sup>30</sup> H. R. 5512 (note 1, above) had provided for taxation of the official incomes of resident alien officers and employees of UNRRA.

<sup>31</sup> See Egon von Rarshofen-Wertheimer, *The International Secretariat*, Washington, Carnegie Endowment for International Peace, 1945, p. 237.

*Possible Amendments Required by the Charter*

The Charter provides that "The Organization shall enjoy in the territory of each of its members such legal capacity as may be necessary for the exercise of its functions and the fulfillment of its purposes" (Article 104), and "such privileges and immunities as are necessary for the fulfillment of its purposes" (Article 105, Par. 1). Representatives of the Members of the United Nations and officials of the Organization "shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connection with the Organization" (Article 105, Par. 2). The General Assembly may make recommendations with a view to determining the details of the application of these principles or may propose conventions to the members of the United Nations for this purpose (Article 105, Par. 3).

The above provisions were drafted in a spirit of extreme caution, in order to avoid prejudging the actual solution to be reached by means of the recommendations or conventions contemplated by Article 105, and, especially, to avoid any commitment to concede to officers of the United Nations the diplomatic privileges and immunities which were granted to officials of the League of Nations by Article 7 of the Covenant.

The failure of the Charter to grant express recognition of the international legal personality of the Organization, which was left "to be determined implicitly from the provisions of the Charter as a whole,"<sup>32</sup> appears to be an example of caution carried to an excess, especially if it was due, as the United States Delegation has suggested, to a desire "to avoid any implication that the United Nations will be in any sense a 'super-state'"<sup>33</sup> Whatever may have been the appropriate method of describing or defining the legal status of the Organization, it is clear that the intent of the Charter is to secure for the United Nations such legal capacities and such privileges, exemptions, and immunities as are provided by the present Act. It is believed that no amendment of the Act, insofar as it relates to the status of the Organization itself, will be required as a result of the conclusion of any convention envisaged by the Charter.

There is some evidence that the Department of State, in sponsoring the present legislation, intended that it should serve to implement completely the future obligations of the United States under the convention to be concluded for the purpose of giving effect to Articles 104 and 105 of the Charter. In fact one of the motives in seeking enactment of the legislation at the particular time may well have been to define the position of the United States in advance of any action by the General Assembly and thus to in-

<sup>32</sup> Report of Subcommittee IV/2/A on the Juridical Status of the Organization, UNCIO Doc. 803, IV/2/A/8; Report of the Rapporteur of Committee IV/2, UNCIO Doc. 933, IV/2/42 (2).

<sup>33</sup> *Report to the President on the Results of the San Francisco Conference* (Department of State Publication 2348, Conference Series 71), p. 157.

fluence the substantive content of its recommendations or of any convention that might be proposed. This endeavor to fix the privileges, exemptions and immunities of United Nations officials at the "foreign governmental official" level, and thus to forestall any proposal for the concession of a diplomatic status, received some encouragement from the indefinite language of the Charter, in which the term "diplomatic" was deliberately avoided and a general standard substituted.<sup>34</sup>

Although the *Report by the Executive Committee to the Preparatory Commission of the United Nations* made no direct recommendation as to privileges and immunities, it was clearly based upon the assumption that diplomatic status should be granted to at least the higher officers of the Organization, since it is stated that "it is by no means necessary that all officials should have diplomatic immunity."<sup>35</sup> The "Report on the Considerations affecting the Selection of the Permanent Headquarters of the United Nations" is somewhat more specific in recommending that:

Any agreement entered into by the United Nations with the host state should provide that the United Nations, its principal and subsidiary organs and the specialised agencies should enjoy all necessary guarantees and facilities provided by Articles 104 and 105 of the Charter for the free exercise, in all circumstances, of their functions, diplomatic immunities and privileges; including inviolability of buildings and property owned or occupied by the United Nations or its organs. . . .<sup>3</sup>

These indications and the general course of discussion at the meeting of the General Assembly at London point to a demand that the higher officials be granted diplomatic privileges and immunities, and that provisions to this effect be incorporated in the convention to be concluded between the United States and other members of the United Nations.<sup>37</sup> Any objection on the part of the United States to such a solution would be greatly strengthened if the Congress had not, in enacting the United Nations Participation Act,<sup>38</sup> provided that the permanent representative of the United States in the Security Council shall have "the rank and status of envoy extraordinary and ambassador plenipotentiary (Sec. 2 (a)), and his deputy that of "envoy

<sup>34</sup> Report of the Subcommittee on Privileges and Immunities to Committee IV/2, UNCIO Doc. 412, IV/2/A/2 (1); Report of the Rapporteur of Committee IV/2, UNCIO Doc. 933, IV/2/42 (2); *Report to the President* . . . (cited, note 33, above), pp. 158-160.

<sup>35</sup> Ch. V, Sec. 5, Appendix: "Study on Privileges and Immunities," United Nations Publication PC/EX/113/Rev. 1 (Nov. 12, 1945), p. 70.

<sup>36</sup> Report of the Executive Committee . . . (cited, note 35, above) Ch. X, Sec. 2, p. 115.

<sup>37</sup> On Jan. 24, 1946, a subcommittee of the Sixth Committee (Legal Question) recommended the adoption of a general convention, rather than recommendations by the General Assembly, as a means for determining the details of application of Articles 104 and 105 of the Charter. "This suggestion," it stated, "does not prejudice the separate question of the conclusion of a special convention with the State on the territory of which the seat of the United Nations will be situated." United Nations Publication, General Assembly, A/C. 6/17.

<sup>38</sup> Public Law 264, 79th Cong. (Ch. 583, 1st Sess.); approved Dec. 20, 1945.

extraordinary and minister plenipotentiary (Sec. 2 (b)). It is scarcely to be expected that other members of the Security Council will confer any lesser rank upon their representatives,<sup>39</sup> and it may reasonably be anticipated that they will claim diplomatic status for their delegates in all organs and agencies of the United Nations. It is true that a distinction based upon traditional grounds can be drawn between representatives of the members of the Organization and officers thereof, and that the latter, as international functionaries, have a weaker claim to diplomatic rank and status. It would, however, appear somewhat difficult for the United States to justify a denial of such rank and status to the Secretary General and other high officials of the United Nations in view of the provision of the recently-ratified Water Treaty with Mexico,<sup>40</sup> which, in setting up the International Boundary and Water Commission, provides that "Each Government shall accord diplomatic status to the Commissioner designated by the other Government. The Commissioner, two principal engineers, a legal adviser, and a secretary, designated by each Government as members of its Section of the Commission, shall be entitled in the territory of the other country to the privileges and immunities appertaining to diplomatic officers (Article 2, Paragraph 4)."

That there may be opposition in the Senate to any amendment of the present Act for the purpose of conferring diplomatic status upon representatives of member in or to the Organization, and upon the higher officers thereof, is, perhaps, indicated by the debate on the bill for the United Nations Participation Act. Senator Millikin objected to the proposal to grant ambassadorial rank and status to the United States representative on the Security Council on the ground that "Every other nation will be called upon to do the same thing, and pretty soon we will have a flock of diplomats at the seat of the Organization who will be suffocating in their own incense."<sup>41</sup> The discussion, although less spirited, was somewhat reminiscent of the debate in the House of Commons on the Diplomatic Privileges (Extension) Act, during which one Member charged the Government with proposing to put international officials "outside the normal run of the law, enabling them

<sup>39</sup> A possible precedent is found in Article 3, Resolution IX, adopted by the Inter-American Conference on Problems of War and Peace on Mar. 6, 1945, which provides that the *ad hoc* delegates of the American Republics to the Governing Board of the Pan American Union "shall have the rank of Ambassadors and shall enjoy the corresponding privileges and immunities. . . ." At the request of the Governing Board, the application of this provision has been suspended, pending reconsideration at the Ninth International Conference of American States or at some previous conference. In the meanwhile the following countries have appointed the special representatives contemplated by the Resolution: Argentina, Colombia, Guatemala, Mexico, the United States, and Uruguay.

<sup>40</sup> Not yet published in the U. S. Treaty Series; for text see Goodrich, L., and Carroll, M., *Documents on American Foreign Relations*, Vol. VI (1943-44), p. 558. In force, Nov. 8, 1945, *Department of State Bulletin*, Vol. XIII, No. 336 (Dec. 2, 1945), p. 901.

<sup>41</sup> *Congressional Record*, Vol. 91, No. 208, 79th Cong., 1st Sess. (Nov. 26, 1945), p. 11156.

to enter night clubs, drink after hours, and all sorts of things." <sup>42</sup> The Minister of State, Mr. Richard Law, protested against this and similar interpretations; he had not supposed, he said, "that any honourable Member has so little confidence in our Parliamentary institutions and our Parliamentary system of Government as to believe that there could ever be a Foreign Secretary who would create a vast class of privileged persons, who would devote their leisure, and probably their working hours as well, to careering incontinently about the King's highway massacring the King's lieges with absolute impunity, having first fortified themselves with unlimited quantities of duty-free wine and spirits, purchased out of tax-free incomes." <sup>43</sup>

A second modification of the Act which will be necessitated as a result of the establishment of the headquarters of the Organization in the United States will be an amendment of the provision which makes citizens of the United States, officers or employees of the Organization, liable to Federal taxation of their official incomes. <sup>44</sup> The principle of national tax exemption was established on January 28, 1946, by the Fifth Committee of the General Assembly (Administrative and Budgetary Questions) when it adopted the following recommendation: <sup>45</sup>

(1) The Committee believes there is no alternative to the proposition that national tax exemption for United Nations salaries and allowances is indispensable to equity among its Member nations and equality among its personnel. <sup>46</sup>

(2) It recommends that, pending this accomplishment, the budget of the Organization should carry a contingent appropriation to refund tax payments and that an amount equivalent to such refunds to employees because of income tax, be added to the budget contributions of the Members, whose nationals in the service of the Organization were required to pay income tax on their salaries and allowances received from the Organization. <sup>47</sup>

The justification for this recommendation was expressed by the delegate of the United Kingdom, who considered that:

The only real solution of the problem of salary equalization lay in complete tax exemption. Although he approved the intrinsic rightness of the principle of income tax, its application to international officials was fraught with difficulties. Theoretically it could be applied in three ways but on analysis all were impracticable. A national tax levy was obviously inequitable because of the wide differences in national rates. A tax imposed by the host country was unfair because that country would reap considerable profit at the expense of the Organization and

<sup>42</sup> Hansard, *Parliamentary Debates*, House of Commons, Vol. 402, No. 121 (Sept. 27, 1944), col. 368.

<sup>43</sup> Same, Vol. 403, No. 132 (Oct. 13, 1944), col. 2087.

<sup>44</sup> The conclusion of a convention providing for national tax exemption will give to the Congress the constitutional authority, and will impose upon it the obligation, to provide also for exemption from state taxation. See note 17, above.

<sup>45</sup> *Journal of the General Assembly*, No. 16, Suppl. No. 5, A/C. 5/13, p. 16.

<sup>46</sup> Adopted unanimously.

<sup>47</sup> Adopted by 17 votes to 11.

its contributors. Finally, a tax imposed by the Organization, though perhaps psychologically sound, would have little real purpose since, in effect, the Organization would simply be paying the tax it levied.<sup>48</sup>

The International Organizations Immunities Act constitutes a notable step toward an adequate solution of one of the more important legal problems created by the establishment of the seat of the United Nations upon American soil. Its defects lie in its incomplete recognition of the principle that the international interest has as great a claim to protection as has that of national states. Considerations arising from tradition, from apprehension of adverse political criticism, and, perhaps, from a certain nationalistic bias, have to some extent been permitted to obscure the principle that the sole justification for, and the measure of, exemptions and immunities from the local law are to be found in the necessity of ensuring the free working of international institutions and the complete independence of their agents from any form of national control. The local authority has also its legitimate claims, but these can be reconciled with the international interest on the basis of the mutual advantage of all. There is no reason to believe that the United States, in concluding necessary arrangements with the Organization, will be unmindful of its obligations as a host and of its ultimate interest as a member of the United Nations.

<sup>48</sup> *Journal*, No. 16 (cited, note 45, above), p. 14.

## THE FIRST MEETING OF THE GENERAL ASSEMBLY OF THE UNITED NATIONS

By WALTER H. C. LAVES<sup>1</sup> and FRANCES O. WILCOX<sup>2</sup>

The First Part of the First General Assembly of the United Nations was in session in London from January 10 to February 14, 1946. Meeting intermittently during this period also were the Security Council and the Economic and Social Council.

It is the purpose of this article to outline the general scope of the meeting and to indicate in broad terms the principal issues with which it was pre-occupied. No attempt is made to summarize all of the Assembly's work, since this will be done in the official documentation of the United Nations. The issues selected for consideration here are those which seem to hold a special significance in relation to the inauguration of the work of the United Nations or for the future development of the Organization. The activities of the Security Council and the Economic and Social Council are referred to only where essential to understanding the action of the General Assembly.

The first meeting of the Assembly in a very real sense concluded the organizational phase of the United Nations. Following the San Francisco Conference the Preparatory Commission, first through its Executive Committee and then sitting as the full Commission, prepared a series of recommendations for bringing the Organization into active operation. These recommendations<sup>3</sup> became the principal subject of the agenda for the first meeting of the Assembly.

Following a brief summary of the organization of the Assembly and of its electoral functions, the work of the Assembly is discussed below in terms of the activities of the six main committees. This has been done because the bulk of the Assembly's work in fact took place in these committees and it was here that the principal issues were most thoroughly debated.

### I. ORGANIZATION OF THE GENERAL ASSEMBLY

In accordance with the recommendation of the Preparatory Commission, the Assembly elected its President<sup>4</sup> and seven Vice Presidents<sup>5</sup> and estab-

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<sup>3</sup> *Report of the Preparatory Commission of the United Nations*, London, 1945. Cited hereafter as *Report of P. C.*

<sup>4</sup> Paul Henri Spaak (Belgium): *Journal of the General Assembly*, No. 2. Cited hereafter as *Journal*.

<sup>5</sup> The first delegates of the following countries: China, France, Union of South Africa, Soviet Union, United Kingdom, United States, and Venezuela: *Journal*, No. 3.



lished a framework of committees.<sup>6</sup> No comment is needed on any of these decisions except that relating to the General Committee. Insofar as other issues arose they are discussed in the sections below which deal with the work of the individual committees.

Regarding the establishment of the General Committee a prolonged discussion concerning its composition took place<sup>7</sup> along lines already developed in the Preparatory Commission. Some states, feeling that the General Committee would inevitably tend to deal with substantive questions, insisted that it include representatives of all delegations. Others believed that the committee could not function efficiently unless it was considerably smaller than the total membership of the United Nations. The decision to have the committee composed of the President, the seven Vice Presidents and the chairmen of the six main committees, was followed by a further determination that the committee should not make decisions on political questions. Its work was limited to assisting the President in organizing the agenda and work of the Assembly and in coordinating the activities of its committees.

## II. ELECTORAL FUNCTIONS OF THE GENERAL ASSEMBLY

The central position of the General Assembly in the Organization is clearly demonstrated by its wide electoral powers. In fact, most of the other organs of the United Nations depend wholly or in part upon appropriate action by the Assembly in the election of their members. The Charter provides, for example, that the non-permanent members of the Security Council, the members of the Economic and Social Council, and certain of the members of the Trusteeship Council, shall be elected by the Assembly. Moreover, the Security Council and the Assembly, acting concurrently, select the judges of the International Court of Justice. Finally, the Charter provides that the General Assembly, on the recommendation of the Security Council, will appoint the Secretary-General.<sup>8</sup> Several important problems arose in connection with these electoral functions.

The first official act of the Assembly, the election of its President, brought to a head the whole question of the use of the nominating process in connection with the secret ballot. Following the nomination of Mr. Lie of Norway, Mr. Spaak of Belgium was elected to the office without having been nominated. This result of an obvious behind-the-scenes maneuver led the Ukrainian delegation to move an amendment to the Provisional Rules of Procedure of the Assembly so as to require that all candidates in Assembly elections should be nominated and discussed except where the Assembly decides

<sup>6</sup> *Journal*, No. 3. *Main Committees*: I. Political and Security, II. Economic and Financial, III. Social, Humanitarian and Cultural, IV. Trusteeship, V. Administrative and Budgetary, VI. Legal. *Procedural Committees*: General Committee and Credentials Committee. *Standing Committees*: Advisory Committee for Administrative and Budgetary Questions and Committee on Contributions. *Ad Hoc Committees*: League of Nations Committee and Permanent Headquarters Committee.

<sup>7</sup> *Journal*, No. 3.

<sup>8</sup> See Arts. 23, 61, 86, 97. Also Art. 8 of the Court Statute.

unanimously to vote by acclamation.<sup>9</sup> In spite of the arguments that the nominating process would permit the Assembly to consider the relative merit of different candidates and that it is in complete harmony with the constitutional practices found in most states, it was finally agreed that "there shall be no nominations" in Assembly elections.<sup>10</sup> This decision was apparently inspired by the fear, on the part of certain small states in particular, that their complete freedom and independence in voting could not be retained unless elections were absolutely secret and without nominations. There can be no doubt that the abolition of the nominating process will encourage cloak-room politics at future meetings of the Assembly.

The election of the non-permanent members of the Security Council resulted in a well-balanced group in accordance with the terms of the Charter. Due regard seems to have been paid, in the first instance, to the contribution of members "to the maintenance of peace and security and to the other purposes of the Organization, and also to equitable geographical distribution." With the Netherlands from Western Europe, Poland from Eastern Europe, Egypt representing the Arab states, Australia from the South Pacific, and Brazil and Mexico from the Latin America group, a pattern of representation has developed quite comparable to that followed in the League of Nations.<sup>11</sup> Both the Chinese and French delegations, however, noted that important groups of states—like the Asiatic mainland—had not been given non-permanent representation and insisted that the election should in no way constitute a precedent for the future. With the admonitions of France and China and the experience of the League of Nations in mind, it is safe to say that there will be considerable pressure within the Organization, especially when Sweden, Portugal, Albania, Italy, and other new members are admitted, to increase the size of the Security Council in order to make it more representative in character.

The election of the 18 members of the Economic and Social Council took place in an equally satisfactory manner. While the Charter (Article 61) lays down no standards for the Assembly to follow, it was recognized at San Francisco that the work of the Economic and Social Council would be severely handicapped unless the Great Powers and the other economically important nations of the world were members. The Council as elected is not only broadly representative from a geographic point of view; it also includes most of the influential economic states within the Organization.<sup>12</sup>

<sup>9</sup> *United Nations, General Assembly*, Document A. C. 6/7.

<sup>10</sup> Doc. A/14. This provision was adopted in Committee 6 by a 22-21 vote. *Journal*, No. 3, No. 16, pp. 317-337.

<sup>11</sup> Australia, Brazil, and Poland were elected for two year terms, the other states for one year. See *Journal*, No. 4, pp. 61-75.

<sup>12</sup> Seventeen of the eighteen members were elected on the first ballot: Belgium, Canada, Chile, China, France, and Peru were elected for three years; Cuba, Czechoslovakia, India, Norway, the Soviet Union, and the United Kingdom for two years; Colombia, Greece, Lebanon, the Ukraine, the United States, and Yugoslavia for one year. Apart from the

One of the most perplexing electoral problems confronting the Assembly related to the terms of office of the members of the various Councils, elected at this January meeting, since the next elections will regularly take place in September. The Charter specifies<sup>13</sup> terms of one, two and three years and the Provisional Rules of Procedure provide<sup>14</sup> that the terms begin "immediately on election" and end "on the election of a member for the next term." If the next installation were to take place in September, 1946, then clearly the terms of the members elected in January would be cut short by several months. On the other hand, if the next election were postponed until September, 1947, the terms would be extended by eight months.

The Assembly adopted a sensible compromise.<sup>15</sup> It revised the Rules of Procedure so that henceforth Council members elected during the fall session of the Assembly would take office the following January. To be sure, this provision introduces an interval—a kind of "lame duck" interval—between each election and the date the newly elected Council members take office. But there would seem to be no serious objection to such an interval, particularly since there is no necessary close relationship between the sessions of the Assembly and the activities of the various Councils.

Finally, the Assembly, in conjunction with the Security Council, proceeded to the election of the 15 members of the International Court of Justice. There was relatively little political maneuvering or log-rolling. Rather there was a genuine disposition to staff the new court with outstanding men and to make certain that the judges elected would represent the main forms of civilization and the principal legal systems of the world.<sup>16</sup> Only two aspects of the election need be mentioned here. In the first place, the growing power of Latin America in international affairs was demonstrated when four Latin American judges were elected in place of the three customarily elected to the Permanent Court of International Justice. In the second place, there was some criticism of the election machinery on the ground that the Assembly and the Security Council failed to act in strict accordance with the instructions of the Court Statute (Article 8) to hold their elections independently of each other. In fact the two organs met simultaneously in different rooms of the same building and frequently communicated with each other with respect to the progress of the election.

Great Powers, four members are from Latin America, one from the Arab League, three from Eastern Europe, two from Western Europe, one from Southern Europe, and two from the British Dominions. *Journal*, No. 3-4.

<sup>13</sup> Arts. 23, 61 and 86.

<sup>14</sup> Art. 78.

<sup>15</sup> *Journal*, No. 29, pp. 498-517; Docs. A/14, A/15, A/53. *Journal*, No. 31, pp. 576-581. *Journal*, No. 32.

<sup>16</sup> Article 9 of the Statute. See Doc. A/25; *Journal*, No. 24, p. 229; No. 25. Following are the judges elected: Mo Hsu (China), Charles de Visscher (Belgium), Jules Basdevant (France), Jose Gustabo Guerrero (El Salvador), Sergei Krylov (U.S.S.R.), Arnold McNair (U.K.), Fabela Alfaro (Mexico), Green Hackworth (U.S.A.), Alejandro Alvarez (Chile),

## III. POLITICAL AND SECURITY AFFAIRS (COMMITTEE 1)

According to the recommendations of the Preparatory Commission the Political and Security Committee would normally consider such questions as the admission, suspension, and expulsion of Members, political and security matters within the scope of the Charter, the general principles of coöperation in the maintenance of peace and security, and the peaceful adjustment of situations likely to impair friendly relations among nations.<sup>17</sup> Even though the first meeting of the Assembly was primarily organizational in character, Committee 1 dealt with several significant problems: 1) the establishment of the atomic energy commission; 2) the language problem; and 3) the relations of non-governmental organizations with the United Nations.

*The Atomic Energy Commission*

Because of its wide implications for world peace and security, the resolution providing for the establishment of a United Nations commission to consider problems arising from the release of atomic energy and related matters was without doubt the most important single item on the Assembly's agenda. Most delegates agreed that if the Organization could not come to a speedy understanding on that issue then the United Nations itself could hardly expect to survive. As a result of this overwhelming sentiment for action Committee 1 resorted to the extraordinary procedure of approving the resolution first and discussing it later.

At the Moscow conference in December, 1945, the Foreign Ministers of the United Kingdom, the Soviet Union, and the United States agreed to recommend for the consideration of the General Assembly the establishment of an atomic energy commission. The draft resolution providing for the commission was presented to the Preparatory Commission on January 6th on behalf of the three powers and France, China, and Canada, who assumed the initiative in sponsoring it before the Assembly.<sup>18</sup> According to the terms of the resolution the commission is to be made up of one representative from each of the eleven states represented on the Security Council, and Canada when that state is not a member of the Council. While it is established by the Assembly it is to carry on its activities under the general direction of the Security Council. It is to "inquire into all phases of the problem and make such recommendations from time to time with respect to them as it finds possible." In particular it will make specific proposals:

- (a) For extending between all nations the exchange of basic scientific information for peaceful ends;
- (b) For control of atomic energy to the extent necessary to ensure its use only for peaceful purposes;

J. Philadelpho de Barros Azevedo (Brazil), Badawi Fasha (Egypt), J. E. Read (Canada), Milovan Zoricic (Yugoslavia), Helge Klaestad (Norway), Bohdan Winiarski (Poland).

<sup>17</sup> Report of P. C., p. 21.

<sup>18</sup> See Docs A/C. 1/6; A/C. 1/2; A/12.

(c) For the elimination from national armaments of atomic weapons and of all other major weapons adaptable to mass destruction;

(d) For effective safeguards by way of inspection and other means to protect complying states against the hazards of violations and evasions.

Even before the Assembly met two extremely important questions arose relating to the meaning of the resolution. Would the recommendations of the Commission, when approved by the Security Council, be binding upon the members of the United Nations without formal acceptance by their governments? Would member states be expected to exchange basic scientific information before effective security arrangements had been developed for the mutual protection of all concerned?

On both these points leaders of the United States delegation offered emphatic reassurance. Secretary of State Byrnes, in his speech of December 30, and Senator Tom Connally in presenting the resolution to Committee 1, both insisted that the commission could study the problem and make recommendations but that it had no authority to compel action on the part of any government. "Each state," said Senator Connally, "would be free to consider the acceptance or rejection of the commission's recommendations in accordance with its own Constitutional processes."<sup>19</sup> This argument seems wholly consistent with the terms of the Charter. The General Assembly, according to Articles 11-17, is carefully limited in its authority. It may initiate studies, it may consider matters within its competence and it may make recommendations to the member states or to the other organs of the United Nations. It cannot go further than that. While Article 22 gives it authority to create subsidiary organs, it is inconceivable that it could create an agency like the atomic energy commission and endow it with power which the Assembly itself does not possess. Moreover, Article 26 makes it clear that any plans formulated under the direction of the Security Council for the regulation of armaments would have to be submitted to the members of the United Nations for their approval.

As to the second question Secretary Byrnes pointed out on December 30, and again on January 9, that the four objectives outlined in the resolution establishing the commission are not intended to indicate the order in which the objectives are to be considered. Adequate safeguards, in other words, would apply not merely to certain stages of the commission's work, but would apply "in relation to every phase of the subject and at every stage. . . . Neither we nor any other nation would be expected to share our armament secrets until it was certain that effective safeguards had been developed to ensure our mutual protection."

Committee 1 thereupon approved the resolution without change, and by a unanimous vote. Some delegations pointed out that inasmuch as the Commission was a creature of the Assembly it was administratively unsound

<sup>19</sup> *Journal*, No. 11, p. 3. For the debates in the Committee and the Assembly see *Journal*, No. 11, 1st Supplement, p. 2; No. 12, 1st Supplement, p. 9; No. 14, p. 290.

to have it submit its reports and recommendations to, and receive its directions from, the Security Council. In the same vein it was also argued that the membership of the Commission should be more representative of the United Nations as a whole. However, in spite of the administrative anomaly involved, the arrangement worked out in the resolution would seem to be both practical and in conformity with the principles of the Charter. In the first place, the profound interest of the entire world in solving the extremely difficult atomic energy problem is reflected in the provision that the Commission should be set up and its terms of reference approved by the Assembly. The vote of the Assembly thus affords a democratic basis for the Commission and its work. In the second place, the Charter has already conferred (Article 24) upon the Security Council primary responsibility for the maintenance of peace and security. It would be unfortunate, therefore, if the membership of the Commission were expanded unduly beyond the membership of the Security Council. It would be unfortunate, too, if the Commission were placed in such a position that it might be called upon by the Assembly to submit reports which the Security Council would consider detrimental to peace and security. That is why the resolution provides that the reports and recommendations of the Commission shall be made public unless the Security Council, in the interest of peace and security, otherwise directs. Where appropriate the Security Council will transmit such reports to the Assembly, to the members and to the other organs of the United Nations.

In some quarters the fear has been expressed that the Commission, because of the very nature of its functions, might invade the legitimate field of activity of the Security Council or the Military Staff Committee. The resolution makes adequate provision for such an eventuality. "The Commission shall not infringe upon the responsibilities of any organ of the United Nations," reads the last paragraph, "but should present recommendations for the consideration of those organs in the performance of their tasks under the terms of the United Nations Charter." Given the role of the Military Staff Committee, which was established to advise and assist the Security Council on all questions relating to the Council's military requirements,<sup>20</sup> and the specialized task of the Atomic Energy Commission, the Security Council should be able to coordinate the activities of the two agencies effectively.

Since Committee I adopted the resolution before thoroughly discussing its merits, many important questions concerning the competence of the Commission were left unanswered. The Commission is to deal with the problems raised by the discovery of atomic energy "and other related matters." What does the term "other related matters" mean? Moreover, it is to make specific proposals for the elimination from national armaments of atomic weapons and of "all other major weapons adaptable to mass destruction." What are such weapons? Does this mean that the Commission is to

<sup>20</sup> Article 47.

make proposals for a comprehensive disarmament program? If so, do paragraphs a, b, c, and d, cited above—including the provisions for the exchange of basic scientific information and for effective safeguards by way of inspection—all apply to all other major weapons of mass destruction as well as to atomic energy? While space precludes a discussion of these problems here, it is clear that one of the first tasks of the Commission will be to define more clearly its own terms of reference.

### *The Language Problem*

The problem of the use of languages in United Nations proceedings was highly political in nature and potentially full of controversy. At San Francisco English and French were the working languages of the conference, and Chinese, English, French, Russian, and Spanish the official languages. All conference documents and records were issued in the two working languages although the Charter itself was prepared and opened for signature in the five official languages.<sup>21</sup>

In the meetings of the Executive Committee and the Preparatory Commission<sup>22</sup> the delegate of Ecuador, supported by several other delegations, argued that all the official languages should be regarded as working languages and should have an equal status in the United Nations. It was pointed out that there were eighteen Spanish speaking members of the United Nations, and failure to admit Spanish as a working language would severely handicap those nations inasmuch as they would be compelled to place an undue emphasis on a knowledge of English and French in choosing their delegates to the Assembly. The Soviet delegation further objected that China and the Soviet Union were permanent members of the Security Council and that English and French should not be given preferential treatment.

When the debate on this issue was resumed in Committee 1 the Brazilian and Dutch delegates, stressing the great desirability of breaking down linguistic barriers, came forward with the suggestion that the Organization have only one official language, preferably English. Committee 1 was confronted with the necessity of effecting a compromise between two rather contradictory principles: (1) liberal language rules which would enable any delegate to express himself in his own tongue, and (2) restrictive rules which would avoid an excessive number of translations and thus make for more efficient meetings. In the end the Committee fell back on the practice evolved since San Francisco. "In all organs of the United Nations other than the International Court of Justice," reads General Assembly Rule No. 57, "Chinese, English, French, Russian and Spanish shall be the official languages,

<sup>21</sup> The only reference made to languages in the Charter is found in Article 111: "The present charter, of which the Chinese, French, Russian, English, and Spanish texts are equally authentic, shall remain deposited in the archives of the Government of the United States of America."

<sup>22</sup> See *Report of P. C.*, pp. 119-123.

and English and French the working languages."<sup>23</sup> Speeches made in either of the working languages will be interpreted into the other working language, and speeches made in Russian, Chinese or Spanish will be interpreted into both French and English. All resolutions and other important documents, however, will be made available in all five official languages.<sup>24</sup>

In practice, therefore, the work of the United Nations will be carried on much as it has been since San Francisco. English and French will continue to hold their positions as the diplomatic languages of our times. On the other hand, the decision to publish the important documents in Russian, Chinese and Spanish will do much to keep the peoples of the world in touch with the major developments within the Organization and thus give to it a broader popular base upon which to rest. Still another significant step toward breaking down language barriers was taken when the committee recommended that the Secretary-General study thoroughly the possibility of installing a telephonic system of interpretation for the use of the Assembly and, if possible, arrange for the establishment of such a system for the next meeting. With the instantaneous translation of speeches into several languages the work of the Assembly could be speeded up considerably and meetings take on new meaning for many delegates who hitherto have been compelled to sit through tedious hours of translations.

#### *Relations with Non-Governmental Organizations*

If the matter of atomic energy was the most important issue before the Assembly, the problems relating to the participation of non-governmental organizations in the United Nations were perhaps the most controversial. While the decisions arrived at—reached after long and heated debate—were not in themselves far reaching, they related to the basic character of the Organization and presaged future conflicts on the role which organized groups other than sovereign states shall play in the deliberations of the United Nations.

Even before the Assembly convened the issue was raised by the World Federation of Trade Unions in a letter dated December 13, 1945, addressed to the President of the Preparatory Commission. The letter recalled the important role of labor in world affairs and presented an official request from the WFTU for representation on the various bodies to be set up by the United Nations. At the first meeting of the General Committee the Ukraine delegation asked that the proposal be placed on the agenda of the Assembly. Shortly afterward similar requests were received from the International Coöperative Alliance, the International Democratic Federation of Women.

<sup>23</sup> Article 39 of the Court Statute provides that English and French shall be the official languages of the Court.

<sup>24</sup> See Docs. A/C. 1/8; A/20; also *Journal*, No. 18, 1st Supplement, p. 12; No. 21, p. 379.



the World Federation of Democratic Youth, and the American Federation of Labor. The latter request was officially sponsored by the United States delegation.<sup>25</sup>

While these requests varied somewhat, their general implications were much the same. The WFTU position, as summarized by WFTU representatives on January 16, 1946, consisted of three proposals:

- a) to have permanent representation in an advisory and consultative capacity, without vote but with a limited right to speak, in the General Assembly;
- b) to be brought into regular consultation with the Economic and Social Council according to the terms of Article 71 of the Charter; and
- c) to be granted full participation later on, including the right to vote, in the work of the Economic and Social Council.

Clearly the Charter does not contemplate such close-working relations with non-governmental organizations. Article 71, to be sure, provides that the Economic and Social Council "may make suitable arrangements for consultation with non-governmental organizations." But the United Nations is essentially an organization of sovereign states. Since the Economic and Social Council (Article 31) is made up of 18 members of the United Nations elected by the General Assembly, it would not be possible to award an organization like the WFTU the right to vote without a revision of the Charter. Nor would it seem possible to invite non-governmental organizations to participate actively in the work of the Economic and Social Council and thus bestow upon them privileges which the 33 non-members of the Council do not ordinarily enjoy.<sup>26</sup>

A somewhat different situation obtains in respect to the Assembly. The Charter itself makes no provision for relations between non-governmental organizations and the Assembly. One might argue, even so, that the Assembly has a perfect right to invite the representatives of non-governmental organizations to attend its meetings as observers and to occupy special seats set aside for them. But to grant them even a limited "right" to speak would, in the eyes of many, not only violate the spirit of the Charter, but would be the opening wedge in a drive to obtain the right to sit on committees, to participate in the general debate, and to vote.

In view of these considerations, and in view of the fact that concessions granted to one organization would inevitably result in a flood of applications from other organized groups, the General Committee moved cautiously. By a vote of 7 to 6, with one abstention, it submitted a resolution to the Assembly recommending that "the Economic and Social Council should as

<sup>25</sup> See Docs. A/Bur/8; A/Bur/9; A/Bur/11; A/Bur/12; A/Eur/19.

<sup>26</sup> Article 69 provides that the Council "shall invite any member of the United Nations to participate, without vote, in its deliberations on any matter of particular concern to that member."

soon as possible adopt arrangements allowing the WFTU to take part, for purposes of consultation, in the work of the Economic and Social Council, its commissions and committees." A second resolution inviting the WFTU and the AF of L to send their representatives to attend meetings of the Assembly as official guests was rejected largely because the sponsors of the resolution objected to the inclusion of the AF of L in the same text.<sup>27</sup> On the motion of the United States delegation the first resolution was referred by the Assembly to Committee I for further study.

In Committee I, as in the General Committee, the United States delegation argued that the requests of all non-governmental organizations should be referred to the Economic and Social Council without any action by the Assembly. This position seemed logical enough inasmuch as the Preparatory Commission had already placed the matter on the agenda of the Economic and Social Council and it could be assumed that the Council, after careful consideration of all the factors involved, would take appropriate action under Article 71. The United States also contended that Article 71 was permissive rather than mandatory in character and that the General Assembly, therefore, had no power to adopt a resolution in effect directing the Economic and Social Council to enter into relations with any particular organization. If such a resolution were adopted, however, the United States insisted that it should not be discriminatory in nature but that the AF of L and other deserving organizations should be awarded the same consultative or other status as might be granted the WFTU.

Some of the WFTU supporters—particularly the Ukraine, the Soviet Union, Belgium, and France—argued that the WFTU, because of its numerical strength and international character, merited a special position in the United Nations. They urged, therefore, that it be admitted in an "advisory" capacity to all the meetings of the Economic and Social Council. They argued that the AF of L was not an international organization and hardly deserved the same treatment as the WFTU.<sup>28</sup>

In at least one respect the argument advanced by the United States delegation does not seem to have been in entire accord with the Charter. In spite of the permissive terms of Article 71 the Charter clearly bestows upon the Assembly the authority to make recommendations on any matter within the scope of the Charter or relating to the powers and functions of any of the organs provided for in the Charter.<sup>29</sup> On the other hand, Article 71 is not confined to international organizations; the Economic and Social Council may also enter into consultative arrangements with national organizations "after consultation with the member of the United Nations concerned."

<sup>27</sup> Doc. A/Eur/16; A/21. *Journal*, No. 12, pp. 279-80; No. 15, p. 307; No. 19, p. 361.

<sup>28</sup> For arguments see *Journal*, Nos. 12, 15, 19, cited above. Also No. 23, 1st Supplement, pp. 14-17; No. 25, 1st Supplement, pp. 18-20; No. 30, 1st, p. 28; No. 31, 1st, pp. 26-28; No. 32.

<sup>29</sup> See Articles 10, 11, 13.

Largely on the basis of its appeal not to discriminate against the AF of L and other organizations, the United States won a favorable vote on its draft resolution in both Committee 1 and the Assembly.<sup>30</sup> Paragraph (a) recommends that "the Economic and Social Council should as soon as possible adopt suitable arrangements enabling the World Federation of Trade Unions and the International Coöperative Alliance as well as other international non-governmental organizations whose experience the Economic and Social Council will find necessary to use, to collaborate for purposes of consultation with the Economic and Social Council." Paragraph (b) provides for similar arrangements with the AF of L "as well as other national and regional non-governmental organizations whose experience the Economic and Social Council will find necessary to use." It will be noticed that the words "advisory capacity" have not been used. It will be noticed, too, that the resolution is much less comprehensive than the original request presented by the WFTU.

It was unfortunate but inevitable that the debate on such an important issue had to take place in an atmosphere charged with domestic and international political considerations. The WFTU, with affiliated unions (including the CIO) in some 50 states, was anxious to establish itself as the spokesman for labor in the United Nations. The AF of L was just as anxious to be awarded an equal status with the WFTU and thus enhance its position in its rivalry *vis-à-vis* the CIO. Since many delegations were relying on the support of strong trade union movements at home, logic often gave way to factors of politics and prestige.

#### IV. ECONOMIC, SOCIAL AND HUMANITARIAN AFFAIRS (COMMITTEES 2 AND 3)

Committee 2, Economic and Financial, and Committee 3, Social and Humanitarian, shared responsibility in examining Chapter III of the Preparatory Commission Report relating to the Economic and Social Council. In addition, the Assembly referred to Committee 2 the important UNRRA resolution and to Committee 3 the question of refugees.

Those matters relating specifically to economic affairs and the proposed Commissions of the Economic and Social Council in this field (Economic and Employment, Statistical, Temporary Transport and Communication, and Fiscal Commissions) came before Committee 2. Matters relating to plans for Commissions in the social field (Human Rights, Temporary Social, Narcotic Drugs, and Demographic Commissions) were referred to Committee 3. The two Committees jointly considered a number of items in the Report of the Preparatory Commission which could not be clearly allocated to the one or the other.<sup>31</sup>

The parts of the Report of the Preparatory Commission referred to them brought forth little discussion, and were approved by the Committees and

<sup>30</sup> See Doc. A/54.

<sup>31</sup> *Journal*, No. 11, Supplement No. 2, p. 2 and Supplement No. 3, p. 2.

by the Assembly for transmission to the Economic and Social Council. In this connection the approval of the setting up of the various Commissions to be established under the Economic and Social Council deserves special mention. Through these Commissions the machinery of the United Nations will be greatly augmented and a vast amount of work in the economic and social field made possible.

One issue, which was singled out for some discussion, and which will come up for more detailed consideration in the future, relates to the makeup of the Commissions.<sup>32</sup> A debate has been going on for some time as to whether Commission members should be persons selected by the Economic and Social Council or representatives of countries designated by the Council. It has been argued, on the one hand, that only if Commission members are outstanding individuals, selected and appointed by the Council and free of national governmental control, could the Commissions hope to develop truly United Nations policies. Others argued that if Commission recommendations are to have a realistic value, and any likelihood of adoption, they must be drawn up by persons who are closely in contact with governmental policies and programs and can give assurances that the recommendations would be acceptable to their governments. A third view has been that the Economic and Social Council should select and appoint individuals from among government personnel.

The Preparatory Commission Report<sup>33</sup> recommended:

37. Most Commissions should contain a majority of responsible highly-qualified governmental representatives. Where the work of a commission is likely to result in recommendations for specific action by governments, acceptance of this principle would add realism and responsibility to the advice of the commission and improve the prospects of implementation by governments.

38. Non-governmental members of commissions, with appropriate qualifications, might be chosen by the Council from among the nationals of any Member of the United Nations. Such members might include government officials chosen by the Council in their personal capacity, after the Council had obtained the consent of the government concerned.

The discussion of this issue was not extensive, but, following upon comments by the delegates from the United States, the United Kingdom, and Canada, and in spite of an explanation by Sir Ramaswami Mudaliar that the Preparatory Commission "had felt that it was highly desirable to have a majority of governmental representatives in the commission . . .," the Committee agreed that paragraphs 37 and 38 "should not be regarded as binding upon the (Economic and Social) Council and that the views expressed should be incorporated in the report of the subcommittee."<sup>34</sup>

The observations of the Preparatory Commission on the relationships of

<sup>32</sup> *Journal*, No. 13, Supplement No. 3, p. 1.

<sup>33</sup> *Report of P. C.*, p. 39.

<sup>34</sup> *Journal*, No. 13, Supplement 3, p. 2-3.

the United Nations to specialized international agencies<sup>35</sup> were briefly discussed. Special emphasis was placed upon 1) the need for using imagination in developing new types of institutions for international coöperation so as to bring nations closer together for finding solutions of common problems and so as to insure quicker translation of international agreements into effective national action, and 2) the need for coördinating the work of various agencies as suggested in the Preparatory Commission Report, and possibly by considering the establishment of centralized as well as regional headquarters for all the principal agencies. The Observations of the Preparatory Commission were approved for the consideration of the Economic and Social Council.

Committee 2 also had referred to it a draft resolution on UNRRA, submitted by the United Kingdom. This resolution, aimed to support UNRRA in its work of carrying relief to devastated areas, appealed to states which had not responded to the UNRRA Council's request (August, 1945) for an additional contribution of one per cent of their national income, and also urged other "peace loving states" to join UNRRA. Discussion centered around proposed amendments, including one that "peace loving states" should mean only those who were members of the United Nations, and another, proposed by the United States, that the terminal dates for UNRRA work be set in Europe as the end of 1946, and in the Far East at March 1947. The resolution finally adopted by the Assembly incorporated both of these amendments and established a Committee to consult with the states referred to, toward speeding increased contributions to UNRRA. Finally, it instructs the Secretary General to arrange for the United Nations to receive from the UNRRA full reports of its work.<sup>36</sup>

The most controversial issue to come before these two committees, and certainly one of the most important political issues to come before the Assembly, was that of refugees, which was put on the agenda of Committee 3.<sup>37</sup>

Since the question of handling refugees is of great concern to all the United Nations, the United Kingdom submitted to the Assembly a resolution aiming to bring the matter immediately to the attention of the Economic and Social Council for study and recommendation in terms of the administrative and other international institutions required. However, it was clear that on certain political aspects of the problem the Economic and Social Council would require guidance from the Assembly, and it was in these, rather than on the institutional aspects, that the principal conflict occurred in the Assembly.

<sup>35</sup> *Report of P. C.*, Ch. VIII, Section 1 B. *Journal*, No. 15, Supplements 2 and 3, p. 4.

<sup>36</sup> Document A/23. For discussion of this issue see *Journal*, No. 12, page 4; No. 16, p. 9; No. 18, p. 13; and No. 19, p. 17.

<sup>37</sup> See the discussion of this issue in *Journal*, No. 18, p. 8; No. 19, p. 12; No. 21, p. 15; No. 23, p. 18; No. 25, p. 22; No. 28, p. 26; No. 29, p. 31 (discussion in Committee 3); and General Assembly debate in *Journal*, No. 31, p. 544.

The central difference was whether the individual refugee or his country of origin should ultimately determine whether and when he should return to that country. Mrs. Roosevelt, speaking in support of freedom of choice for the individual, during one of the most dramatic sessions of the Assembly, made clear the issue ". . . we here in the United Nations are trying to frame things . . . which will consider first the rights of man, which will consider what makes man more free: not governments but man."<sup>35</sup>

Flowing from this difference in fundamental approach were the divergent attitudes toward three specific aspects of the administration of refugee affairs. The minority were especially concerned lest the term "refugees" become a safeguard for war criminals, quislings, and traitors who should be returned for trial to their country of origin. The United States and the United Kingdom, supported by the majority of Members, while anxious not to protect against punishment those who had opposed the war of the United Nations, feared equally that the terms "war criminals," "quislings," and "traitors" might be used to cover political dissidents who had aided the war of the United Nations but who now differed with the particular government in power in their country of origin.

The minority were opposed to permitting in refugee camps any propaganda against the United Nations or any of its members, or against the return of refugees to their native lands. The majority of the Committee and of the Assembly favored freedom of speech and full opportunity for all refugees to receive any available information on the basis of which to make up their minds.

The minority wanted the administrative personnel of refugee and displaced persons camps to be composed of representatives of nationals of countries whose citizens are the refugees, for through this personnel the refugees would receive more accurate and more complete information regarding the economic and social conditions in their countries of origin. They would then be able to make a better decision based on full knowledge of the facts. The majority again was ready to rely on its faith in freedom of access to information and expressed fear of possibly overzealous supervisors and the special pressures which refugees might be subjected to and be unable to resist.

The depth of feeling on these three issues is indicated by the fact that they were fully debated in Committee 3, then in its drafting subcommittee, and, after adoption by Committee 3 of its Reporter's conclusions, debate on the three issues was again reopened on the floor of the Assembly. Here again the minority view was put to a vote, and again defeated. To many observers these debates revealed much the most fundamental difference among the United Nations and forecast future difficulties which will severely tax the cohesive elements in the Organization.

The final resolution adopted by the Assembly<sup>36</sup> refers the urgent problem

<sup>35</sup> *Journal*, No. 31 p. 547.

<sup>36</sup> Document A/45.

of refugees and displaced persons to the Economic and Social Council for study and for report to the next meeting of the General Assembly. It recommends that the Council take into account the following principles: 1) that the problem is international in scope; 2) that no refugee or displaced person shall be compelled against his will to return to his country of origin, unless he be a war criminal, quisling, or traitor who is required to be surrendered in conformity with present or future international agreements; 3) that the future of persons not returned shall be the concern of whatever international body may be authorized to deal with refugees, unless the country of their residence has made arrangements; and 4) that assistance shall be provided, through promotion of bilateral agreements or otherwise, to effect the early return of displaced persons to their country of origin. The Assembly in the resolution

Considers that Germans being transferred to Germany from other states or who fled to other states from Allied Troops, do not fall under the action of this declaration insofar as their situation may be decided by allied forces of occupation in Germany, in agreement with the governments of the respective countries.

#### V. TRUSTEESHIP (COMMITTEE C)

When the Assembly convened it was faced with the necessity for taking action to implement those sections of the Charter dealing with non-self-governing territories (Chapter XI) and the international trusteeship system (Chapters XII and XIII). The early establishment of the trusteeship system seemed particularly desirable inasmuch as the liquidation of the League of Nations would leave the status of the League mandated areas unclear. According to Article 86, however, the membership of the Trusteeship Council was to be equally divided between those members of the United Nations which administer trust territories and those which do not—the total number to include the five Great Powers. As no trusteeship agreements had been concluded since San Francisco, the prospects for constituting the Trusteeship Council looked none too bright.

In the Executive Committee considerable attention had been given the possibility of setting up a temporary Trusteeship Committee which could carry on pending the creation of the Trusteeship Council. This idea was abandoned in the Preparatory Commission, however, largely because of the fear that it might further delay the establishment of the trusteeship system. In its place the Preparatory Commission drafted a recommendation for the General Assembly calling upon those states administering territories under League of Nations mandate to undertake practical steps, in concert with the other states directly concerned, for the speedy conclusion of trusteeship agreements.<sup>40</sup>

<sup>40</sup> See *Report of the Preparatory Commission*, pp. 49–56; also *United Nations Preparatory Commission, Committee A: Trusteeship*, London, 1945.

This draft resolution had its effect even before Committee 4 had the opportunity to consider it. In the opening sessions of the Assembly the mandatory powers made their policies clear. On January 17 Mr. Bevin stated, amid prolonged applause, that preliminary negotiations had already started for placing Tanganyika, the Cameroons, and Togoland under trusteeship. Steps would also be taken in the near future, he said, to establish Transjordan as an independent state, although no proposals would be put forth in respect to Palestine until the Anglo-American Committee of Enquiry had made its report.<sup>41</sup> Other states followed in rapid order. New Zealand announced intentions to place Western Samoa under trusteeship. Australia made a similar announcement in respect to New Guinea and New Hebrides, Belgium in respect to Ruanda-Urundi, and France in respect to Togoland and the Cameroons. With public declarations from these five states to rely upon, the establishment of the trusteeship system envisaged in Chapters XII and XIII became at least a mathematical possibility.

These unexpected developments called for a shift of emphasis in the work of Committee 4. While the draft resolution of the Preparatory Commission had dealt exclusively with Chapters XII and XIII of the Charter it now became desirable to give increased attention to the implementation of the obligations resting upon all the colonial powers under Chapter XI. Actually Chapter XI is much more important in some respects, since it lays down far-reaching duties and obligations for all colonial powers with respect to the administration of non-self-governing territories regardless of whether the trusteeship system ever comes into effect. The principles enumerated therein apply now to the hundreds of millions of dependent peoples scattered over the world. As the result of American initiative the Committee, therefore, enlarged the draft resolution by reminding members of the United Nations responsible for the administration of non-self-governing territories of the responsibility they had assumed under Chapter XI to

recognize the principle that the interests of the inhabitants of these territories are paramount. They accept, as a sacred trust, the obligation to promote to the utmost the well-being of the inhabitants of these territories. To that end they accept certain specific obligations, including the obligation to develop self-government and to assist the inhabitants in the progressive development of their free political institutions.

The Committee was well aware that beautiful phrases, however well turned, would not in themselves accomplish the desired objectives. They therefore incorporated in the resolution a Chinese amendment requesting the Secretary-General to include in his annual report a summary of the information transmitted to him by members of the United Nations under Article 73 of the Charter relating to the economic, social, and educational conditions in the territories for which they are responsible.<sup>42</sup> The publication of this material in the Secretary General's report should do much to help

<sup>41</sup> *Journal*, No. 8, p. 173.

<sup>42</sup> See Doc. A/34; A/C. 4/10; A.C. 4/15; A/C. 4/21.



focus the spotlight of public opinion upon the dependent areas and raise the standards of administration in respect to non-self-governing territories.

During the elaboration of the American draft resolution, Committee 4 devoted considerable discussion to the meaning of the phrase "states directly concerned." Article 79 of the Charter expressly provides that the terms of trusteeship for each of the trusteeship territories "shall be agreed upon by the states directly concerned," including the mandatory power in the case of territories held under mandate. It follows that each of the states directly concerned in a particular territory in effect has a veto on the trusteeship agreement relating to that territory and on its alteration or amendment.

No doubt with Palestine and the Italian colonies in mind, the Arab states pressed for a definition of the term. The Iraq delegation submitted a proposal outlining certain criteria for determining the states directly concerned including such factors as geographic propinquity and cultural, linguistic, economic or social ties with the territory to be placed under trusteeship. The United States delegation, however, supported by the present mandatory powers and the Soviet Union, firmly resisted all such attempts to define in advance the states directly concerned. As John Foster Dulles pointed out in the Assembly "any abstract definition might have given states not genuinely concerned in establishing the trusteeship system a legal position which might in practice have impeded the full and prompt establishment of that system."<sup>43</sup> On this point the position taken by the United States would seem to be both logical and in conformity with the Charter. Innumerable difficulties will be avoided in the future if the states immediately concerned make the initial determination through diplomatic channels and then submit the trusteeship agreement to the Assembly for approval. The Assembly, in considering the agreement, can then decide whether all the states directly concerned have been consulted and, if need be, it can recommend that further negotiations be undertaken.<sup>44</sup>

One further word should be added, concerning the Provisional Rules of Procedure of the Trusteeship Council. These rules, which were formulated by the Executive Committee and the Preparatory Commission, were passed on to Committee 4 by the Assembly for its consideration. Since Article 90 of the Charter bestows upon the Trusteeship Council the authority to adopt its own rules of procedure, Committee 4 wisely refrained from considering the provisional rules, recommending instead that the Secretary General transmit them to the Trusteeship Council as soon as the latter is constituted. The Committee thus avoided many tedious hours of debate.

It is rather remarkable that, despite the inability of the United States to formulate a forthright policy concerning the mandated islands in the Pacific, the United States delegation has been able to assume a position of

<sup>43</sup> See also *Journal*, No. 28, p. 483; also A/C. 4/11.

<sup>44</sup> For discussion of the Committee report see *Journal*, No. 28 pp. 482-490; also Committee summaries in Nos. 11-15, 17, 19, 25, 26.

leadership in respect to trusteeship matters both at San Francisco and at London. At San Francisco the United States delegates played an outstanding role in the formulation of Chapters XI, XII, and XIII of the Charter. During the Executive Committee and Preparatory Commission stages the United States was instrumental in drafting provisional rules of procedure for the Trusteeship Council that were liberal and flexible.<sup>45</sup> Finally, during the General Assembly the United States again took the leadership in framing a resolution which should give hope and courage to the people of dependent areas everywhere.

#### VI. ADMINISTRATIVE AND BUDGETARY MATTERS (COMMITTEE 5)

While the other committees dealt with inherently newsworthy issues Committee 5 was absorbed in the examination of the comprehensive reports of the Preparatory Commission dealing with the functions and organization of the Secretariat and the financial arrangements for the United Nations.

At San Francisco the broad philosophy of the Secretariat had been set forth in Chapter XV of the Charter. The method for selecting the Secretary General through recommendation by the Security Council and appointment by the Assembly had been determined. It had been agreed that he should be the principal administrative officer of the Organization, and the Secretary General of each of the principal organs. He had been granted the important political function of bringing to the attention of the Security Council any matter which he thought might threaten the maintenance of international peace and security. Provision had also been made to insure a secretariat staff of unquestioned international loyalty so far as this could be done by the statement of this principle in the Charter and by proscriptions against national interference. Perhaps most important of all, the Charter provided that the Secretariat be considered as one of the principal organs of the Organization.

In similar fashion the San Francisco Conference had provided in general terms for the financing of the Organization. The authority for voting the budget had been given exclusively to the General Assembly (Art. 17). It was provided that the expenses of the Organization should be borne by Members in whatever manner they might be apportioned by the General Assembly. Finally, a penalty clause was adopted (Art. 19) depriving a Member of its vote if its arrears were as much as the contributions due from it for the two preceding years.

Translating these very general principles into an operating administrative organization which could function as the backbone of the whole United Nations Organization required an immense amount of detailed work. The bulk of this had to be left, of course, to the man to be selected as Secretary

<sup>45</sup> Rule 24 making public meetings the general rule for the Trusteeship Council, and rule 42 concerning the handling of petitions directed to the Council, are cases in point. See *Report of P. C.* pp. 49-56.

General, for he would be responsible for the efficient operation of this administrative machine. Yet he was not to be elected until the First General Assembly and Security Council had met. In order therefore to expedite the achievement of a going organization the Executive Committee and the Preparatory Commission sought to anticipate as far as possible the problems which would face the Secretary General and toward this end prepared a series of recommendations dealing with the Organization of the Secretariat and with the Financial and Budgetary arrangements.<sup>45</sup>

It was the task of Committee 5 to examine Chapters VIII and IX of the Preparatory Commission Report and in addition to determine the salaries and allowances for the Secretary General, Assistant Secretaries General, and Directors and to vote a provisional budget and a provisional scale for Member contributions. The bulk of the two chapters was adopted by the Assembly substantially as submitted.

Especially notable in this adoption of the Report was the willingness to abide by the conclusion of the Preparatory Commission that as principal administrative officer the Secretary General should be left full discretion to develop his organization, prepare his staff regulations and rules, and classifications and salary scales, and prepare and administer an Annual Budget—all this of course subject to the supervision of the General Assembly. Whatever organizational and administrative arrangements were adopted by the Assembly were of a provisional character and intended primarily to expedite the inauguration of the services to be provided by the Secretariat.

Consistent with this approach Committee 5 defeated an effort to impose upon the Secretary General the controlling influence of a committee like the Supervisory Commission of the League of Nations.<sup>46</sup> This proposal arose as an amendment to the recommendations of the Preparatory Commission for an Advisory Committee on Administrative and Budgetary Questions, and aimed to change its function from one of assisting to one of controlling and supervising the Secretary General. The decision of the Committee, approved by the Assembly, was an important step in assuring to the Secretary General an outstanding position of administrative direction and leadership.

The difference in attitude between the United States as virtually a minority of one, and all the other countries, on the subject of tax immunity for the staff of the United Nations, deserves special consideration. The issue arose first in determining the salaries for Secretary General, Assistant Secretaries General, and Directors, and arose recurrently in the development of principles regarding salaries of the United Nations staff in general. It was urged by the delegates from most other countries that salaries could not be

<sup>45</sup> *Report by the Executive Committee to the Preparatory Commission*, Chs. VI and VII. Preparatory Commission, Summary Record of Meetings, Committee 6: Administrative and Budgetary. See *Report of P. C.*, Chs. VIII and IX.

<sup>47</sup> *Journal*, No. 18, suppl. No. 5, p. 23.

fixed without knowing whether they were to be reckoned as "net" or as "gross." If the salaries were to be stated in gross terms they would have to be adequate to cover possible national income taxes. If net, provisions would need to be made for reimbursement in the event of liability of staff to national income tax laws. Underlying this net/gross question was an assumption on the part of most delegates that the staff of the United Nations, to be truly international, would need to be exempt from national controls like income taxes. It was pointed out by these delegates that unless all national laws were uniform in this respect, the United Nations would need to reimburse those of its staff who paid national income taxes, in order to insure equal pay for equal work. This, however, would mean that some countries would be contributing indirectly to the treasuries of those countries which levied such income taxes. In order to insure equity among states it would therefore be necessary to increase the assessments upon such Members by the amount of the reimbursements paid to their nationals by the United Nations.

The United States delegate did not argue against the principle of tax immunity of international civil servants. He did argue, however, that the question whether nationals of the United States working for the United Nations would be exempt from income taxes depended upon whether treaty obligations existed and upon whether Congress would amend the tax laws toward achieving this effect. Until then the General Assembly could do nothing but develop a salary scale without regard to whether salaries would be exempt or not, and without determining that they should be net or gross.

It was recognized by virtually all the delegates that the creation of a tax privileged class was undesirable, and there was therefore also considerable support for instituting a staff contribution plan similar to that employed in the Provisional International Civil Aviation Organization. Under this plan all employees pay a contribution,—roughly equivalent to the Canadian income tax—into the organization's treasury. Those employees who pay national income taxes may deduct from their assessed contribution the amount of that tax. The PICA plan thus insures that all employees make some contribution to the world's governmental institutions and at the same time tends to equalize the position of those who are and those who are not liable for national income taxes. There was no final determination on this question, however, pending a study of the entire tax immunity problem by the Secretary General.

The final resolution adopted by the General Assembly on the tax immunity problem states:

#### TAXATION

Having regard particularly to the administrative and budgetary arrangements of the Organization, the General Assembly concurs in the conclusion reached by the Administrative and Budgetary Committee that there is no alternative to the proposition that exemption from national taxation for salaries and allowances paid by the Organization is

indispensable to the achievement of equity among its Members and equality among its personnel.

THEREFORE THE GENERAL ASSEMBLY RESOLVES that:

12. Pending the necessary action being taken by Members to exempt from national taxation salaries and allowances paid out of the budget of the Organization, the Secretary-General is authorized to reimburse staff members who are required to pay taxation on salaries and wages received from the Organization.

13. In the case of any Member whose nationals in the service of the Organization are required to pay taxation on salaries and allowances received from the Organization, the Secretary-General should explore with the Member concerned methods of ensuring as soon as possible the application of the principle of equity amongst all Members.

14. The records and documents of the Administrative and Budgetary Committee and of the Advisory Group of Experts respecting staff contribution plans be referred to the Secretary-General for his information, and the Secretary-General be requested to submit recommendations thereon to the Second Part of the First Session of the General Assembly.

In the final Assembly vote the United States abstained from voting on the resolution embodying these sections. Since it is not contemplated that the tax reimbursement issue will arise in the administration of the Secretariat before the Second Part of the First Assembly, and since the Secretary-General has been instructed to explore the question with Members, no special item for this purpose is contained in the Provisional Budget.<sup>48</sup>

Finally, mention should be made of the highly significant resolution relating to the information program of the United Nations. The plan for organizing the Secretariat, submitted by the Secretary-General for his guidance, includes a Department of Public Information. A Technical Advisory Committee on Information, appointed by the Preparatory Commission, developed a report on an information program for the United Nations. Meantime Committee 5 passed a resolution,<sup>49</sup> later approved by the Assembly, emphasizing the importance of an informed public opinion on United Nations activities and aims, endorsing the principle set forth in the Preparatory Commission Report to the General Assembly and transmitting to the Secretary-General for his information and consideration the recommendations of the Technical Advisory Committee on Information.

#### VII. LEGAL QUESTIONS (COMMITTEE 6)

The most important task before Committee 6 was the implementation of Articles 104-105 of the Charter. These Articles provide that the Organization shall enjoy in the territory of each of its members such legal capacity and such privileges and immunities as are necessary for the fulfilment of its

<sup>48</sup> Discussions of the tax question in Committee 5 will be found: Supplement 5 to the following *Journal*, Nos. 11, 13, 15, 16, 17, 23, 25. The Rapporteur's Report is found in Docs. A/41, A/44, A/47, A/48. The Assembly action on these reports: *Journal*, No. 31, pp. 564-69.

<sup>49</sup> *Journal*, No. 21, Suppl. 5, pp. 30/31.

purposes. Similarly, representatives of the member states and officials of the Organization shall enjoy "such privileges and immunities as are necessary for the independent exercise of their functions in connection with the Organization." These broad obligations were assumed by the 51 United Nations when they ratified the Charter. The task at London was to sharpen the rather vague generalizations into the kind of specific commitments which would permit the Organization to operate efficiently.

It is obvious that a definite understanding in respect to privileges and immunities is absolutely essential as between the Organization and the state in which its headquarters are situated. It is there that the permanent staff will be located and it is there that most of the business of the Organization will be transacted. On the other hand, the United Nations will no doubt decide to open a number of regional offices and its staff members will be traveling to all parts of the world on official business. Likewise the Organization will need to enter into contracts and to own property in many states. For these reasons the question of privileges and immunities concerns all the members of the United Nations to a greater or lesser degree.

To meet this need the Preparatory Commission submitted two conventions for the consideration of the Assembly: 1) a general draft convention on privileges and immunities; and 2) a draft convention to be concluded with the United States for the location of the headquarters of the United Nations. The first draft convention outlines the privileged position of the Organization and its functionaries in general, but in this respect it falls considerably short of the League of Nations principle that officials "when engaged on the business of the League, shall enjoy diplomatic privileges and immunities."<sup>50</sup> Both in the Preparatory Commission and in Committee 6 it was agreed that the full range of diplomatic privileges and immunities did not seem necessary for United Nations officials to discharge their functions properly.<sup>51</sup> As a result the convention grants only certain privileges and immunities—e.g., immunity from legal process in respect of official acts, exemption from taxation on United Nations salaries and emoluments, immunity from national service obligations and from immigration restrictions—but reserves for the Secretary General and the Assistant Secretaries General the privileges and immunities accorded to diplomatic envoys under international law.

While the Convention was approved unanimously by Committee 6 and later opened in the General Assembly for accession by member states, considerable discussion took place over the propriety of exempting officials from national service obligations and from taxation on United Nations salaries.<sup>52</sup> The United States delegation reserved its position on both counts on the ground that the right to exempt our nationals from such duties was a pre-

<sup>50</sup> League Covenant, Art. 7.

<sup>51</sup> See *Report of P. C.*, pp. 50-80; also Preparatory Commission, Committee 5: Legal Questions, Summary Record of Meetings, London, 1945.

<sup>52</sup> See the preceding section in which the tax exemption problem is discussed at length.

rogative of the Congress. Byelorussia, the Ukraine, the Soviet Union, and the Argentine also entered reservations with respect to national service obligations. On the other hand, it was generally recognized that the members of an international civil service should not feel themselves torn by conflicting loyalties; once appointed to the United Nations staff their allegiance must be to the Organization alone. Moreover, it would be most unfortunate if the nationals of some states were placed on a plane of inequality with other staff members because of the refusal of certain governments to grant certain of the privileges and immunities provided for in the convention.<sup>53</sup>

The second draft convention approved by Committee 6 will serve as the basis of discussion in the negotiations to take place between the United Nations and the United States regarding the establishment of the Organization's headquarters in the United States. This site convention, in addition to provisions related to the site, incorporates the terms of the general convention and, if approved, will extend necessary privileges and immunities to United Nations representatives and officials in the United States pending the entry into force of the general convention. Meanwhile the Secretary-General, with the assistance of a committee made up of the representatives of Australia, Belgium, Bolivia, China, Cuba, Egypt, France, Poland, the United Kingdom, and the Soviet Union, has been authorized to negotiate with the United States and to report back to the Assembly. Insofar as privileges and immunities are concerned the course of these negotiations should not be difficult. There are, to be sure, some slight divergencies between the two conventions and the International Organizations Immunities Act approved by the Congress last December.<sup>54</sup> But these differences are not great and should be speedily reconciled. It is important to note that the United States did not take part in the discussion of the second draft convention.

The Assembly also moved toward the unification of the privileges and immunities enjoyed by the United Nations and the various specialized agencies.<sup>55</sup> Most of the specialized agencies, like the International Monetary Fund, the International Bank, and the Food and Agriculture Organization have detailed provisions with regard to privileges and immunities in their basic charters. Some, because of their particular functions, require privileges of a special nature. In general, however, most of them should be able to function satisfactorily within the broad framework of privileges and immunities provided for the United Nations. To this end, and with the conviction that no agency should ask for privileges which are not essential for its proper functioning, the General Assembly instructed the Secretary-General "to open negotiations with a view to the reconsideration . . . of the

<sup>53</sup> Doc. A/43. See also *Journal*, Nos. 14, 18, 26, 27 for committee discussion.

<sup>54</sup> Public Law 291—79th Congress; see also *Federal Register*, February 20, 1946.

<sup>55</sup> *Report of P. C.*, pp. 50 ff. A/43, p. 38.

provisions under which the specialized agencies at present enjoy privileges and immunities."

To Committee 6 also fell the task of examining the various amendments to the Provisional Rules of Procedure proposed in the General Assembly. Many of these problems, while nominally legal in character, were actually highly political in nature. Typical were the resolutions concerning the size and competence of the General Committee, the problem of nominations and the secret ballot, and the terms of office of Council members. Since these matters have been dealt with above it will not be necessary to consider them here.

Finally, a word should be said about the efforts of the Committee and the Assembly to give effect to Article 102 of the Charter providing for the registration and publication of treaties. Desirous of replacing the valuable League of Nations Treaty Series, the Assembly instructed the Secretary-General to draft proposals for the practical implementation of Article 102 and to invite both members and non-members of the Organization to submit for registration and publication current treaties and agreements as well as other agreements concluded in recent years but not included in the League Treaty Series.<sup>56</sup> This decision to bring up to date the League series will be applauded by all students of world affairs.<sup>57</sup>

#### VIII. LEAGUE OF NATIONS COMMITTEE

An inevitable consequence of the establishment of the United Nations was the dissolution of the League of Nations. This could not be accomplished without first considering what should happen to the functions it has performed and disposing in some manner of the League's assets.

The General Assembly accepted, following a brief discussion in its League of Nations Committee, the Preparatory Commission recommendation that the Assembly reserves the right to decide "not to assume any particular function or power (of the League), and to determine which organ of the United Nations or which specialized agency . . . should exercise each particular function or power assumed." In principle it agreed to undertake those functions of the League Secretariat relating to the custody of treaties. It accepted responsibility, subject to prior examination by the Economic and Social Council, for those technical and nonpolitical functions of the League Secretariat relating to the substance of international instruments whose execution is dependent upon the exercise by the League of Nations of particular functions conferred by the instruments. The General Assembly requested the Economic and Social Council to survey the broad nonpolitical

<sup>56</sup> Doc. A/31; A/C. 6/1; *Journal*, No. 23 for committee discussion.

<sup>57</sup> Mention should be made also of resolutions on the privileges and immunities of the International Court of Justice, on the coordination of the privileges and immunities of the United Nations with those of the specialized agencies, and on the Committee structure of the General Assembly. See *Journal*, No. 31, pp. 575.



functions and activities performed by the League of Nations itself, with a view to determining which of these should be assumed by the United Nations or by one of the specialized agencies brought into relationship with the United Nations. Pending this determination the Assembly agreed that the Economic and Social Council should continue provisionally the work of the following League departments: the Economic, Financial and Transit Department, the Health Section, the Opium Section, and the secretariats of the Permanent Central Opium Board and Supervisory Body.

The Secretary General was requested "to make provision for taking over and maintaining in operation the Library and Archives and for completing the League of Nations Treaty Series."

The Secretary General's attention was also called to the desirability of engaging, subject to his own choice and determination, for those functions assumed from the League of Nations "such members of the experienced personnel by whom it is at present being performed."

With respect to the assets of the League of Nations, the Assembly accepted the recommendation of the Committee appointed by the Preparatory Commission to negotiate with the Supervisory Commission of the League of Nations. Under these recommendations all the material assets of the League of Nations are to be transferred to the United Nations at their original cost value. (The determination of a market or use value had been found impossible.) Shares in the total credit of the League of Nations are to be allocated among the members of the League of Nations in accordance with a schedule determined by the League of Nations. The shares of those members of the League of Nations who are members of the United Nations will be credited to them on the books of the United Nations for application to their United Nations assessments not later than December 31, 1948. The shares of League of Nations members who are not members of the United Nations are to be settled by the League of Nations itself, along with the settlement of the League's other liabilities. Any remainder of liquid assets will be disposed of by the League of Nations according to its own plans. As far as possible the League of Nations will separate out all interests which the International Labor Organization may have in the League of Nations assets, prior to their transfer to the United Nations. Arrangements will be made by the United Nations later regarding the use by the International Labor Organization of the Assembly Hall and the Library.

Finally, the Assembly appointed a small committee to negotiate with the *Carnegie-Stichting*, owners of the Peace Palace at The Hague, regarding the use of the premises of the Permanent Court of International Justice for the new International Court of Justice. The same committee will also handle negotiations with the Swiss authorities regarding the transfer of certain of the League of Nations assets. It is expected that transfers of assets will take place on or about August 1, 1946.

The plan adopted transfers to the United Nations all necessary title, but

leaves to the League of Nations the settlement of liabilities, including the management of the Staff Pension Fund and pensions of the Judges of the Permanent Court of International Justice, as well as settlement of accounts regarding contributions in arrears, and the distribution of remaining liquid assets and accounts with non-members of the United Nations. The plan is thus a final and definite settlement and appears to be both just and convenient.<sup>58</sup>

#### IX. HEADQUARTERS COMMITTEE

Toward the end of the Preparatory Commission it was decided that the location of the headquarters of the United Nations should be in the Eastern part of the United States<sup>59</sup> and an Interim Committee was sent to the United States to examine alternate sites on the basis of the criteria set forth in the Commission's Report.

After an inspection lasting a full month the Interim Committee returned to London to report to the Assembly.

The report of the Committee, favoring a permanent location in the North Stamford-Greenwich district and temporary headquarters in New York City, was referred to a Headquarters Committee appointed by the Assembly. This Committee held eleven meetings, debating vigorously the location for the permanent and temporary headquarters. The debate brought forth again strong support for San Francisco, both as permanent and as temporary headquarters. Compromises were suggested, including proposals that only the temporary site be picked at this time and another that both the permanent and temporary locations should be left undecided until further study by the Secretary General.

The final resolution adopted, favoring Westchester (N. Y.) and/or Fairfield (Conn.) Counties, requested a Headquarters Commission to draw up plans based on different size plots ranging from two to forty square miles. It was also decided to place the Interim Headquarters in New York City. The Headquarters Commission, intended to aid the Secretary General in working out details, was created and was advised to give careful and friendly attention to problems involving displacement of persons, effect of acquisition of tax property on local tax revenues, etc.

The debate on both the permanent and temporary headquarters brought to the fore once more the issues vigorously debated in the Preparatory Commission, and had latent in it all the feeling of the arguments over European as against United States headquarters, and over San Francisco as against the East Coast. Feeling was probably intensified both by the cost con-

<sup>58</sup> See the following references: Preparatory Commission Summary Record of Meetings, Committee 7 (League of Nations); Preparatory Commission Report, Chapter XI; *Journal*, No. 19, Supplement No. 7; *Journal*, No. 22, Supplement No. 7; Documents A/18, A/18 Add 1, A/18 Add 2, A/18 Corr 1, A/28.

<sup>59</sup> Preparatory Commission Report, Chapter X, p. 114.

templated in the recommendation of a 40-50 square mile site in the high-priced Stamford-Greenwich area, and by protests from that area against the threatened "invasion" by the United Nations. Throughout these discussions the United States delegation maintained the position of neutrality adopted during the Preparatory Commission stage.<sup>60</sup>

#### X. CONCLUDING COMMENTS

Those who followed closely the work of the First Part of the First General Assembly agree that the meetings were successful. The over-riding objective of the Assembly was realized—namely, to transform the United Nations into a going concern. As Senator Tom Connally remarked in his report to the Senate on March 12: "After San Francisco we had only the bare skeleton of the Charter. At London the inert framework was invested with flesh and blood. It became a living organism." Moreover, a number of important substantive problems were satisfactorily dealt with.

In the long run, of course, the success of the United Nations will depend upon the willingness of the member nations, and more particularly the great powers, to utilize the machinery they have established for the purpose of solving their mutual problems. At London the General Assembly handled well its role as the "town meeting of the world," and the Security Council tackled four delicate and intricate controversies with considerable success. The machinery has already demonstrated its value and its effectiveness. It is up to the United Nations to make that machinery work.

<sup>60</sup> *Journal*, No. 33; Document A/58 Rev. 1 (final resolution); Document A/Site 2 (report of the Inspection Group).

## EDITORIAL COMMENT

### SOVEREIGN IMMUNITY LIMITED TO ESSENTIAL GOVERNMENT FUNCTIONS:

#### NEW YORK V. UNITED STATES

It is not an unusual phenomenon in American Constitutional practice to have a group of States join in resisting what they believe to be an encroachment upon their powers by the Federal Government. It will be recalled that, in September, 1944, thirty-eight States filed a joint petition in the Supreme Court requesting a rehearing of the case in which the Court had ruled that the business of insurance in interstate commerce was subject to the Federal anti-trust laws and regulations. The case involved the interpretation of Federal legislation under the interstate commerce clause and was not a question of sovereign immunity. Recently the alleged encroachment upon the sovereign right of a State of the Union by the Federal taxing power was resisted by New York State with the active support of forty-five other States appearing as *amici curiae*. The decision of the Supreme Court handed down January 14, 1946,<sup>1</sup> merits our attention because the doctrines enunciated are applicable in principle to international relations as well.

The United States brought action to recover taxes assessed against the State of New York, under the Revenue Act of 1932,<sup>2</sup> on the sale of mineral waters taken from Saratoga Springs. The State claimed immunity from the tax upon the ground that "in the bottling and sale of said waters the defendant State of New York was engaged in the exercise of a usual, traditional, and essential governmental function." The Supreme Court overruled this contention in a six to two decision. Justice Frankfurter, writing the opinion (Justices Douglas and Black dissenting) quoted with approval from *Ohio v. Helvering*<sup>3</sup> holding that a State which sells liquor, even in the exercise of the police power, is amenable to federal taxing power:

If a state chooses to go into the business of buying and selling commodities, its right to do so may be conceded so far as the Federal Constitution is concerned; but the exercise of the right is not the performance of a governmental function. . . . When a state enters the market place seeking customers it divests itself of its *quasi* sovereignty *pro tunc*, and takes on the character of a trader, so far, at least, as the taxing power of the federal government is concerned.

Substantially the same question had come before the Supreme Court prior to the Eighteenth Amendment and had been decided against the State. South Carolina sought to operate a dispensary system monopolizing the sale of intoxicating liquors. There the Court drew a line between taxation of the historically recognized governmental functions of a State and business

<sup>1</sup> *State of New York and Saratoga Springs Commission and Saratoga Springs Authority v. The United States of America*. Advance Opinions, 1946 U. S. Law Week 4089.

<sup>2</sup> 47 Stat. 169, 264; Sec. 615 (e) (5).

<sup>3</sup> (1934) 292 U. S. 360 at p. 369.

of a kind which theretofore had been pursued by private enterprise.<sup>4</sup> Nor was this distinction novel in our judicial history. As early as 1824 Chief Justice Marshall applied the principle to a Georgia banking corporation in which the State of Georgia was a part owner. He expressed the principle as follows:<sup>5</sup>

It is, we think, a sound principle, that when a government becomes a partner in any trading company, it divests itself, so far as concerns the transactions of that company, of its sovereign character, and takes on that of a private citizen. Instead of communicating to the company its privileges and its prerogatives, it descends to a level with those with whom it associates itself, and takes the character which belongs to its associates, and to the business which is to be transacted.

The dissenting opinion of Justices Douglas and Black in the *Saratoga Springs* case did not assume to draw any distinction between a Federal tax on South Carolina's liquor business and a Federal tax on New York's mineral water business. On the other hand, they refused to be bound by the rule of *stare decisis*, which, in their opinion, has only "a limited application in the field of Constitutional law." While this contention has been the subject of much discussion, we mention it only in passing as it is not material to the subject here under discussion. What we desire to emphasize is that the decision in the instant case has a direct bearing upon the judicial settlement of international disputes in which sovereign immunity is claimed as a ground of exemption from the jurisdiction of the local courts even in respect to transactions which are not essential government functions. The international character of the problem was also recognized in the opinion of the dissenting justices when they remarked that "the Constitution is a compact between sovereigns." They differed with the majority only as to the extent of the powers delegated. The correctness of the decision of the Court, when viewed from this angle, therefore rests upon the validity of the proposition that sovereign immunity is based upon the exercise by a government of some essential government function.

The opinion of Chief Justice Stone concurring with the majority expresses the principle as follows:

If we are to treat as invalid, because discriminatory, a tax on "State activities and State-owned property that partake of uniqueness from the point of view of intergovernmental relations," it is plain that the invalidity is due wholly to the fact that it is a State which is being taxed so as unduly to infringe in some manner the performance of its functions as a government which the Constitution recognizes as sovereign.

We have previously had occasion to point out that this distinction has not always been recognized by the Supreme Court, especially where the property of a foreign government, such as a merchant ship, has been employed in

<sup>4</sup> *South Carolina v. United States*, 1905, 199 U. S. 437.

<sup>5</sup> *United States Bank v. Planters' Bank of Georgia*, 1824, 9 Wheat. 904, 907.

purely commercial business.<sup>6</sup> The principle cannot be said to be well established but may be in the process of development, having gained recognition at least in some countries.<sup>7</sup> The importance of limiting sovereign immunity where the state enters the arena of commercial business has only recently begun to assume vital importance. The nationalization of all export and import business by Soviet Russia has now been followed, although to a more limited degree, by the nationalization of certain industries by Great Britain, France, and other countries. The significance of this phenomenon in international life must soon be recognized as one deeply affecting both economic and political relations. The fact that the Supreme Court of the United States has restricted the immunity of State governments to the exercise of essential government functions should not be overlooked in the conduct of our foreign relations. The principle is a corollary to the maintenance of a system of free enterprise.

ARTHUR K. KUHN

#### THE LEADERS' AGREEMENT OF YALTA

On February 11, 1946, the United States Department of State released the following text of a secret agreement signed at Yalta in the Crimea, on February 11, 1945:

The leaders of the three Great Powers—the Soviet Union, the United States of America and Great Britain—have agreed that in two or three months after Germany has surrendered and the war in Europe has terminated the Soviet Union shall enter into the war against Japan on the side of the Allies on condition that:

(1) The *status quo* in Outer Mongolia (the Mongolian People's Republic) shall be preserved;

(2) The former rights of Russia violated by the treacherous attack of Japan in 1904 shall be restored, viz.:

(a) The southern part of Sakhalin as well as all the islands adjacent to it shall be returned to the Soviet Union,

(b) The commercial port of Dairen shall be internationalized, the preëminent interests of the Soviet Union in this port being safeguarded and the lease of Port Arthur as a naval base of the U.S.S.R. restored.

(c) The Chinese Eastern Railroad and the South Manchurian Railroad which provides an outlet to Dairen shall be jointly operated by the establishment of a joint Soviet-Chinese Company, it being understood that the preëminent interests of the Soviet Union shall be safeguarded and that China shall retain full sovereignty in Manchuria;

(3) The Kurile Islands shall be handed over to the Soviet Union.

It is understood that the agreement concerning Outer Mongolia and the ports and railroads referred to above will require concurrence of Generalissimo Chiang Kai-shek. The President will take measures in order to obtain this concurrence on advice from Marshal Stalin.

<sup>6</sup> See the writer's editorial comment in this JOURNAL, Vol. 21 (1927), p. 742.

<sup>7</sup> See editorial comments in this JOURNAL, Vol. 28 (1934), pp. 119-122; Vol. 39 (1945), p. 772. See also Harvard Research in International Law, draft treaty, in Supplement to this JOURNAL, Vol. 26 (1932), p. 455, Arts. 11, 23, 25.

The heads of the three Great Powers have agreed that these claims of the Soviet Union shall be unquestionably fulfilled after Japan has been defeated.

For its part the Soviet Union expresses its readiness to conclude with the National Government of China a pact of friendship and alliance between the U.S.S.R. and China in order to render assistance to China with its armed forces for the purpose of liberating China from the Japanese yoke.

Feb. 11, 1945

J. STALIN

FRANKLIN D. ROOSEVELT

WINSTON S. CHURCHILL<sup>1</sup>

The careless informality and the execrable draftsmanship of this highly important instrument raise interesting questions of a technical nature. Who were the parties to the agreement? Upon whom is it legally binding? Precisely what obligations were assumed by the contracting parties?

The agreement purports to be between the "leaders" or "heads" of "the three great powers" which are identified as "the Soviet Union," the United States of America, and "Great Britain." The characterization of the President as "the leader" of the United States is scarcely a term of art and its precise implications are unknown to United States constitutional law, although the appellation is not unfamiliar to students of Nazi terminology. Similarly lacking in precision is the characterization of the President as "the head" of a "great power." Aside from their designation as "leaders" or "heads," it is nowhere stated in the text of the instrument that the persons who signed acted on behalf of their respective states or that they had the competence or authority to bind their states. The name "Marshal Stalin" appears once as such. The same sentence refers to "The President." Mr. Churchill's name or titles do not appear at all in the text. The signatures appended to the instrument are not followed by any official designations. The only clear expression of an undertaking assumed by a state, as such, is found in the last paragraph, which begins "For its part the Soviet Union expresses its readiness to conclude with the National Government of China a pact of friendship and alliance between the U.S.S.R. and China," although, in the first paragraph, the three "leaders" are stated to "have agreed" that the Soviet Union shall enter the war against Japan at a (fairly)<sup>2</sup> certain time subject to (fairly uncertain) conditions.

The terms in which the conditions are set forth require brief comment before their exact purport is analyzed. It makes sense to state that "the former rights of Russia" shall be "restored" if one thinks of their being restored to "Russia"; but it is difficult to see how southern Sakhalin can be "returned" to the Soviet Union and "the lease of Port Arthur as a naval

<sup>1</sup> *Department of State Bulletin*, Vol. XIV, No. 347 (Feb. 24, 1946), p. 282.

<sup>2</sup> The passage setting forth the agreed date for Soviet entry into the war against Japan—"in two or three months after Germany has surrendered and the war in Europe has terminated"—apparently does not refer to termination of war in a technical sense.

base of the U.S.S.R. restored" when neither has ever been in the possession of the Soviet Union.

Although the phraseology of the first paragraph that "the leaders of the three great powers . . . have agreed that . . . the Soviet Union shall enter into the war against Japan" is qualified by the phrase "on condition that . . .," it is apparent that the conditions next set forth are not conditions the fulfillment of which is regarded by the signers as necessarily preceding the entry of the Soviet Union into the war against Japan. The agreed date for the entry of that state into the war against Japan is "two or three months after Germany has surrendered and the war in Europe has terminated," but the conditions ("the agreement") concerning Outer Mongolia and the ports and railroads of Manchuria are made dependent upon the "concurrence of Generalissimo Chiang Kai-shek." This deference to the interests of China appears to be somewhat qualified by the next two sentences ("The President will take measures in order to obtain this concurrence on advice from Marshal Stalin" and "The heads of the three great powers have agreed that these claims of the Soviet Union shall be unquestionably fulfilled after Japan has been defeated"), but the nature of the conditions as conditions subsequent to the entry of the Soviet Union into the war against Japan more clearly appears. That they were so regarded by the Soviet Union is shown by her entry into the war against Japan on August 9, 1945, prior to the fulfillment of the conditions. Marshal Stalin, having exacted a stiff price, somewhat at the expense of China, from Messrs. Roosevelt and Churchill, friends of China, delivered the goods at a time most convenient to those leaders. The question remains: What is the nature and extent of the obligations assumed by President Roosevelt?

First, Mr. Roosevelt accepted Marshal Stalin's condition that "the *status quo* in Outer Mongolia (the Mongolian People's Republic) shall be preserved" and agreed that "these claims of the Soviet Union shall be unquestionably fulfilled after Japan has been defeated." What is the meaning of these provisions? If Outer Mongolia is an integral part of the Republic of China,<sup>3</sup> as was recognized by the Union of Soviet Socialist Republics in 1924,<sup>4</sup> the Chinese-Soviet Agreement on Outer Mongolia, concluded by exchange of notes at Moscow on August 14, 1945, would appear to be a modification of the *status quo*; for, by this agreement,

<sup>3</sup> See Louis Nemzer, "The Status of Outer Mongolia in International Law," this JOURNAL, Vol. 33 (1939), pp. 452-464.

<sup>4</sup> The first paragraph of Article V of the Chinese-Soviet Agreement on General Principles signed at Peking on May 31, 1924, reads as follows: "The Government of the Union of Soviet Socialist Republics recognises that Outer Mongolia is an integral part of the Republic of China and respects China's sovereignty therein;" League of Nations Treaty Series, Vol. XXXVII, pp. 176, 178. Nemzer, writing in 1939, stated that, although Soviet Russia has acted upon the assumption that China's jurisdictional authority in Outer Mongolia had varied in recent years, the Soviet Government "has never denied the sovereignty of China in this area;" Nemzer, as cited, p. 438.



in view of the desire repeatedly expressed by the people of Outer Mongolia for their independence, the Chinese Government declares that, after the defeat of Japan, should a plebiscite of the Outer Mongolian people confirm this desire, the Chinese Government will recognize the independence of Outer Mongolia with the existing boundary as its boundary while the Soviet Government, taking note of the above statement of the Chinese Government, "further states that the Soviet Government will respect the political independence and territorial integrity of the People's Republic of Mongolia (Outer Mongolia)".

Likewise the Soviet Government, taking note of the above statement of the Chinese Government, "declares on its part that it will respect the state of independence and territorial integrity of the Mongolian People's Republic (Outer Mongolia)." <sup>5</sup> If, on the other hand, Outer Mongolia was already an independent state at the time the Leaders' Agreement was signed at Yalta, what obligations were assumed by Mr. Roosevelt with reference to the preservation of the *status quo* in Outer Mongolia? Did he envisage the United States as a perpetual guarantor of the independence of Outer Mongolia, against the Soviet Union as well as against China? Or is it possible that he merely agreed not to oppose future Soviet predominance in this territory over which China claimed sovereignty? Is the obligation executed or does it remain executory?

The second condition accepted by Mr. Roosevelt for Soviet entry into the war against Japan was that "the former rights of Russia violated by the treacherous attack of Japan in 1904 shall be restored" namely, that southern Sakhalin and adjacent islands should be "returned" to the Soviet Union; that the port of Dairen should be internationalized, "the preëminent interests of the Soviet Union in this port being safeguarded"; that the "lease" of Port Arthur as a naval base of the Soviet Union should be "restored"; <sup>6</sup> that the Chinese Eastern and South Manchuria Railroads should be jointly operated by a Soviet-Chinese company, "it being understood that the preëminent interests of the Soviet Union shall be safeguarded and that China shall retain full sovereignty in Manchuria." Since, by the Chinese-Soviet Agreements concluded at Moscow on August 14, 1945, the Soviet Union obtained substantial fulfillment of her claims in Manchuria, the question arises whether these conditions of the Yalta Leaders' Agreement are to be considered as executed or whether Mr. Roosevelt assumed any executory obligations to see that the preëminent interests of the Soviet Union in Manchuria should be safeguarded or "that China shall retain full sovereignty in Manchuria."

Have the conditions that the Kurile Islands and southern Sakhalin should

<sup>5</sup> *Department of State Bulletin*, Vol. XIV, No. 345 (Feb. 19, 1946), pp. 204-5.

<sup>6</sup> By the terms of the Russian-Chinese Convention of March 27, 1898, for the lease of the Liaotung Peninsula to Russia, the lease was to run twenty-five years, and would have expired on March 28, 1923, unless prolonged by mutual consent. See J. V. A. MacMurray, *Treaties and Agreements with and Concerning China, 1894-1919*, pp. 119, 1221.

be handed over to the Soviet Union been fulfilled by the Soviet military occupation of those islands with the consent of the United States authorities? Or does the fulfillment of these conditions agreed to by President Roosevelt require the approval of the United States in the treaty of peace?

Uncertainties revealed by an analysis of the text render even more important the question whether the United States, in contrast possibly to President Roosevelt, was ever legally bound upon signature of the agreement by the latter. In releasing the text of the secret agreement one year after it was signed, Secretary of State James Byrnes referred to it as "the agreement between the President of the United States, Franklin D. Roosevelt, the Prime Minister of Great Britain, Winston Churchill, and Generalissimo Stalin,"<sup>7</sup> not as an agreement between the United States, the United Kingdom, and the Union of Soviet Socialist Republics. "At the same time Mr. Byrnes stated that it is evident that this agreement was regarded by President Roosevelt, Prime Minister Churchill, and Generalissimo Stalin as a military agreement. He used this characterization of it as a military agreement to justify its being kept secret, even from him, the Secretary of State. Any possible implication that, since it was a military agreement, it was concluded by the President as an executive agreement under his Constitutional powers as Commander-in-Chief, and that it was therefore not necessary to submit it to the Senate as a treaty, appears to be negatived by his reported statements to the press on January 29, 1946. At that time the Secretary, asked whether it would be necessary to have a treaty to formalize the transfer of southern Sakhalin and the Kuriles to the Soviet Union,

"replied<sup>8</sup> in the affirmative, adding that . . . it was his understanding that any cession of territory must be legalized in a treaty. . . . Asked whether the [secret Yalta] agreement was so phrased that it could be interpreted as an award of those areas to the Soviet Union or merely that Britain and the United States would support the Soviet Union's claim to it in an eventual peace treaty, the Secretary replied that it was his recollection that the language in one of the agreements was that it should be turned over, but he added that there was not any question about what was intended at Yalta because at Yalta he heard Mr. Roosevelt on at least one or two occasions take the position that as to cession of territory, it was a matter that had to be settled in the peace treaty. He said that that was always Mr. Roosevelt's view and that at Potsdam Mr. Truman took the same position as to the Silesian area, making it plain that it was an agreement, and that at the proper time this Government would support it."

If, paraphrasing the conclusions of the Harvard Research in International Law on the Law of Treaties,<sup>9</sup> we assume (1) that the competence of the

<sup>7</sup> *Department of State Bulletin*, Vol. XIV, No. 347, as cited *The New York Times*, Feb. 12, 1946.

<sup>8</sup> *Department of State Bulletin*, Vol. XIV, No. 345 (February 10, 1946), pp. 189-90.

<sup>9</sup> Harvard Research in International Law, *Law of Treaties*, this JOURNAL, Vol. 29 (1935), Supplement, p. 1008.

President to make an executive agreement which will be internationally binding on the United States is determined by United States law, including the Constitution; and (2) that an executive agreement not within his competence under United States law is not binding on the United States under international law, we reach interesting results. There are sufficient precedents to justify the conclusion that the President has the Constitutional competence to conclude internationally binding military agreements without the advice and consent of the Senate. Certainly there is sufficient reason in the circumstances of its signing to regard an agreement for bringing the Soviet Union into the war against Japan at the most strategically desirable time as a military agreement. At the same time, the price exacted by Marshal Stalin made the agreement much more than a military agreement. Its provisions that the claims of the Soviet Union should be unquestionably fulfilled after Japan has been defeated refer to the transfer of Japanese territory and the shackling of Chinese territory and contain commitments of such uncertain meaning and doubtful duration as to raise serious doubts as to the President's Constitutional competence to commit the United States by executive agreement.

There has been considerable controversy as to the duration and binding force of executive agreements.<sup>10</sup> President Theodore Roosevelt's statement that his *modus vivendi* with Santo Domingo was merely "a direction of the Chief Executive which would lapse when that particular executive left office" <sup>11</sup> is certainly not true of the durability of all executive agreements. A large number of executive agreements, made within the sole Constitutional competence of the President, or pursuant to action by Congress within its Constitutional competence, have remained in effect through several administrations.<sup>12</sup> The assumption that the contracting parties had the competence to contract the obligations contracted is implicit in the statement of the Harvard Research in International Law that for the purposes of international law executive agreements are not to be distinguished from treaties.<sup>13</sup> The same assumption is implicit in the view expressed by the Chief of the Treaty Division of the Department of State in 1934 to the effect that:

Executive agreements with foreign governments entered into under one President continue to remain in force under his successors unless and until the statutes or regulations in pursuance of which they are entered into are repealed or the specified time for their operation has

<sup>10</sup> See Myres S. McDougal and Asher Lans, "Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy," in 54 Yale Law Journal (1945), pp. 181-351, 534-615, especially 318-351; Edwin M. Borchard, "Treaties and Executive Agreements—A Reply," in same, pp. 616-634, especially pp. 637 ff., 657 ff.

<sup>11</sup> Quoted in Green H. Hackworth, *Digest of International Law*, Vol. V, p. 403, from *Theodore Roosevelt: An Autobiography*, 551-552.

<sup>12</sup> See instances cited by McDougal-Lans, pp. 343-345.

<sup>13</sup> Law of Treaties, this JOURNAL, Vol. 29 (1935), Supplement, pp. 667, 1008.

expired, or notice of a desire to terminate is given by one side or the other.<sup>14</sup>

There is no reason, however, why all executive agreements should be regarded as of equal validity; more especially there is no reason in law—national or international—why a succeeding administration should not treat an executive agreement made outside his competence by a preceding Executive as merely his personal pledge, never binding under international law on the United States. Such a procedure would have the advantage of putting foreign states on notice that not every agreement concluded by the President is binding on the United States.

Whether or not Marshal Stalin was put "on notice" by President Roosevelt as to the latter's Constitutional incompetence to conclude certain international engagements is not entirely clear. However, in his Report on the Crimea Conference, delivered before a joint session of Congress on March 1, 1945, Mr. Roosevelt said:

As you know, I have always been a believer in the document called the Constitution. I spent a good deal of time in educating two other nations of the world with regard to the Constitution of the United States—that the charter has to be and should be approved by the Senate of the United States under the Constitution. I think the other nations of the world know it now.<sup>15</sup>

In the prepared text of this speech released by the White House prior to its delivery, the following passage appears:

I am well aware of the Constitutional fact—as are all the United Nations—that this charter must be approved by two thirds of the Senate of the United States—as will some of the other arrangements made at Yalta (*italics added*).<sup>16</sup>

The italicized words do not appear in the report in the *Congressional Record* of the speech as delivered.

In one passage of his statement accompanying the release of the Leaders' Agreement of Yalta, Secretary Byrnes referred to it as "this memorandum." The content, terminology, and form of the agreement, the fact that it contains no provisions for its coming into force or for its termination, as well as the fact that many of its provisions have been executed, suggest that this agreement might well be considered merely as a memorandum recording the personal agreement of the three "leaders."<sup>17</sup> Since the claims of the Soviet

<sup>14</sup> From a letter from the Chief of the Treaty Division, U. S. Department of State, to William Hays Simpson, Dec. 7, 1934, quoted in William Hays Simpson, "Legal Aspects of Executive Agreements," in 24 Iowa Law Review (1933), pp. 67, 86.

<sup>15</sup> *Congressional Record*, Vol. 91, Part 2, p. 1620 (March 1, 1945).

<sup>16</sup> *Department of State Bulletin*, Vol. XII, No. 297 (March 4, 1945), p. 324.

<sup>17</sup> It is not without interest that the Report on the Crimea Conference released Feb. 12, 1945, although signed by Messrs. Churchill, Roosevelt, and Stalin, does not purport to be an "agreement," but is referred to in its text as a "statement" on the results of the conference: *Department of State Bulletin*, Vol. XII, No. 285 (Feb. 12, 1945), pp. 213-6.

Union with reference to Outer Mongolia and Manchuria have already been accepted by China, there would seem to be no reason for the United States to approve or disapprove, by treaty or otherwise. As to Southern Sakhalin and the Kuriles there would seem to be no reason for the United States to withhold its consent to their formal transfer to the Soviet Union in the peace treaty with Japan. This proposal would have the advantage of relegating an agreement of uncertain meaning, doubtful duration, and questionable legal validity to its proper rôle of an historical curiosity and a legal monstrosity.

HERBERT W. BRIGGS

#### GUATEMALA VS. GREAT BRITAIN: IN RE BELIZE

The International Court of Justice, a principal organ of the United Nations, has been constituted through the election of its fifteen Judges. Great Britain has offered to have her 87-year-old dispute with Guatemala, concerning the territory of Belize, decided by this Court. The Belize controversy may constitute the first case before the new Court. It seems, therefore, timely to state the facts and the law involved in this case, without voicing any opinion as to the judgement.

The territory which the British call British Honduras<sup>1</sup> and the Guatemalans Belize, according to its capital, has an area of 8598 square miles, a little larger than Wales, and is situated 600 miles west from Jamaica; it borders in the West on Guatemala, in the East on the Caribbean Sea. It has a population of some 61,000 inhabitants, of whom only 4% are white. It is a British Crown Colony under a Governor, aided by an appointed Executive Council and a partially elected Legislative Council.

The history of Belize goes back to the XVIIth century and forms part of England's struggle against the Empire of Spain. The era of buccaneering<sup>2</sup> led in 1655 under Cromwell to the conquest of Jamaica, and Spain recognized England's title to Jamaica by the Treaty of Madrid of July 18, 1670. The attempts made by England to stop buccaneering<sup>3</sup> had as a consequence that some of the former buccaneers became woodcutters, and woodcutters from Jamaica, attracted by the forests of mahogany, logwood, cedar, and cabinet

<sup>1</sup> For brief information see: *The Statesman's Year Book*, 1943 pp. 271-273; *Pan American Year Book*, 1945, pp. 530-532. British literature: G. Henderson, *An Account of the British Settlements of Honduras*, 1811; *Honduras Almanac*, Belize, 1873; D. Morris, *The Colony of British Honduras*, 1883; A. R. Gibbs, *British Honduras: a historical and descriptive account of the colony from its settlement, 1670*, London, 1883; L. W. Briscoe and P. B. Wright, *Handbook of British Honduras, 1889-1893*; A. B. Dillon, *Geography of British Honduras*, London, 1923; M. S. Metzgen and H. E. C. Cain, *Handbook of British Honduras, 1925*; A. H. Anderson, *Brief Sketch of British Honduras*, London, 1927; Sir C. A. Birdon, *Brief Sketch of British Honduras*, London, 1928; Sir A. Aspinall, *Handbook of the British West Indies, British Guiana and British Honduras, 1929-1930*.

<sup>2</sup> C. H. Haring, *Buccaneers in the West-Indies*, 1910.

<sup>3</sup> *Cambridge History of the British Empire*, Vol. I, p. 246.

wood, which covered the greater part of British Honduras, made their first settlement in Belice in 1662. Jamaica was the port of the logwood cutters.<sup>4</sup> "The British settlement at Belice was a direct outgrowth of the buccaneering era in the Western World."<sup>5</sup> Up to 1786 the settlers remained completely independent of British control. Only in 1786 was a Superintendent for the Settlement appointed by the British Crown. But during the whole of the XVIIIth century<sup>6</sup> there were constant disputes between England and Spain over the legality of the British settlement in Belice. The treaties of Paris of 1763 and of Versailles of 1783, followed by the Convention of London of 1786, dealt with the matter. In 1779 the settlement had been destroyed by the Spaniards; but the survivors returned in 1783. In 1798 the settlers resisted a Spanish attack<sup>7</sup> and after that time were left in peace.

In the first half of the XIXth century the British made several encroachments on the Central American Coast which led to a rivalry and discussions with the United States, connected with the Monroe Doctrine and general Anglo-American diplomacy, and concerning the future Panama Canal. In 1841 the British proclaimed the "Mosquito" protectorate, in 1849 they occupied Tigre Island in the Bay of Fonseca, in 1852 the British "Colony of the Bay Islands" was established. The discussions with the United States led to the Clayton-Bulwer Treaty of April 19, 1850,<sup>8</sup> by which the Contracting Parties bound themselves not to colonize or assume or exercise any dominion over any part of Central America. Soon afterward the British decided to stop colonial expansion in the Caribbean area. By the treaty with Honduras of 1859<sup>9</sup> they withdrew from the Bay Islands and concluded a self-denying treaty with Nicaragua concerning the Mosquito Coast.<sup>10</sup>

But the British claim to the whole of British Honduras was upheld. By 1839 the Government of Belice was fully organized. On April 30, 1859, Britain concluded with Guatemala the treaty of frontiers between British Honduras and Guatemala. In 1862 Britain converted the settlement of Belice into a British Colony with a Lieutenant Governor, under the Governor of Jamaica. In 1871 British Honduras became a Crown Colony. In 1884

<sup>4</sup> Same, p. 382.

<sup>5</sup> Mary W. Williams, *Anglo-Isthmian Diplomacy, 1815-1915*, Washington 1916, p. 2.

<sup>6</sup> *Cambridge History of the British Empire*, Vol. II, pp. 538-541. See also S. J. A. Burdon, *Archives of British Honduras*, London, 1931-1935.

<sup>7</sup> E. W. Williams, *The Baymen of Belice and how they wrested British Honduras from the Spaniards*, 1914.

<sup>8</sup> Malloy, *Treaties of the U.S.*, Vol. I, p. 659; Martens, *Nouveau Recueil Général*, 1857, p. 187.

<sup>9</sup> *British & Foreign State Papers*, Vol. XLIX, pp. 15-19; Martens, Vol. XVI, Part II (1860), pp. 370-374.

<sup>10</sup> Same, pp. 96-106. See also British-Nicaraguan Treaty, signed at Managua on April 19, 1905, in Martens, 2e sér., Vol. XXXV (1908), p. 367, which provides, in Art. 2: "His Britannic Majesty agrees to recognize the absolute sovereignty of Nicaragua over the territory that constituted the former Mosquito Reserve."

the dependence from Jamaica was severed and British Honduras became an independent Crown Colony under a Governor.

The dispute<sup>11</sup> with Guatemala over Belice dates from the treaty of 1859. The treaty,<sup>12</sup> signed on April 30, 1859, at Guatemala City, where ratifications were exchanged on September 12 of the same year, lays down in Art. 1 the frontiers between British Honduras and Guatemala. Guatemala recognizes British sovereignty over the whole territory of British Honduras without restriction. Art. 2 provides for a Joint Boundary Commission. Art. 7 contains the controversial norm,<sup>13</sup> concerning the construction of a road from the Atlantic Coast to Guatemala City. The Joint Boundary Commission was appointed in 1860, met in 1861, but did not complete its work. There followed a long diplomatic controversy over the meaning of Art. 7. On August 5, 1863, the Lennox Wyke-J. de Francisco Martin treaty was signed, by which Britain's obligations under Art. 7 were reduced to the payment of £50,000; but the treaty was not ratified. In 1867 Britain informed Guatemala that she considered her obligations under Art. 7 canceled, as the costs of the construction of the road were far higher than expected. Guatemala protested.

In 1928 the Joint Commission was again appointed. An exchange of notes, concerning the completion of the demarcation of boundaries, was signed at Guatemala City on August 25 and 26, 1931.<sup>14</sup>

In September, 1936, Guatemala proposed to Britain that Britain return British Honduras against a payment of £400,000, or that Britain pay £400,000, while Guatemala will renounce any further claim under Art. 7, or, finally, that Britain pay £50,000 and grant a strip of land for the department of Petén so that it may have an outlet to the sea. Britain rejected the proposals.

On July 21, 1937, Guatemala proposed international arbitration by the President of the United States. Britain accepted the idea of arbitration,

<sup>11</sup> Gordon Ireland, *Boundaries, Possessions, and Conflicts in Central and North America and the Caribbean*, Cambridge, Mass., 1941, pp. 120-128.

<sup>12</sup> Wyke-Aycinena Treaty: *British & Foreign State Papers*, Vol. XLIX, pp. 7-13; Martens: Vol. XVI, Part II (1860), pp. 366-370. The treaty is in English and Spanish.

<sup>13</sup> Art. 7: "With the object of practically carrying out the views set forth in the preamble of the present Convention for improving and perpetuating the friendly relations which at present so happily exist between the two High Contracting Parties, they mutually agree conjointly to use their best efforts by taking adequate means for establishing the easiest communication (either by means of a cart-road, or employing the rivers or both united, according to the opinion of the surveying engineers) between the fittest place on the Atlantic Coast, near the settlement of Belice, and the capital of Guatemala, whereby the commerce of England on the one hand, and the material prosperity of the Republic on the other, cannot fail to be sensibly increased, at the same time that the limits of the two countries being now clearly defined, all further encroachments by either party on the territory of the other will be effectually checked and prevented for the future."

<sup>14</sup> Martens: *Se sér.*, Vol. XXVI (1933), pp. 42-48. The text of the treaty of 1859 is reprinted in the Annex.

but held that it should be made by the Permanent Court of International Justice. This change was not accepted by Guatemala.

✓ In 1938 Guatemala took a new stand and claimed the reincorporation of the whole territory of British Honduras into Guatemala. She pressed her claim in official publications<sup>15</sup> and by Pan American action. She attached a reservation concerning Belize to the Declaration of Panama of 1939<sup>16</sup> and the Second Consultative Meeting at Havana in 1940 adopted Resolution XIX<sup>17</sup> which "expresses the keen desires and wishes of the American countries in favor of a just, peaceful, and prompt solution of the question of Belize between Guatemala and Britain." Since 1939 a large literature dealing with the historical and legal aspects of the problem of Belize has come into existence.<sup>18</sup>

In August, 1939, the new minister of Guatemala in London, S. Aguilar, was instructed to begin new negotiations on Belize with Lord Halifax, but President Jorge Ubico of Guatemala made known on June 15, 1940, that the efforts to reincorporate British Honduras would be suspended until Britain had less pressing major difficulties on her hands.

✓ The new Constitution of Guatemala of March 11, 1945,<sup>19</sup> declares in Art. 1 of its Transitory Dispositions<sup>20</sup> that Belize is part of Guatemala's territory and considers the measures undertaken to obtain its effective reincorporation as matters of national interest. On September 19, 1945, the National Con-

<sup>15</sup> Guatemala, Secretaría de Relaciones Exteriores, *Libro Blanco: Cuestión de Belice*, 1938, and *Continuación del Libro Blanco*, 1939.

<sup>16</sup> Carnegie Endowment for International Peace, *The International Conferences of American States, First Supplement, 1933-1940*, Washington, 1940, p. 357. <sup>17</sup> Work cited, p. 363.

<sup>18</sup> D. Vela, *Nuestro Belice*, Guatemala City, 1939; *Opinion of the Geographical and Historical Society of Guatemala on Guatemala's right to Belice*, 2nd ed., 1939; S. Aguilar, *La cuestión de Belice*, in *Revista de la Facultad de Ciencias Jurídicas y Sociales de Guatemala*, Vol. I (1938-39), pp. 281-307, 499-530, Vol. II, pp. 56-114, 290-322, 440-453, 500-504, 543-556 and, Vol. IV, pp. 34-53, 250-268; Fernando Juárez Muñoz, *Belice es nuestro*, in same, Vol. I, pp. 557-561, and Vol. III, pp. 66-87, 163-172; Marco Aurelio Morales, *Asunto de Belice entre Guatemala y Bretaña* in same, Vol. III, pp. 281-287; L. Anderson, *Los Estados Unidos y las ocupaciones británicas en Centro-América*, in *Revista de Derecho Internacional*, No. 72 (1933), pp. 170-227; F. Termer, *Guatemala und Britisch Honduras: ein Landstreit*, in *Ibero-Amerikanisches Archiv*, Berlin, Vol. XI<sup>7</sup> (1940), pp. 44-67; F. Asturias, *Belice*, Guatemala City, 1941; G. Santiso Gálvez, *El caso de Belice a la luz de la historia y el derecho internacional*, Guatemala City, 1941; José Luis Mendoza, *Inglaterra y sus pactos sobre Belice*, 1942 (reviewed by Aurelio Alba in *Tulane Law Review*, Vol. XIX (1944), pp. 315-322; A. Craviotto, *La Paz de América*, Mexico City, 1943; Gabriel Pasos, *Belice: patrimonio de Guatemala*, Thesis, Granada (Nicaragua), 1944.

The most important juridical study is L. Anderson, *Estudio jurídico acerca de la controversia entre Guatemala y la Gran Bretaña relativa a la convención de 30 de abril de 1859 sobre asuntos territoriales* in *Revista de Derecho Internacional*, No. 70 (1939), pp. 163-231. This study has been made Guatemala's official standpoint. Guatemala has also favored the book by Mendoza. A brief summary of Guatemala's legal position is now given in *Revista de . . . Guatemala*, Vol. VIII (1945), pp. 24-27.

<sup>19</sup> Text in *Revista de . . . Guatemala*, Vol. VIII (1945), pp. 35-79.

<sup>20</sup> Same, p. 78.



gress of Guatemala requested the Government to renew measures for recovery of the territory. A Guatemalan note of September 24, 1945, to the British Minister in Guatemala declared the suspension of discussions ended and expressed the wish to initiate negotiations to reach a happy solution of the question in the least possible time. The British note of January 14, 1946,<sup>21</sup> is based on Art. 36 (3) of the Charter of the United Nations, according to which legal disputes should be referred to the International Court of Justice. While Britain rejects Guatemala's argument that the treaty of 1859 has lapsed, and regards Guatemala's claim to the territory of British Honduras as devoid of all foundation, she considers the dispute to be a legal dispute and is willing to accept the compulsory jurisdiction of the Court "*ipso facto* and without special agreement, in all legal disputes concerning the interpretation, application or validity of any treaty relating to the boundaries of British Honduras, including all questions resulting from any conclusion which the Court may reach with regard to any such treaty." The decision would naturally be binding on Britain and Guatemala.

If the case comes before the Court, two completely different legal problems may have to be decided. The first has to do, as the British note of 1946 puts it, with the interpretation, application, and validity of the treaty of 1859. The first problem the Court will have to decide is the character of this treaty and the meaning of its Art. 7; this necessitates the interpretation of the treaty. Guatemala makes the point that she concluded the treaty under pressure, fearing, in consequence of the enormous discrepancy in power between her and Britain, otherwise to lose even more territory. But Guatemala does not contest the validity of the treaty because of duress. She also concedes that she recognized by this treaty the unrestricted sovereignty of Britain over the whole territory of British Honduras. According to Guatemala's argument, as developed especially by Anderson and Mendoza, the treaty of 1859 is a real treaty of cession of territory and constitutes Britain's only legal title to Belize. According to Britain, the treaty of 1859 is a simple treaty of boundaries, concluded on the basis of previous British sovereignty. Guatemala refers to the preliminary negotiations with Wyke, in which it was made clear that the treaty is a treaty of cession of territory and that Guatemala wants a compensation as a *quid pro quo*. Wyke, Guatemala says, declared that a cession, accompanied by compensation, was diplomatically impossible, because of Britain's obligation under the Clayton-Bulwer Treaty. Guatemala declares that on account of that reason alone the treaty of cession was disguised as a treaty of boundaries, and the compensation put into the ambiguous language of Art. 7, whereby the parties agreed "conjointly to use their best efforts" for the building of the road for the mutual benefit of both parties, and she points to Wyke's

<sup>21</sup> The Guatemalan note of 1945 and the British answer of 1946 were circulated among the members of the General Assembly of the United Nations. (General Assembly, A/13, 23 January 1946, 5 pp.).

report to his Government of April 30, 1859. This argument inevitably brings up the question of what was to be Guatemala's part in these "joint efforts." Guatemala pretends that it was well understood that, in spite of its language, Art. 7 should create a unilateral obligation on the part of Great Britain for the unilateral benefit of Guatemala. The interpretation of Art. 7 is important for the question of non-fulfillment; the problem whether and how far *travaux préparatoires* may be used by the Court for the interpretation of the treaty will also present itself.

The next point is the problem of non-fulfillment. Guatemala claims that Art. 7 constituted a resolatory condition for the cession of territory. Guatemala pretends that Art. 2, concerning the demarcation of boundaries, has not been fulfilled, and that Britain has not fulfilled Art. 7, nor has she paid the £50,000 agreed upon in the abortive treaty of 1863. Has Great Britain failed to fulfill Art. 7? What about her earlier contention that her obligation under Art. 7 was canceled because of the unforeseen high costs of the construction of the road?

As, according to Guatemala, Britain failed to fulfill Art. 7, she has, under international law, a right, at her option, either to insist on fulfillment and indemnity, or to declare the treaty of 1859 no longer valid. She has chosen to declare that the treaty has lapsed because of non-fulfillment, a legal position rejected by Great Britain. Here the Court will have to decide the problem of the unilateral termination of a treaty because of non-fulfillment by the other party, and the highly controversial problem whether such unilateral right can be exercised because of the non-fulfillment of any article of a treaty, and whether in such case the whole treaty can be abrogated.

On the basis of the interpretation of the treaty and the decision of the question of non-fulfillment the Court may come to the conclusion that the treaty of 1859 has lapsed. In this case the entirely different problem of Great Britain's title to sovereignty over Belize, prior to and independent from the treaty of 1859, will have to be decided, an issue equally covered by the British note of 1946.

✓ Guatemala claims that the treaty of 1859 constitutes Britain's only legal title to Belize and that the lapse of the treaty restores the *status quo ante*, i.e. to leave Britain without any legal title, whereas the legal title is in Guatemala.

✓ Guatemala claims as the successor of Spain; Spain's title to sovereignty was inherited first by the independent Central American Republic in 1821, then, after the dissolution of this Republic, by Guatemala, to which sovereignty over Belize belongs under the rule of *uti possidetis*. ✓ Guatemala must, therefore, prove Spain's title to sovereignty.

The only legal title, Guatemala claims, which Great Britain held during the colonial period to the settlement in the northern part of British Honduras, stems from Art. 17 of the Treaty of Paris of February 10, 1763, under which the King of Spain "will not permit the British subjects or their work-

men-to be disturbed and molested under any pretense whatever in the occupation of cutting, loading, and carrying away dye wood or logwood in northern British Honduras"; but this article forbids any other agricultural, industrial or commercial activity, forbids the keeping of troops, the erection of fortifications or the establishment of any form of government and adds expressly that "this concession shall never be considered as derogating in the slightest degree the rights of the sovereignty of Spain." Analogously worded are Art. 6 of the Treaty of Versailles of September 3, 1783, and Art. 3 and 4 of the London Convention of July 14, 1786. Under these treaties, Guatemala says, Great Britain held only a precarious concession of usufruct, granted by the Spanish Crown, and expressly recognized Spanish sovereignty. Guatemala rejects the theory of title by conquest in 1798, as the Treaty of Amiens of 1802 returned to Spain the territories conquered during the hostilities, with the exception of Ceylon and Trinidad and as the Treaty of Madrid of 1814 revalidated the treaties of 1783 and 1786 and Britain recognized the limited rights of her subjects in Belize and Spain's sovereignty. Guatemala points out that Great Britain herself considered Belize merely "under the protection, but not within the dominions, of Britain," that Belize was officially known in Britain as a Settlement until 1862.<sup>22</sup> Guatemala points also to the attitude of the United States concerning Belize<sup>23</sup> and to the views of various American writers.<sup>24</sup>

As Spain had sovereignty over Belize, as Guatemala inherited Spain's title, and as, under international law, state succession extinguished the treaties of 1783 and 1786, Guatemala held sovereignty over Belize free from the concessions granted by Spain, Guatemala ceded Belize to Britain by the treaty of 1859. As this treaty has lapsed, full sovereignty is again in Guatemala and she wants to reincorporate this territory in the Republic.

Britain not only contests that the treaty of 1859 has lapsed but also rejects Guatemala's claim to the territory as devoid of all foundation. For while Spain's sovereignty over Belize is hardly deniable and was recognized

<sup>22</sup> "By the treaty of 1783 Belize still remained under Spanish sovereignty. In 1815, and for many years subsequent to that date, Britain regarded Belize merely as a settlement of British subjects upon soil the sovereignty of which was in Spain" (Mary W. Williams, *Anglo-Isthmian Diplomacy, 1815-1915*, Washington, 1916, p. 9). This, therefore, not correct, as Ireland states, that British Honduras has been "a British colony for 300 years" (work cited, p. 120).

<sup>23</sup> A statement by Clayton to Bulwer is quoted in *Cambridge History of the British Empire* (Vol. II, p. 541), according to which the United States did not construe the renunciation of territorial interests by Great Britain as extending to her settlement in Belize. But later the Senate set up an inquiry into British proceedings in Belize and a United States Representative "went on to claim that Belize itself was part of Guatemalan territory and that the British settlers were intruders" (same, p. 541). The United States recognized British claims to Belize in the Dallas-Clarendon treaty of 1856, but Guatemala takes the position that this treaty can in no way be binding upon Guatemala.

<sup>24</sup> Bancroft, *History of Central America*, Vol. II, p. 629. See also Manuel Peniche, *Historia de las relaciones de España y México con Inglaterra sobre el establecimiento de Belize*, 1869.

by Britain, Britain bases her title to Belize, apart from the treaty of 1859, on effective occupation, long and undisturbed possession.<sup>25</sup>

The termination of the old dispute by international adjudication is highly desirable; it would also give the International Court of Justice a first case of great legal interest and considerable political importance. The decision of Great Britain to accept the compulsory jurisdiction of the Court in this dispute, which eventually may involve the fate of the colony, is certainly proof of Britain's earnest desire to base British policy on the United Nations Organization. Naturally the consent of Guatemala is necessary to give the Court jurisdiction; notwithstanding her attitude of 1937, it is earnestly to be hoped that Guatemala will give her consent.

JOSEF L. KUNZ

#### THE DEMAND FOR WORLD GOVERNMENT

The atomic bomb may produce as great a revolution in the field of political science as in that of physical science. The atomic scientists, more aware of what they have done, and shocked by this awareness into earnest and vigorous effort to secure social action to control the consequences of their discoveries, demand a strong international control over production and use of the bomb and are quite willing to follow the consequences of this logic into a system of world government. Even though depressed by consultation with political scientists they are not discouraged; they are steadily organizing and pressing for what they think is needed. There is no group in the country more socially conscious, more eager, or more potentially effective than the atomic scientists, and those who are interested in international law and order may gain greatly from association with them.

It is characteristic of the average human being that it requires disaster, or the immediate prospect of disaster, to rouse him to doing what his intelligence long ago told him to do, or to thinking of that on which he never before took the trouble to think. Many who had not troubled themselves to think about organization for the maintenance of international peace now look appealingly to the UNO, and ask for a commission to control the atomic bomb. Others who had complacently satisfied themselves that the UNO was a safe shelter for sovereign irresponsibility are now shocked into asking that what should have been done at San Francisco (by way of strengthening the Charter) should now be done. Some who had always demanded a stronger system now ask for world government, and find an increasing number of followers.

The demand for world government increases steadily, though those who support it would differ greatly as to its meaning or degree of authority. A number of distinguished persons met at Dublin, N. H., in October, 1945, and drew up a statement calling for a much stronger international system

<sup>25</sup> "Continuous and peaceful display of territorial sovereignty (peaceful in relation to other States) is as good as a title" (Huber, Arbitrator, *The Island of Palmas (Miangas)*, 1928).

than was provided in the charter of UNO. This was interpreted as asking for abandonment of UNO and construction *de novo*, though this interpretation was denied by some members. The group has continued its activities, meeting at Princeton in January, 1946, and sending a representative to London to present to the UNO General Assembly recommendations for specific amendments to the United Nations Charter.<sup>1</sup> "Americans United for World Organization," under the chairmanship of the radio commentator, Raymond Gram Swing, have changed their name to "Americans United for World Government," and announce a policy "for the development of the United Nations Charter into a world agency adequate in delegated sovereignty to enforce the peace." Dr. Arthur Compton has told us that "if we are wise we shall take immediate steps to form a world government." Mr. Ely Culbertson, not going this far, calls for a "Federative Alliance," employing his earlier quota plan. Mr. T. K. Finlette has written an article entitled "No Middle Ground"—either world government or the old anarchy of agreement among sovereign states.<sup>2</sup> A book by Emery Reves, *The Anatomy of Peace*, is becoming a best seller, worth two issues of the *Reader's Digest*. A dramatic statement by Mr. Norman Cousins in the *Saturday Review of Literature* has been distributed widely. World government has been debated over the University of Chicago Round Table and Town Hall of the Air, at the Norman Waite Harris Foundation meetings; it is increasingly the topic of forums and cocktail parties, not to mention meetings of political scientists. An organized group of distinguished authors has petitioned the President in its support. A resolution to this end has been introduced into Congress.<sup>3</sup>

Whereas a few months ago the issue before the American people was that between international organization and international government (with the former winning at San Francisco), the issue is now becoming one between international government and world government. What is the difference between them?

The former is sufficiently explained by the prefix "inter." It would be an association of states—sovereign states, if you wish—which establish some common organs and agree to certain rules and obligations for the maintenance of peace and the advancement of common interests. It has been argued in political debates over the UNO that such a system means no loss of sovereignty, but this involves questions of meaning and of degree. The United Nations Organization probably has too little authority to be called even "international government," much less "world government."

The latter phrase is not yet one of agreed meaning, but the chief char-

<sup>1</sup> The Dublin, N. H., conference was called together by Owen Roberts, formerly Justice of the Supreme Court, Robert P. Bass, former Governor of New Hampshire, Grenville Clark, and Thomas H. Mahoney. Its Chairman is now Alan Cranston of Washington.

<sup>2</sup> *The Nation*, New York, Atomic Bomb Supplement December 22, 1945.

<sup>3</sup> By Senator Glean Taylor: Sen. Res. 183, 79 Cong. 1 Sess

acteristics of the system which it denotes may be summarized as follows: a legislative body which can make new international law by majority vote, binding sovereign states without their individual consent; a court with compulsory jurisdiction, before which sovereign states can be called even without their consent; an international police force, not dependent upon the armed forces of sovereign states; and authority to reach down to individuals within sovereign states and uphold rights or require duties of them. The object of attack is national sovereignty.

This writer can accept these as logical and desirable objectives, but there remains the very important question as to the means by which they should be sought and the extent to which they can now be practicably pressed.<sup>4</sup> Is the UNO so unavailing that it must be abandoned, and must we build *de novo*, from the ground up? If so it is a discouraging prospect which lies ahead for us.

When the atomic scientist has completed his formula with scientific proof his job is done; when the political scientist has demonstrated the logic of his formula his job has just begun. Acceptance of the latter, no matter how logical, depends upon the information and interest, the whims, prejudices, and economic situation, of the average citizen; it depends upon what the *Reader's Digest* chooses to print, upon radio talks by a Father Coughlin, upon the printing by the Hearst papers of petitions to be signed by readers and delivered by truckloads to Senators. Public opinion advances slowly, and not even the shock of the atomic bomb has produced, upon any wide scale, change of established beliefs concerning national sovereignty. The same public which welcomes with enthusiasm and admiration any scientific discovery, no matter how frightening in its consequences, looks with suspicion and skepticism upon the political scientist who proposes a social or governmental change to take account of these consequences.

This situation, for good or bad, is part of the problem; it can not be disregarded. Democracy moves slowly its wonders to perform; the people must be willing to accept and support the idea—probably under dictatorships as well. World Government can not spring full panoplied from the brain of the political scientist; it can be born only after long gestation and painful travail. Political progress rarely if ever appears as a complete break with the past; usually it builds upon what is already there.

These reflections lead to the conclusion that it would be unwise and

<sup>4</sup> Since the above was written, a report has been received summarizing the results of a questionnaire conducted for the *American Magazine* by the Bureau of Applied Social Research at Columbia University. Practically all of the 50 or 60 experts consulted were in favor of working toward a world government as a final objective. On the other hand, not one of them was willing to push ahead, independently of the UNO, and to seek to establish world government at once. They divided about equally as to whether an effort should be made at once to change UNO into a true world government, or whether UNO should gradually be strengthened and developed toward that goal.

probably impossible to scrap UNO and to substitute for it a new scheme of world government. The chances are that we would lose what we have gained—for UNO is a gain—and acquire nothing in its place. On the other hand it may be possible to develop UNO in the desired direction. Whatever changes are made, within or without UNO, must depend upon the agreement of sovereign states; and it would surely be easier to achieve this agreement by the procedures and pressures available under UNO, and by changes in UNO itself, than by thrusting a new system *in toto* upon public opinion throughout the world.

Taking the characteristics of world government as above suggested, what would be the possibilities? An independent police force, such as Governor Stassen has asked for, could be provided within the terms of the present Charter, without amendment—if members would agree to do it. All that is necessary to secure compulsory jurisdiction for the Court is acceptance by a few other states of the "Optional Clause" of the Statute of the Court; an example set by the United States in this regard (i.e., adoption of Senator Morse's resolution) would be followed by many other states. These advances could be made without an entirely new system, and without even the necessity of amending the Charter.

Authority to legislate, to bind a state without its own consent, would require amendment. Though Mr. Bevin has strongly supported a World Parliament more opposition would be encountered here. Such amendment might be possible, however, for limited fields of legislative authority, such perhaps as regulations concerning control over materials needed for the atomic bomb. To remove the veto, which advocates of world government would regard as essential in this connection, would also require amendment.

Finally, the proposal to authorize the world government to reach down to individuals within sovereign states would change the character of UNO and make it a supra-national body. While this could, of course, be done by amendment, it would meet with passionate opposition from patriots of many nationalities. Responsibility and loyalty to an international authority by individuals would seem to be the key feature of world government; and certainly the individual human being is the unit to serve which all organizations exist. It is, however, in the sense of a general authority to supersede the jurisdiction of sovereign states over individuals, unattainable at present. On the other hand, the Charter of UNO itself contains the concept of international protection of human rights (and rights imply duties); the Nuremberg trials may establish a precedent for holding individuals liable for international crimes; and fear of the atomic bomb again might lead to acceptance of certain specific controls over individuals in the effort to control this weapon. Development would be possible under the UNO, step by step, where it would be impossible as a new system, overriding national sovereignty completely.

It thus appears that the issue is one of degree, and there is no reason why

it should split public opinion into factious opposition. What advocates of world government wish can be obtained, where possible of attainment, more easily through the development and strengthening of UNO than by scrapping UNO and building anew. It is a very common error to say that the only alternatives are sovereignty or no sovereignty. Sovereignty, certainly in the practice of today, is not an absolute matter, but a very relative one. It may be compared to individual liberty, which is never regarded as absolute freedom of action. Sovereignty likewise will be earnestly maintained, but sovereignty also is being progressively restricted. This process has been going on for years, and UNO, weak as it is, has added further restrictions upon sovereignty. This process should be continued, and can be, but it would not be possible to travel the whole distance in one leap. Few persons are satisfied with UNO as it now stands, and many believe that public opinion would have approved more authority for it than timorous Senators and statesmen were willing to confer upon it. With the added weight of fear of the atomic bomb upon public opinion there is little doubt that the American people would, with adequate leadership, approve various steps moving the UNO in the direction of world government, but it is very much to be doubted whether they would be willing to scrap UNO and again go through the travail of creating a new system. That would be a dangerous risk to take.

CLYDE EAGLETON

#### THE ALTERNATIVE TO APPEASEMENT

Once again the more important states of the world and their governments and their peoples are being confronted by the question of whether they shall seek international peace and justice by a process of appeasement. To some degree all states are placed in this position but it is states with more power to determine the course of international affairs and greater responsibility therefor, in a vague sense, and, conversely, with greater interests at stake, which are more gravely affected. It is also true that this question—that of trying to forestall recourse to violence and satisfy the demands of justice by concessions to national demands—is an ever present issue in international affairs, but the issue becomes more acute at certain times when some one or more states make especially drastic demands, accompanied by especially dangerous threats, express or implied. Such a situation developed in the world between 1922 and 1941, Italy, Japan, and Germany being the leading figures in the action, and it is widely felt that as a result of Russian policies and initiatives a similar situation confronts the world today.

It will be denied by many critics of appeasement that there is involved any question of satisfying just demands, or of doing justice beyond preserving peace, in such situations. This would seem to be an unenable, and also a very dangerous, attitude. In any such situation the demands of the complaining and aggressive (but not yet aggressor) states almost invariably contain a greater or less amount, or more or fewer items, of justice. Japan



had just complaints against China in 1931 and 1937, Italy just complaints against Ethiopia in 1934-1935, and Germany just complaints against Poland and other countries in 1939. Indeed it is in part the more or less completely negative *non possumus* attitude of the other states which renders the demands of the aggressive state so intransigent. The real objection to his demands often lies not in their injustice but precisely in their intransigence and more particularly still in his unwillingness to seek satisfaction through the processes of inquiry, discussion, and consent and thus submit his demands to appraisal as to their justifiability. Opponents of appeasement often fall into a similar error on the other side and practically repudiate the basic principle of revision in its entirety.

This is a problem of human relations, behavior, or tactics, in all walks of life, but it is a peculiarly international problem and has been recognized as such for some time. It is even a problem of international law if enforcement of international rights and obligations is, as is often argued, a question of international law itself. It is closely related to the problem of how best to advance the development of international institutions, which has recently been given sharp attention by various students.<sup>1</sup> The question is peculiarly important in the international field because of the relatively limited extent to which substantive rights and procedure for the vindication of those rights are defined and provided by international law; this makes negotiation and manoeuvring and tactics doubly important in comparison with their status in the more fully regulated national field.

The thought back of an appeasement policy is obvious. Preservation of peace is of paramount importance, it is argued; therefore such concessions should be made, within reason, as will satisfy the demands of aggressive states. In absence of adequate international community facilities for adjudicating upon their rights and enforcing the law, including the obligation to refrain from aggression (assuming that there is such an obligation), and in view of the dangers involved in attempting to carry out such a program, it is felt to be better to be conciliatory and conceding. Today the idea that preservation of unity among the Great Powers is essential to the maintenance of peace is added to the argument.

The weakness of such a program is also obvious (the obscure and perplexing problems arise later). Justice is forgotten, in carrying out such a program, in the interest of immediate peace, although peace cannot be stable if based on injustice, and the qualification "within reason" is forgotten and the making of concessions becomes a headlong capitulation. The demands of the aggressive state being based largely on mere interest rather than on law, concessions do not quiet the issue but seem to be a sign of weakness and encourage further demands. The attempt to buy off the aggressive state by concessions, loans, or other favors, is futile. Such grants encourage other states to make similar demands, if they believe that

<sup>1</sup> This JOURNAL, Vol. 39 (1945), p. 547, note 4.

they can succeed in such a venture, or, conversely, they discourage victimized states from standing up for their rights if they feel powerless to contest a case. And it is precisely among the Great Powers that the greatest vigilance is required in this respect. In these ways the international situation is undermined morally or psychologically and even juridically. The result is likely to constitute not only a gross sacrifice of justice but also a general collapse of international morale, leading to that very outbreak of war which it was sought to avoid, especially if the aggressive state is willing, as is likely to be the case, to go that far.

The real difficulty arises when it is asked what is the proper alternative to appeasement as a method for dealing with aggressive demands. Two or three possible techniques for meeting the situation may be considered. One method frankly advanced is preventive war, another is that of adopting substantially the methods and manner of the aggressive state. A third may better be analyzed and described when we come to it than sharply labelled in advance.

Advocacy of preventive war in such a situation seems unduly extreme, unnecessarily extravagant, almost a counsel of despair, as it at once plunges into one of the two results sought to be avoided, with all its disastrous consequences and uncertainties. If the states resisting impending aggression could be sure of quick and effective results there would be much to be said for the action in question; it could well take on the character of international police action—if well founded in right and general international approval; certainly if war is inevitable (which is never certain) preventive action is immeasurably superior to merely waiting for the aggressor to choose his own occasion while allowing one's own powers to dwindle in the meantime. But although the vices of preventive war have been exaggerated by the pacifists, and its possible values unduly ignored, it obviously constitutes a desperate expedient, one to be adopted only if there is no other alternative available; it is the typical hasty "solution" proposed by the military "mind."

In a reaction against or away from appeasement another "strong" or "firm" or "hard" technique is at times put forward<sup>2</sup> which, while it expressly repudiates war as a possibility, certainly seems to lie on the same side of the psychological and political spectrum. The bold demands of the aggressive state are to be matched with equally bold statements by those who oppose him. Complaint is to be met with complaint, if circumstances warrant, and even threats are to be met by an attitude which refuses to be intimidated and which clearly by implication threatens resistance. And all thought of appeasement, justified or unjustified, would disappear upon the adoption of such an attitude.

The basic idea underlying such a stand is sound and so are one or two

<sup>2</sup> Addresses of Senator Vandenberg and Secretary of State Byrnes on February 27 and 28 and that of Mr. Churchill on March 5, 1946: *The New York Times*, February 28 and March 1 and 6, 1946.

subordinate considerations involved. It is equally true, however, that certain qualifications and cautions are necessary.

It is thus wholly wise and sound to repudiate unjustified and shortsighted appeasement and to stand up for what is right. And in so far as the aggressive state is bluffing or counting on obtaining what it wants merely by the effect of strong words, replying in kind may be just the thing needed. Finally, the general moral, psychological, or political effect of courageous leadership in maintaining the principles of international law and order should count for something here.

On the other hand, if such a change of attitude means merely to indulge in a contest in loud shouting or aggressive action, it can be exceedingly dangerous, especially if accompanied by the fatal *non-possumus* attitude mentioned earlier. If the aggressive state should not have been bluffing the effect may be to upset the applecart and to do so without careful calculation of advantage as to time and other factors. This is bound to be disastrous if the tactic of strong words and firm stands is adopted under the illusion that it will necessarily be sufficient, because of the moral position of the defender of international peace and order, for the aggressive state will certainly not defer to any such considerations. If a policy of strong words is to be adopted it must be backed up by willingness and ability to defend the law by force if need be.

What then is the proper alternative to appeasement? Is there no sound compromise between the latter on one side and, on the other, preventive war or the less immediate but also extremely dangerous technique just considered? It hardly seems that the wise course to be pursued in such circumstances need be either undiscoverable or unattainable. Men have been struggling with this problem for six thousand years of recorded history and for many more thousands of years of unrecorded history. It is a perennial problem, and it will not be entirely eliminated by the establishment of a world state, a system of world law, and even facilities for its execution; it is the generic problem of maintaining law and justice and the general welfare by wise tactics *vis-à-vis* potentially anti-social action.

Abandonment of unsound appeasement, for the reasons recited, is obviously the first step to be taken along the road to both peace and justice; the arguments supporting this conclusion do not need to be repeated here. This must include a resolute refusal to give any aid, economic or other, so long as the aggressive state maintains its unreasonable demands or its anti-social actions, or which can aid it in these matters. Repudiation of any intention of preventive war is almost equally important, especially if the aggressive state labors under a morbid fear in this respect; such a repudiation may not be entirely convincing to the latter but if, as is almost certainly the case, this position is sincerely taken it should be possible by fullest publicity and repetition and detailed elaboration to make it so. Next a firm but a quiet and considerate attitude must be taken on the issues at stake—

absolutely firm but scrupulously dispassionate and reasonable; this must be supplemented by a constant readiness for frankness, understanding, agreement, and even coöperation in removing misunderstanding and causes of strife. This must all be backed up by equally unostentatious but unconcealed maintenance of economic and military power—rehabilitation of that power if it has been allowed to degenerate. Measures of appeasement may safely be undertaken if it is clearly stipulated that no rights are waived in the process, and adequate precautions taken against sharp practices on the part of the adversary. And when confronted by physical *faits accomplis* the choice must be made between being content with public protest, plus refusal of coöperation, even approaching measures of non-intercourse or boycott, and general hostile physical action if the situation justifies it.

Finally, and most important of all, emphasis must be shifted from the concrete cases or issues at stake to the question of their mode of treatment or settlement. Wrangling over specific items is ordinarily the cardinal weakness alike of the position of the aggressive state and of that of the defenders of international law and world peace, as suggested earlier in this discussion. They assert and deny title to or possession of a certain piece of territory, e.g., when they—that is, the defenders—should throw all their weight behind the demand for methods of rational and pacific settlement (inquiry, discussion, agreement or/and adjudication). Insisting on orderly processes of settlement is in the main the keynote of this whole problem, or its solution. It is far more difficult for the aggressive state to meet this proposal than concrete opposition to his concrete demands or action, and this is the only thing which the defenders have a right to ask, *a priori*, in any case. The proper alternative to appeasement is not to match aggressiveness by war or bellicosity but to substitute for appeasement quiet but unflinching insistence on orderly processes of settlement—accompanied by genuine willingness to make changes when this process indicates that they should be made, but also by maintenance of force for use in case of need. Even this will not necessarily accomplish the result desired—maintenance of international law and peace—but it has a far better chance of attaining that end than either appeasement or violence and if it breaks down the position of the aggressor state must be far weaker morally, politically, and hence from a physical standpoint also.<sup>2</sup>

PITMAN B. POTTER

#### DUE PROCESS AND INTERNATIONAL LAW

In a six to two decision the United States Supreme Court recently sustained the decision of a Military Commission appointed by General MacArthur in the Philippines sentencing General Yamashita for failure to prevent

<sup>2</sup> Since this was written Mr. Dulles, Senator Connolly, and former Secretary Hull have suggested that they believed to be appropriate programs to be followed in the circumstances: *The New York Times*, March 2, 12 (p. 5), and 13, 1943.

atrocities by forces under his command during Japanese occupation of the Philippines.<sup>1</sup> Chief Justice Stone, who wrote the opinion of the Court, and Justices Murphy and Rutledge, who dissented, were together in recognizing that the authority of the Commission came from the law of war and the authority of Congress to "define and punish . . . offenses against the law of nations" which includes the law of war.

The dissenting justices considered that since the Commission was set up under the authority of the United States, the defendant was entitled to the guarantees of due process of law asserted in the Fifth Amendment. According to Justice Murphy,<sup>1a</sup>

The Fifth Amendment guarantee of due process of law applies to "any person" who is accused of a crime by the Federal Government or any of its agencies. No exception is made as to those who are accused of war crimes or as to those who possess the status of an enemy belligerent. Indeed, such an exception would be contrary to the whole philosophy of human rights which makes the Constitution the great living document that it is. (The immutable rights of the individual, including those secured by the due process clause of the Fifth Amendment, belong not alone to the members of those nations that excel on the battlefield or that subscribed to the democratic ideology.) They belong to every person in the world, victor or vanquished, whatever may be his race, color or beliefs. They rise above any status of belligerency or outlawry. They survive any popular passion or frenzy of the moment. No court or legislature or executive, not even the mightiest army in the world, can ever destroy them. Such is the universal and indestructible nature of the rights which the due process clause of the Fifth Amendment recognizes and protects when life or liberty is threatened by virtue of the authority of the United States.

The Chief Justice, however, speaking for the Court, declined to hold that "due process" in the sense applicable to domestic tribunals applied to a tribunal established under international law. Except as Congress had expressly declared otherwise, the competence and procedure of such tribunals were, he thought, determined by international law.<sup>2</sup> and, in the case of mili-

<sup>1</sup> *In re Yamashita*, 1946, 66 Sup. Ct. 340, text below, p. 412. Cited hereafter as Case.

<sup>1a</sup> Case, p. 353.

<sup>2</sup> There is nothing novel in this doctrine. The Supreme Court has held that the Constitutional Guarantees do not apply automatically to extraterritorial courts established in pursuance of treaties (*In re Ross*, 1890, 140 U. S. 453, 464), to courts in occupied foreign territory (*Neeley v. Henkel*, 1901, 180 U. S. 109, 122), or to military commissions (*Ex parte Vallandigham*, 1863, 1 Wall. 243. *Ex parte Quirin*, 1942, 317 U. S. 1). It has even been held that they do not automatically apply in annexed territories not yet incorporated into the United States (*Hawaii v. Mankichi*, 1933, 190, 197; *Dorr v. U. S.*, 1904, 195 U. S. 138) although the court "suggested" that "certain natural rights (including the right to due process of law) enforced in the Constitution by prohibition against interference with them" may be guaranteed in unincorporated territory but "what may be termed artificial or remedial rights which are peculiar to our own system of jurisprudence" are not. (Brown, J., in *Downes v. Bidwell*, 1901, 182 U. S. 244, 282).

tary commissions, it belonged in first instance to the commanding officer to apply that law.<sup>2a</sup>

By thus recognizing military commissions in order to preserve their traditional jurisdiction over enemy combatants unimpaired by the Articles (of War), Congress gave sanction, as we held in *Ex parte Quirin* (317 U. S. 1), to any use of the military commission contemplated by the common law of war. . . . Petitioner, an enemy combatant, is therefore not a person made subject to the Articles of War by Article 2, and the military commission before which he was tried, though sanctioned, and its jurisdiction saved, by Article 15, was not convened by virtue of the Articles of War, but pursuant to the common law of war. It follows that the Articles of War, including Articles 25 and 38, were not applicable to petitioner's trial and imposed no restrictions upon the procedure to be followed. The Articles left the control over the procedure in such a case where it had previously been, with the military command.

The Court discussed the contentions of the defendant that a military commission could not be convened after cessation of hostilities; that the prosecution failed to charge a violation of the law of war; that the order governing the procedure of the commission permitted the admission in evidence of depositions, affidavits, and hearsay and opinion evidence; that the defendant was not given the same procedural advantages which a military commission would have accorded to an American soldier charged with the same offense; that advance notice had not been given to the neutral power representing the interests of Japan in the United States; and that the defense was not given time to prepare its case. The Court, however, found "that the Commission had authority to proceed with the trial, and in doing so did not violate any military, statutory or constitutional command," and consequently concluded that the proceedings were lawful.<sup>2b</sup>

The dissenting justices thought that the Court assumed that justice would be done if no positive law was violated. They objected, however, that this would leave the defendant with no constitutional protection at all. Justice Rutledge said:<sup>2c</sup>

The Court does not declare expressly that petitioner as an enemy belligerent has no constitutional rights, a ruling I could understand but not accept. Neither does it affirm that he has some, if but little, constitutional protection. Nor does the Court defend what was done. I think the effect of what it does is in substance to deny him all such safeguards. And this is the great issue in the cause.

For it is exactly here we enter wholly unbrodden ground. The safe signposts to the rear are not in the sum of protections surrounding jury trials or any other proceeding known to our law. Nor is the essence of the Fifth Amendment's elementary protection comprehended in any single one of our time-honored specific constitutional safeguards in trial, though there are some without which the words "fair trial" and all they connote become a mockery.

Apart from a tribunal concerned that the law as applied shall be an

<sup>2a</sup> Case, p. 350.

<sup>2b</sup> P. 353.

<sup>2c</sup> P. 378.

instrument of justice, albeit stern in measure to the guilt established, the heart of the security lies in two things. One is that conviction shall not rest in any essential part upon unchecked rumor, report, or the results of the prosecution's ex parte investigations, but shall stand on proven fact; the other, correlative, lies in a fair chance to defend. This embraces at the least the rights to know with reasonable clarity in advance of the trial the exact nature of the offense with which one is to be charged; to have reasonable time for preparing to meet the charge and to have the aid of counsel in doing so, as also in the trial itself; and if, during its course, one is taken by surprise, through the injection of new charges or reversal of rulings which brings forth new masses of evidence, then to have further reasonable time for meeting the unexpected shift.

One may ask in what law did Justice Rutledge discover this essence of justice? The dissenting justices rested principally on the Fifth Amendment though it clearly was not intended to apply literally in courts exercising jurisdiction over the enemy.<sup>3</sup> Perhaps they had in mind the distinction made in the Insular Cases between "natural" and "artificial" rights specified in that amendment.<sup>4</sup> They would have been on firmer ground if they had sought standards established in international law.

That law is to be found, according to the Statute of the International Court of Justice (Art. 38), in international conventions, international customs, general principles of law recognized by civilized nations, judicial decisions and text writers. From these sources arbitral tribunals have assumed that standards can be found determining what constitutes a denial of justice.<sup>5</sup>

According to the practice of international law, Japan is entitled to protest and demand reparations from the United States if General Yamashita was denied justice in his trial. In fact, the Potsdam Declaration of July 26, 1945, acceptance of which by Japan on August 10, 1945, brought hostilities to an end, declared that "stern justice shall be meted out to all war criminals, including those who have visited cruelties upon our prisoners." This agreement was cited by the Court<sup>5a</sup> and, like all international agreements, is to be interpreted by standards of international law. It would seem, therefore, that in the Yamashita case the Supreme Court should apply the standards on the basis of which an international tribunal would decide whether justice was denied by the military commission. The Court did in fact utilize various sources of international law but it made little effort to discover the standards by which that law determines whether justice has been denied.

<sup>3</sup> It has been held that Constitutional guarantees do not prevent condemnation without compensation of enemy property in prize courts (*The Prize Cases*, 1862, 2 Black 665), or even in ordinary courts (*Miller v. U. S.*, 1870, 11 Wall. 268, 307; *U. S. v. Chemical Foundation*, 1926, 272 U. S. 1, 11).

<sup>4</sup> Note 2 above.

<sup>5</sup> "The propriety of governmental acts should be put to the test of international standards." Neer case (*U. S. v. Mexico*, 1927, Opinion of the Commissioners, p. 71; Green Hackworth, *Digest of International Law*, Vol. 5, p. 528).

<sup>5a</sup> Case, p. 345.

It is clear that international law sets less precise standards of justice than does due process of law in the United States Constitution. The civilized countries of the world vary in their technical rules. Some require juries in criminal cases, others do not. Some prefer an inquisitorial procedure, others a litigious procedure. Some, especially those utilizing juries, have rigorous rules of evidence, others leave the court a wide freedom to examine and weigh every sort of evidence. Some will not admit criminal liability unless the offense and its penalty were very precisely defined by law before the act was committed, others leave the tribunal a considerable latitude to find criminal liability and determine penalties on the basis of general definitions of offences and principles of law. (International law cannot apply the technicalities of any one system of municipal law but must discover the general principles underlying all civilized systems of law and the customs inherent in international practice as evidenced by conventions, diplomatic discussions, and opinions of international tribunals and text writers.) Professor Edwin Borchard, after noticing that diplomatic practice and arbitral decisions "have established the existence of an international minimum standard to which all civilized states are required to conform under penalty of responsibility," writes: *4/8/47*

But the existence of the standard and its service as a criterion of international responsibility in specific instances by no means give us a definition of its content. Frequent reference to it may easily give rise to the erroneous inference that it is definite and definable, whereas the variability of time, place and circumstance makes it even less precise than the term "due process of law," which has also with the passage of time added substantive content to its procedural controls. The international standard is compounded of general principles recognized by the domestic law of practically every civilized country, and it is not to be supposed that any normal state would repudiate it or, if able, fail to observe it. Referring to its procedural aspects Mr. Root in 1910 characterized it as "a standard of justice, very simple, very fundamental, and of such general acceptance by all civilized countries as to form a part of the international law of the world."<sup>6</sup>

Among definitions of denial of justice from the procedural aspect the following may be noted:

The state is responsible on the score of denial of justice . . . when the tribunals do not offer the guarantees which are indispensable to the proper administration of justice.

The state is likewise responsible if the procedure or the judgment is manifestly unjust, especially if they have been inspired by ill-will towards foreigners as such, or as citizens of a particular state.<sup>7</sup>

A state is responsible if an injury to an alien results from a denial of

<sup>6</sup> "The Minimum Standard of the Treatment of Aliens," in *Proceedings of the American Society of International Law*, 1939, p. 61.

<sup>7</sup> *Institute of International Law*, 1927, this JOURNAL, Vol. 23 (1929), *Special Supplement* p. 229.



justice. Denial of justice exists when there is a denial, unwarranted delay or obstruction of access to courts, gross deficiency in the administration of judicial or remedial process, failure to provide those guarantees which are generally considered indispensable to the proper administration of justice, or a manifestly unjust judgment. An error of a national court which does not produce manifest injustice is not a denial of justice.<sup>8</sup>

In exercising jurisdiction under this Convention, no State shall prosecute an alien who has not been taken into custody by its authorities, prevent communication between an alien held for prosecution or punishment and the diplomatic or consular officers of the State of which he is a national, subject an alien held for prosecution or punishment to other than just and humane treatment, prosecute an alien otherwise and by fair trial before an impartial tribunal and without unreasonable delay, inflict upon an alien any excessive or cruel and unusual punishment, or subject an alien to unfair discrimination.<sup>9</sup>

Everyone has the right to have his criminal and civil liabilities and his rights determined without undue delay by fair public trial by a competent tribunal before which he has had opportunity for a full hearing. The state has a duty to maintain adequate tribunals and procedures to make this right effective.

Everyone who is detained has the right to immediate judicial determination of the legality of his detention. The state has a duty to provide adequate procedures to make this right effective.

No one shall be convicted of crime except for violation of a law in effect at the time of the commission of the act charged as an offense, nor be subjected to a penalty greater than that applicable at the time of the commission of the offense.<sup>10</sup>

Commenting on international practice as evidenced by the awards of arbitral tribunals and treaties, Borchard writes:

While military law, operating in time of war only, gives military officers and courts a greater discretion in the matter of arrest, detention and imprisonment than is accorded to civil authorities in time of peace, they must nevertheless comply with the requirements of due process of law. Treaties usually provide for due process of law in the litigation, civil or criminal, to which the respective citizens of the contracting states are parties, by stipulating for free access to courts, formal charges, an opportunity to be heard, to employ counsel, to examine witnesses and evidence, and a guaranty of essential safeguards against a denial of justice.<sup>10.1</sup>

Did the trial of General Yamashita measure up to these standards? It is not proposed to examine the questions in detail, but some remarks may be pertinent in regard to the complaints made by the defendant.

<sup>8</sup> Harvard Research in International Law, Draft Convention on Responsibility of States, Art. 9, this JOURNAL, Vol. 23 (1929), Special Supplement, p. 173; Hackworth, Vol. 5, p. 527.

<sup>9</sup> Harvard Research, Draft Convention on Jurisdiction with respect to Crime, Art. 12, this JOURNAL, Vol. 29 (1935), Supplement, p. 596.

<sup>10</sup> Statement of Essential Human Rights by committee representing principal cultures of the world appointed by the American Law Institute, 1944, Arts. 7, 8, 9.

<sup>10.1</sup> *Diplomatic Protection of Citizens Abroad*, 1919, p. 100.

(1) Could a military commission be convened after hostilities were over for trial of breaches of the law of war by enemy persons? On this point the court examined international law and concluded:<sup>10a</sup>

No writer on international law appears to have regarded the power of military tribunals, otherwise competent to try violations of the law of war, as terminating before the formal state of war has ended. In our own military history there have been numerous instances in which offenders were tried by military commissions after the cessation of hostilities and before the proclamation of peace, for offenses against the law of war committed before the cessation of hostilities.

The dissenting justices made little objection on this point, though Justice Rutledge thought there was less necessity for a military commission after active hostilities were over.<sup>10b</sup>

(2) Did the prosecution charge acts which were violations of the law of war when committed? On this point the court said: "Obviously, charges of violations of the law of war triable before a military tribunal need not be stated with the precision of a common law indictment."<sup>10c</sup> Provisions of the Hague Conventions, arbitral awards, and opinions of United States Courts were cited, enabling the court to conclude, "that the allegations of the charge, tested by any reasonable standard, adequately alleges a violation of the law of war and that the commission had authority to try and decide the issue which it raised."

Justice Murphy argued at length, however, that a commanding officer could not be considered responsible for the action of persons in his command when in fact, because of the military situation at the time, he could not control or even know what they were doing. He said:<sup>10c</sup>

The only conclusion I can draw is that the charge made against the petitioner is clearly without precedent in international law or in the annals of recorded military history. This is not to say that enemy commanders may escape punishment for clear and unlawful failures to prevent atrocities. But that punishment should be based upon charges fairly drawn in light of established rules of international law and recognized concepts of justice.

The issue is a close one, but it would appear that international law holds commanders to a high degree of responsibility for the action of their forces. They are obliged to so discipline their forces that members of those forces will behave in accordance with the rules of war even when military circumstances in considerable measure eliminate the practical capacity of the commander to control them.

(3) Does international law permit the submission of depositions, affidavits, and hearsay and opinion evidence in trials in military commissions? On this point the court did not adduce international practice but merely said:<sup>10e</sup>

We cannot say that the commission, in admitting evidence to which objection is now made, violated any act of Congress, treaty or military command defining the commission's authority. For reasons already stated we hold that the commission's rulings on evidence and on the

<sup>10a</sup> Case, p. 346.

<sup>10b</sup> P. 362.

<sup>10c</sup> P. 349.

<sup>10d</sup> P. 353.

<sup>10e</sup> P. 351.

mode of conducting these proceedings against petitioner are not reviewable by the courts, but only by the reviewing military authorities. From this viewpoint it is unnecessary to consider what, in other situations, the Fifth Amendment might require and as to that no intimation one way or the other is to be implied.

Justice Rutledge argued at length that admission of such evidence violates a fundamental principle of justice. It is clear, however, that international tribunals have hesitated to exclude any sort of evidence<sup>11</sup> and the courts in many civilized countries are similarly free in the admission of evidence leaving it to the judges to appreciate the weight that should be attached to the materials.<sup>12</sup> Such evidence has been commonly admitted in military tribunals although in American courts martial certain limitations are imposed by statute. It is not believed that admission of such evidence constitutes a denial of justice in international law.

(4) Does international law require that an enemy be given the same rights as a national tried for the same offense?

The argument that under Article 63 of the Geneva Prisoners of War Convention, prisoners of war are entitled to the same procedure as would be applied to an American soldier in similar circumstances was dealt with by the tribunal on the basis of interpretation of the convention. It held that Article 63 referred to offenses committed while the individual was a prisoner of war, not to earlier violations of the law of war. The dissenting justices gave a broader interpretation to this article. Irrespective of the interpretation of the particular article, it is to be noted that denial of justice in international law has frequently been interpreted to require, as a minimum, treatment of aliens equal to that of nationals. It may be questioned, however, whether international law requires the application of this principle in military commissions. The enemy can, apart from specific convention, claim only the international standard even if the national is given more.<sup>13</sup>

(5) Does the Geneva Convention (Article 60) require notice to the protecting power before trial of a prisoner of war? The Court held that this Article, like Article 63, referred only to trials for offenses committed while the individual was a prisoner of war. The prosecution had charged that General Yamashita had violated the law of war by trying American prisoners of war without notifying the protecting power, an inconsistency emphasized by the defense. The court dealt with the point in a footnote pointing out that it was not clear that the trials authorized by General Yamashita had dealt with

<sup>11</sup> Manley O. Hudson, *The Permanent Court of International Justice, 1920-1942*, p. 571.

<sup>12</sup> "With responsibility for the ascertainment of facts vested in professional judges, the stress will be shifted from the crude technique of admitting or rejecting evidence to the more realistic problem of appraising its credibility." C. T. McCormick, "Evidence," in *Encyclopedia of the Social Sciences*, Vol. 5, p. 646. See also A. E. Feller, "Evidence, Modern Civil Law," in same.

<sup>13</sup> Only "unreasonable," "unfair," or "arbitrary" discriminations against aliens are forbidden. See Harvard Research, Draft Convention on Responsibility of States, Art. 5, this JOURNAL, Vol. 23 (1929), Special Supplement, pp. 147, 134; American Law Institute, *Essential Human Rights*, Art. 17; United Nations Charter, Art. 1, par. 3; notes 7, 9 above.

violations of the law of war before the individuals were prisoners, and that, in any case, this charge was not an element in General Yamashita's conviction.<sup>13a</sup>

(6) Was the defense given a reasonable opportunity to prepare its case after the charges were known? The defendant was arraigned on October 8, 1945, and served with a bill of particulars specifying sixty-four items. The trial began on October 29th and a supplemental bill of particulars with fifty-nine more specifications was filed by the prosecution. Copies had been given the defense three days earlier. Several motions of defense counsel for a continuance were denied, and sentence was pronounced on December 7th. According to Justice Rutledge the burden of the defense under these circumstances was not only "tremendous," but was "impossible."<sup>13b</sup>

On this point the Court said nothing except that "Congress by sanctioning trial of enemy aliens by military commissions for offenses against the law of war had recognized the right of the accused to make a defense,"<sup>13c</sup> and "we hold that the commission's rulings on evidence and on the mode of conducting these proceedings against petitioner are not reviewable by the courts, but only by the reviewing military authorities."<sup>13d</sup> In holding that certain trials authorized by General Yamashita and conducted without proper opportunity to defend could be charged as offenses, the Court said: "It is a violation of the law of war, in which there could be a conviction if supported by evidence to inflict capital punishment on prisoners of war without affording to them opportunity to make a defense."<sup>13e</sup> (Inadequate opportunity of defense counsel to prepare its case would seem to be a denial of justice under international law)<sup>14</sup> The rules of court for the Nuremberg trial required thirty days after lodging of indictment before trial began and the tribunal implied that if any new defendants were added that period of time must be permitted.<sup>15</sup>

(Examining the case as a whole, it would appear that due process of law was accorded in the sense that under international law Japan would not have sufficient ground for asserting that its national had been denied justice, though an international tribunal might sustain that assertion on the ground that the defense was not given sufficient time to prepare its case. Examination of the points urged by the defense suggests that the standards of international law defining denial of justice are unfortunately vague. There has been a great deal of writing on this subject, and many arbitral decisions and treaty provisions, but more concrete exposition of procedural requirements would be desirable. While this is a field which can be developed by precedents, such as those being established by the International Military Tribunal at Nuremberg, the United Nations Commission on human rights may also be able to make important contributions.)

QUINCY WRIGHT

<sup>13a</sup> Case, p. 352. <sup>13b</sup> P. 338. <sup>13c</sup> F. 345. <sup>13d</sup> P. 351. <sup>13e</sup> P. 353. <sup>14</sup> Notes 8-11 above.

<sup>15</sup> Rule 2a and statement of Presiding member, Opening Session, Berlin, Oct. 18, 1945; Record, Session, Nuremberg, Nov. 14, 1945. The Geneva Prisoner of War Convention, Art. 60, requires notification of charges and specifications to the protecting power at least three weeks before the opening of the trial.

## CURRENT NOTES

REVUE EGYPTIENNE DE DROIT INTERNATIONAL

We are happy to welcome the first number of the *Egyptian Review of International Law* which bears the date of the year 1945. It is handsomely printed in some 450 pages, including 150 pages of articles, notes, judicial decisions, and book reviews and 300 pages of documents. The leading article treats of the League of Arab States, and is written by His Excellency Abdel Hamid Badawi pacha, the Egyptian Minister of Foreign Affairs; the article is printed in the original Arabic with a French translation. With the exception of two other articles dealing with the jurisdiction of the Mixed Tribunals of Egypt, all of the others are of current interest from the point of view of general international law. For the most part the articles were delivered in the form of papers before the First Congress of the Egyptian Society of International Law which met at Alexandria in April, 1945. The principal language of the Review is French but contributions in Arabic are reproduced in the original as well as in translation. Papers and documents in English are reprinted in that language. In the documentary section are collections of official texts concerning the League of Arab States, the Act of Chapultepec, the United Nations Organization, the International Court of Justice, and the punishment of war criminals. Among them may be found three interesting reports on the revision of the Statute of the International Court of Justice from the Egyptian delegates to the Conference of Jurists at Washington and to the United Nations Conference at San Francisco, as well as the report of Professor Basdevant of the Committee of Jurists. In addition to the first number of the Review, there has also appeared Brochure No. 1 of the Egyptian Society of International Law containing in English the indictment of the Nazi leaders before the International Military Tribunal at Nuremberg. The Review itself contains the text of Mr. Justice Jackson's report, the agreement on prosecution, and the Charter of the International Military Tribunal.

To organize a Society of International Law and to start the publication of an imposing Review of International Law during a devastating world war requires not only courage but a faith that will move mountains. We extend our warmest congratulations to our Egyptian collaborators, the most recent to join the ranks of those who believe that a better world may be built through the spread of law between and among nations. We are greatly flattered that in their note of presentation the Editors of the *Egyptian Review of International Law* have referred to our kindly interest in and encouragement of their venture and that they have taken the AMERICAN JOURNAL OF INTERNATIONAL LAW as their model. If during the two world wars through which our Journal has passed since it was started nearly forty

years ago, we have been depressed over the outlook for the future of international law, the appearance of the *Egyptian Review of International Law* at this time revives our hopes and trust in the vision of the French philosopher Joubert when he said, *C'est la force et le droit qui règlent toutes choses dans le monde; la force, en attendant le droit.*

*Editor-in-Chief*

GEORGE A. FINCH

BOLETIM DA SOCIEDADE BRASILEIRA DE DIREITO INTERNACIONAL

The Brazilian Society of International Law has resumed publication of its *Boletim*. The number for January-June, 1945, is numbered *Ano I, Número 1*, and contains articles by Accioly, on the Lateran Treaties; P. Azevedo, on treaties and private interests under the law of Brazil; H. Lyra, on Brazilian sovereignty over islands in the Atlantic; C. Eulálio, on the effect of recognition; C. Bevilacqua, on industrial and agricultural use of the waters of international rivers; R. Fernandes, on the Permanent Inter-American Court of Justice; and M. de Vasconcellos, on diplomacy and beligerency in 1944. It also contains records of the proceedings of the Society in 1944, documents (Dumbarton Oaks Proposals), bibliography, etc.

P. B. P.

THE INTERNATIONAL STATUS OF INDIA

If India should achieve complete independence, fully accredited representatives would be appointed for her representation abroad, she would be enabled to sign commercial and other treaties without regard for the interests of the British Empire and her voice would not be merely an echo of that of Great Britain. If she were to be divided into Pakhistan and Hindustan and each were to be given a vote in the United Nations General Assembly, her views would carry still more weight in the deliberations of that body. If India becomes merely a self-governing dominion she will probably remain within the British orbit. Her departure from the Empire might diminish the extent of British military obligations under the Charter. The possibilities are many.

On the other hand, references in the United Nations Charter to respect for human rights and fundamental freedoms for all men certainly will influence Indian constitutional provisions regarding untouchability and the rights of minorities. The efficacy of international organization to maintain world peace will affect decisions regarding the strength of the Indian army. Obviously the future constitution of India is of international concern.

The British Government recently announced that after the April, 1946, provincial elections in India were completed it would discuss with representatives of the Legislative Assemblies whether the proposals contained in the 1942 Declaration brought to India by Sir Stafford Cripps were still acceptable or whether some altered or modified scheme would be preferable. It is therefore worthwhile briefly to consider the more important recommen-

dations of the Conciliation Committee of the Non-Party Leaders Conference, under the chairmanship of Sir Tej Bahadur Sapru,\* not only in the light of the Cripps proposals but also in the light of other prominent plans.

Believing in the underlying fundamental unity of India, Sir Reginald Coupland of Oxford has advocated a loose federation of two Moslem and two Hindu "regions" constructed on the principle of the "river-basin."

One of the weaknesses of this plan is that, by the creation of an exact balance of power, action at the Center might be stultified. On the other hand, D. R. Gadgil of the Gokhale Institute of Politics has repudiated the creation of such artificial intermediate regions and has suggested a federation composed of primary and homogeneous unilingual units rather than of the present provinces whose boundaries were arbitrarily created largely for the sake of administrative efficiency. He contends, however, that Moslem demands are incompatible with the formation of an integrated political state because their fundamental grievance is not the lack of guarantees but the very fact of minority status. Hence he urges that they should be allowed to abstain from joining a federation. The Sapru Committee steers a middle course between these two concepts. It insists that the things which unite Hindu and Moslem are permanent and abiding while those that divide them have been exaggerated by skilful propaganda; it unequivocally rejects the idea of Pakhistan as an outrage justified neither by history nor political expediency. It would, nevertheless, consider the redistribution of provinces on linguistic and cultural lines, but, in order to avoid delay in the adoption of the new constitution, only after the latter came into effect.

For the sake of agreement, and in order to eliminate the divisive factor of separate communal electorates, it is proposed that Moslems in British India (whom the Hindus outnumber two to one) have equal voting power with Hindus other than the Scheduled Castes (Untouchables) only in the Central Legislative Assembly but that there should be joint electorates with reservation of seats. Despite this parity between Hindu and Moslem, action at the Center would not be paralyzed because the balance of power on the few purely communal questions (and even perhaps on the larger number of economic, social, and political questions) would be in the hands of the Scheduled Castes, and the special interests such as commerce and industry, landholders, labor, and women. This, of course, would subject these groups to the temptation of voting for the highest bidder.

The Committee indicated no choice between Independence or Dominion Status but in either case approved certain general fundamental minority rights dealing with liberties of the individual, freedom of press and association, equality of rights of citizenship of all nationals, full religious toleration, protection for the language and culture of all communities, and special rights peculiar to communities such as the Sikhs, Anglo-Indians, Indian-Christians,

\* *Constitutional Proposals of the Sapru Committee*, compiled by Sir Tej Bahadur Sapru and others, Bombay, 1945.

Buddhists, and Parsis. Protection for these minority rights is to be found not in any treaty with His Majesty's Government, as suggested in the Cripps offer, but in the law of the land itself.

To alleviate the condition of the Scheduled Castes, the specific recommendation is made that any custom or usage by which any penalty or disadvantage or disability is imposed or discrimination is made in regard to the enjoyment of civic rights on account of untouchability shall be declared invalid.

In British India aboriginal tribes and what are known as backward classes cover an area of 207,900 square miles containing a population of thirteen millions. Before the Montagu-Chelmsford Reforms, these tracts were subject to special laws providing for simple and elastic forms of judicial and administrative procedure. The Simon Commission had recommended that these "excluded Areas" be transferred from the Provincial Governments to the Government of India but under the 1935 Act their administration is left to the Governor of the Province who can make regulations subject to the approval of the Governor-General. The report contents itself with stating that effective steps should be taken on a generous scale to improve their educational and economic condition, that all bars regarding their entry into local or political bodies and assemblies should be removed, and that an independent minorities commission be established to watch over their interests and to draw the attention of the government to any legitimate grievance of any community.

If political power is to be transferred to an Indian democracy, so as to prevent its concentration in the hands of a few, the Committee proposes that the risks of enfranchising the entire adult population be taken. However, since that population is largely illiterate, as a result of the fact that in British India only one out of every four children stays in school long enough to reach the earliest stage at which permanent literacy is likely to be attained, a system of universal compulsory free primary education at state expense is advocated.

Neither the 1935 Constitution Act, the Cripps offer, nor the Sapru Committee approves a right of secession once a State or Province has joined the Union. However, the Cripps proposals gratuitously offered any British Province the right of non-accession although no such right existed under the 1935 Act. This the Committee strongly opposes as leading to the Balkanization of India. As to the Indian States, the contention is that British power in actual fact is supreme over them as well as over British India; this provides a bond of unity, and both, from the very outset, should be considered as being within the Union through Paramountcy at the Center. This Paramountcy of the Crown will automatically disappear as to federated Indian States. To induce such federation, it has been suggested that an Indian Ruler be named Head of State, and a cabinet minister be put in charge of States' Affairs. However, as to those States which will not con-



sent to join the federation, the jurisdiction of the Crown representative will now be exercised by the Federal Cabinet since no foreign power should be entitled to exercise any kind of jurisdiction over the Union or any of its units. This result might be desirable from the Indian Nationalist point of view, but legally it is still questionable. When the British Crown made its treaties with the Princes it was assumed that British rule in India would continue. Only if the present announced intention of bringing that rule to an end as soon as possible is considered a change of condition sufficient to authorize abrogation of these treaties, and only if these "contracts" are not of a personal nature, may the British unilaterally shift their duty of protecting these States (even against other Indians) to the Federal Cabinet. However, if India receives Dominion Status instead of absolute independence, this difficulty will be largely overcome since the Governor-General acting as Viceroy *vis-à-vis* the non-federating Indian States could discharge these obligations, but the British would then be enabled to maintain an adequate military force in India.

According to the existing Constitution defence is the responsibility of the Governor-General in Council, although money for the upkeep of the army is found by the Indian legislature out of general taxes. Under that part of the 1935 Act which never came into force since Federation was never established, defence was a reserved subject, for the administration of which the Governor-General would be responsible to the Secretary of State and Parliament. Because it believes that under any system of real self-government defence as a whole must be in charge of a member of a responsible ministry, the Sapru Committee has suggested that a Portfolio of Defence be held by a Minister responsible to the legislature and that actual control of the army be in the hands of a Commander-in-Chief under the new government. It is further proposed that since British troops are no longer an army of occupation, they should remain in India only by virtue of a treaty with Great Britain, that as soon as possible they should be replaced by Indian troops, and that recruitment of British officers for the Indian Army should cease immediately and selections be made from the 8,000 Indian officers who at the end of the war held only emergency commissions.

In a brief note it is impossible to do more than comment on the highlights of this excellent and detailed report, which should be read by every student of Indian problems.

✓ALBERT E. KANE

#### THE TRANSMIGRATION OF A LAW

We may have our doubts as to whether there is such a thing as transmigration of souls; we can have none as to the transmigration of laws. Having outlived its usefulness in one country a law may, in later times, be found alive in distant lands.

When, in 1901, the solons of France enacted a law governing associations

they little anticipated that, half a century hence, that law, no longer in vogue in their own country, would have found its way via Turkey to the Holy Land and thence, *ad hoc* and in a roundabout manner, to the New World. That is precisely what took place when the courts of Maryland were recently called upon to apply that law in determining the efficacy of certain testamentary dispositions made by Eleanor S. Cohen, a resident of Baltimore City, in favor of the Hebrew University of Jerusalem.

Originally Miss Cohen devised her residuary estate to Dr. Harry Friedenwald, or alternatively to Justice Louis D. Brandeis, with the request that it be used for the benefit of her coreligionists in Palestine, Baltimore or wherever most good could be accomplished. That residuary estate consisted mainly of a number of reversions in fee simple in real estate in Baltimore, aggregating in value \$107,828.00, with the right to collect ground rents reserved thereon. One of these reversions was embodied in a certain property known as 1916 East 31st Street, Baltimore. The leasehold of that property was owned by William Reisig and Sarah E. Popple.

Now the law of Maryland makes ground rents redeemable for a sum of money equal to the capitalization thereof at 6%. In virtue of that law Reisig and Popple desired to redeem the ground rent reserved on the property of which they were the leaseholders. Had Miss Cohen's will remained as originally executed this would have been quite simple. They would have paid to either Dr. Friedenwald or Justice Brandeis the redemption price fixed by law and in return would have received a good and valid title to the reversion. However, the testatrix, having been advised that the disposition in the will might subject her estate to greater taxation upon her death than would be the case if she had devised her residuary estate to a corporation, modified that disposition by a codicil devising one-half of her residuary estate to the Associated Jewish Charities of Baltimore and the other half to the Hebrew University of Jerusalem. Thereby the testatrix, at least as far as the Hebrew University was concerned, unwittingly complicated matters instead of simplifying them.

No question was raised by Reisig and Popple as to the power of the Associated Jewish Charities to acquire and convey real estate. But as to the Hebrew University such power was strongly contested.

The French law governing associations was taken over by Turkey in 1909, when Palestine was part of her empire. The mandatory regime, instituted in Palestine after World War I, gradually replaced most of the Ottoman laws by English laws. However, the law governing associations, known in Palestine as the Ottoman Law of Societies, is still in force, and most of the charitable, religious, and educational institutions of the country are operating under it. It was the intention of the founders of the Hebrew University to constitute the university itself as a juristic person by an ordinance from the Government of Palestine which was to define its constitution, but that has not been done. Instead the Hebrew University Association was organized and is operating under the Law of Societies mentioned.

The leaseholders of the property in question, contending that the Law of Societies did not confer upon the Hebrew University the power to acquire and convey the reversion in the property, filed a complaint in the Circuit Court of Baltimore City, asking for the appointment of a trustee for the conveyance of the title.

The court, holding the Hebrew University able to acquire and to convey the reversion, dismissed the bill, whereupon the complainants appealed to the Court of Appeals of the State of Maryland. The plaintiffs based their case on the following proposition:

1. The Hebrew University is an unincorporated association and as such cannot, in the absence of a statute empowering it to do so, take and convey real property.
2. The Law of Societies under which the Hebrew University was created is not sufficient to authorize a conveyance of the property. Article 8 of the law prohibits associations from possessing immovables other than those which are strictly necessary to accomplish their purposes. Article 17 prohibits them from accepting gifts without special authorization from the government. No claim was made that governmental sanction has ever been obtained for the gift of the reversion in question.<sup>1</sup>

Affirming the decree of the lower court, the Court of Appeals ruled that:<sup>2</sup>

1. The courts of Maryland are required to take judicial notice of the Law of Societies under which the Hebrew University Association was organized.
2. Under this law the Hebrew University Association was authorized, in accordance with its rules, to accept bequests and to dispose of same.
3. Limitations imposed by the law of Palestine upon the right of the Hebrew University Association to hold and dispose of real estate have no extra-territorial force. The provision in Article 17 of the Law of Societies requiring, for the acceptance of gifts, authorization from the government is invokable alone by the government. No objection having been raised from that source, the validity of the devise is not affected by that provision.
4. Having acquired a valid title to the reversion in question, the Hebrew University Association has the power of sale and disposition thereof.

HAIM MARGALITH

<sup>1</sup> A case in point is that of Jennie McGraw Fiske decided in the year 1883 by the Court of Appeals of the State of New York (111 N. Y. 66). In that case a bequest of \$1,154,363.46, given by the Will of Jennie McGraw Fiske to Cornell University, was held void because the Charter of that University contained a provision declaring that the Corporation thereby created might hold property "not exceeding \$3,000,000.00 in the aggregate" and it appeared that the University already held property up to that limit. The bequest was held void notwithstanding the fact that, subsequent to the death of the testatrix, the limitation of the power of the University was removed by the Legislature.

<sup>2</sup> For opinion see below, p. 483.

## MEETING OF THE AMERICAN COUNCIL OF LEARNED SOCIETIES

*New York, January 23-25, 1946*

The Society was represented at the annual meeting of the American Council of Learned Societies which was held at New York, N. Y., on January 23-25, 1946, by Mr. Arthur K. Kuhn, as an acting Alternate, appointed by President Couderc, and by the undersigned, as Secretary of the Society.

The Conference of Secretaries met in the afternoon and evening of the 23rd and again on the morning of the 24th. Apart from routine business a number of items of considerable interest were discussed.

Some of these also related to the procedure of the Conference or the Societies. Thus a set of regulations was adopted for the Conference in view of the status accorded to it in 1945 as an integral part of the ACLS. A proposal for a common secretariat to conduct some of the routine work of the constituent societies was put forward and discussed and referred back for further elaboration; the proposal will be brought to the attention of the Executive Council of the Society at its next meeting.

The question of the selection of Delegates (and Alternates) to the ACLS by the constituent societies and recommendations which had been adopted some years ago (1934) were again brought to the attention of the Secretaries. It seems very desirable that persons be chosen as Delegates and Alternates who will be able to attend and contribute to the success of the meetings. It was again recommended that the Secretary of each society be given the status of permanent Alternate so that he could always represent his society if no other Delegate or Alternate were present.

Attention was also given to the possibility of bringing about a greater familiarity on the part of members of the constituent societies with the work of the Council. It was agreed that reports such as the present one should be made by each Secretary to his Society at the earliest convenient opportunity, and that more extensive retrospective articles on the activities of the Council in the special fields of the different societies should if possible be prepared for their journals.

Closer cooperation between the Council and constituent societies was envisaged, especially in planning new developments. The Council should receive copies of any plans and programs worked out by the societies and plan its own activities in consultation with the societies interested in particular matters.

The improvement of teaching in the fields cultivated respectively by the societies was discussed and arrangements were made for an exchange of information on this point. The Secretary of this Society pointed out that this problem was, in our case, handled not so much by the Society itself as by the Conference of Teachers of International Law and Related Subjects, although there was probably no insuperable obstacle to the creation of a committee of the Society to consider the matter, for both liberal arts and

professional law schools. The exchange of information mentioned has in the meantime been effected with the Teachers Conference.

Finally the problem of the public relations of the societies was discussed with benefit. For some societies the matter is of no importance but for the Historians, Economists, and Political Scientists the problem reaches proportions comparable with those which it assumes in our own case. All of the societies dealing with current problems of public affairs, national or international, are harassed by the difficulty of combining a proper interest in, and the making of suitable contributions to the solution of, such problems, on one side, and the imperative necessity for remaining non-partisan and scientific on the other.

In this connection the results of the analysis of the membership of the Society, undertaken in connection with collection of dues for 1946, might be mentioned. On the basis of the returns received to date it would appear that some 53 per cent of our members regard themselves as lawyers, some 22 per cent as teachers, about 19 per cent as writers or journalists, 5 per cent as public officials, leaving 1 per cent scattered (business, clergy, etc.). It is believed that all groups in the Society would wish to effect the wise combination of attitudes and activities just mentioned.

A project for a history of the experience of the humanities and the social sciences during the war, to be prepared under the direction of the Executive Offices of the ACLS, was laid before the conference. The project met with general approval subject to reasonable qualifications; it is obvious that such a review, if properly prepared, would be very informing. The undersigned has been asked to write a chapter for the field of international law.

The Council itself met in the afternoon and evening of January 24 and on the morning of the 25th. Numerous matters of routine business were transacted and the Council turned to an extensive and careful discussion of post-war activities and problems. These included, among other things, the development of the ACLS fellowship system, including "demobilization" fellowships, the future of "area" studies such as had been undertaken so extensively during the war, linguistic research and teaching, American studies, educational problems, Federal aid to research and personnel training, and international intellectual relations.

Under the first heading the hope was expressed that the fellowship system of the Council, recently somewhat curtailed, could be expanded to meet in some measure the unusual needs of the immediate post-war period.

It was felt that "area" studies had proven of value and should, properly analyzed and adapted to peace-time needs, be carried along into the future. The same position was taken concerning the linguistic program of the Council.

A report on the place of the humanities in the general educational picture in the United States sounded a sharp note of warning. The probable and even the actual consequences in the humanities and social sciences of seri-

ously defective teaching in the secondary schools were stressed. This will ring a familiar bell in the minds of all teachers of international law and organization.

After a somewhat lively debate it was agreed that the humanities and social sciences should make an effort to obtain their proper share of any Federal aid to research and personnel training. At the same time it was recognized that such aid holds potential dangers particularly in the fields of the social sciences.

The Director of the Council gave a clear and impressive report of the drafting of the UNESCO Constitution in London, in which he had taken a leading part, and of the development of cultural relations activities in the Department of State, with which also the Council has been associated through him. The future of international intellectual life was discussed and the possible participation of the ACLS therein, including the resumption of activity by the International Union of Academies. The breadth of the program to be envisaged in this field, as a result, among other things, of the creation of UNESCO and the increased activity of the United States Government along these lines, contrasts strongly with the state of affairs even in the 1920's and 1930's.

PITMAN B. POTTER

*Secretary of the Society*

#### LEGAL EDUCATION IN THE WESTERN HEMISPHERE

A committee to aid students and professors of law from Latin American countries who may be in Washington, composed of members of this Society, was recently appointed by the Harvard Club of Washington, following an address by the undersigned regarding the Fourth Conference of the Inter-American Bar Association, held at Santiago, Chile, last October. A congress of law teachers from the various countries of the Western Hemisphere, designed to promote some degree of uniformity in legal studies, in programs and plans of teaching, and also in entrance requirements for law schools, is also contemplated. The granting of fellowships to students and professors of law from North American countries for study in Latin American universities, and vice versa, is expected to increase the number of such visitors in Washington. A report on these matters is anticipated for the Fifth Conference, at Lima, in January, 1947.

WILLIAM ROY VALLANCE

## CHRONICLE OF INTERNATIONAL EVENTS

FOR THE PERIOD NOVEMBER 15, 1945-FEBRUARY 15, 1946

(Including earlier events not previously noted)

### WITH REFERENCES

Abbreviations: *B. I. N.*, Bulletin of International News; *C. I. E. D.*, Chronology of International Events and Documents, Royal Institute of International Affairs; *C. S. Monitor*, Christian Science Monitor; *CmL*, Great Britain Parliamentary Papers by Command; *Cong. Rec.*, Congressional Record; *D. S. B.*, Department of State Bulletin; *Ex. Agr. Ser.*, U. S. Executive Agreement Series; *G. E. M. S.*, Great Britain Miscellaneous Series; *G. B. T. S.*, Great Britain Treaty Series; *N. Y. T.*, New York Times; *P. A. U.*, Pan American Union Bulletin; *U. N. A. J.*, United Nations, General Assembly, Journal; *U. N. S. C. J.*, United Nations, Security Council, Journal; *U. S. T. S.*, U. S. Treaty Series.

#### September, 1944

8/August 13, 1945 OPIUM. United States and Great Britain exchanged notes in London regarding limitation of the production of opium. Texts, with American Draft Memorandum and British Memorandum on the Opium Traffic: *D. S. B.*, Feb. 17, 1946, pp. 237-244, 261.

#### February, 1945

11 CRIMEA CONFERENCE. Soviet Russia, United States and Great Britain signed agreement at Yalta, concerning Outer Mongolia, restoration of former Russian rights, return of Sakhalin, Chinese-Eastern and South Manchurian Railroads, Kuril Islands, etc. Text: *N. Y. T.*, Feb. 12, 1946, p. 10; *London Times*, Feb. 12, 1946, p. 4; *G. B. M. S.* No. 4 (1945), *Cmd.* 6735.

#### October, 1945

1 GREAT BRITAIN-UNITED STATES. Initial meeting was held of the Commercial Policy Committee of the U. S.-United Kingdom on economic negotiations. Text of joint statement: *D. S. B.*, Oct. 7, 1945, p. 512.

#### November, 1945

17 HUNGARIAN RECOGNITION (Provisional Government). Text of British announcement of recognition: *London Times*, Nov. 19, 1945, p. 4.

18 BULGARIAN ELECTIONS. Were held for first time since 1940. *N. Y. T.*, Nov. 19, 1945, p. 6.

19-December 4 TELECOMMUNICATIONS CONFERENCE. U. S.-British Commonwealth Telecommunications Conference was held in Bermuda. Agreement in principle on matters relating to cable and radio communications was reached Nov. 27. Summary of points: *N. Y. T.*, Nov. 28, 1945, p. 28. Signed Final Act on Dec. 4. *N. Y. T.*, Dec. 5, 1945, p. 4; *London Times*, Dec. 5, 1945, p. 3. U. S. delegation: *D. S. B.*, Nov. 25, 1945, p. 862. Text of agreement: *D. S. B.*, Dec. 16, 1945, pp. 971-973.

20 GERMAN OCCUPATION. Allied Control Council for Germany approved a plan for the transfer of the German population from Austria, Czechoslovakia, Hungary and Poland into the four occupied zones of Germany. *D. S. B.*, Dec. 9, 1945, p. 937.

20-22 REFUGEES. Conference was held in Paris, at which representatives of 36 governments belonging to the Intergovernmental Committee on Refugees approved Nov. 21 a 12-million dollar budget for 1946. A 7-point memorandum, submitted by

- several Jewish organizations, was received. *N. Y. T.*, Nov. 22, 1945, p. 22. Adopted resolution empowering its Executive Committee to negotiate for the absorption of its functions by the Economic and Social Council of the United Nations. *N. Y. T.*, Nov. 23, 1945, p. 11.
- 20-25 RHINE RIVER. Central Commission for the Navigation of the Rhine met at Strasbourg to discuss resumption of its functions and relation with authorities occupying Germany, and with the European Central Inland Transport Organization. This was the first meeting of the Commission since Germany and Italy withdrew in 1938. *N. Y. T.*, Nov. 21, 1945, p. 3. The meetings were adjourned Nov. 25, to be resumed Dec. 12. *N. Y. T.*, Nov. 27, 1945, p. 12.
- 20-February 8, 1946 INTERNATIONAL MILITARY TRIBUNAL (Germany). The 24,000-word indictment against 20 Nazi leaders was read at the opening session Nov. 20, of the trial held in Nürnberg. *London Times*, Nov. 21, 1945, p. 4. All defendants pleaded not guilty. *London Times*, Nov. 22, 1945, p. 4. Partial text of U. S. Chief Prosecutor's address on opening day: *N. Y. T.*, Nov. 22, 1945, p. 2. Summary: *London Times*, Nov. 22, 1945, pp. 4, 3. Text: 79th Cong., 1st sess., *Senate Doc.* 129. Sir Hartley Shawcross began presentation of the British case on Dec. 4. Summary of and excerpts from his address: *London Times*, Dec. 5, 1945, p. 8. The case of the British prosecutor ended Dec. 7. *London Times*, Dec. 8, 1945, p. 4. Text of summation of prosecutor's case against the German General Staff: *N. Y. T.*, Jan. 8, 1946, p. 10. François de Menthon opened the case of the occupied countries of western Europe and asked the death penalty on Jan. 17. *N. Y. T.*, Jan. 18, 1946, p. 1, 12. Lieut. General R. A. Rudenko, chief Soviet prosecutor, opened the Russian case Feb. 8. *N. Y. T.*, Feb. 9, 1946, p. 7; *London Times*, Feb. 9, 1946, p. 4.
- 21-January 31, 1946 FRANCE. After failing to form a Cabinet and submitting his resignation President de Gaulle announced on Nov. 21 formation of a coalition government with some former Cabinet positions abolished. *N. Y. T.*, Nov. 22, 1945, pp. 1, 18. Personnel: *London Times*, Nov. 22, 1945, p. 4. On Nov. 23 the Constituent Assembly gave a vote of confidence to de Gaulle. *N. Y. T.*, Nov. 24, 1945, p. 1. de Gaulle resigned Jan. 20. *N. Y. T.*, Jan. 21, 1946, p. 1. Text of letter of resignation: Jan. 22, p. 5. On Jan. 23 Felix Gouin was elected President. *N. Y. T.*, Jan. 24, 1946, p. 1; *London Times*, Jan. 24, 1946, p. 4. M. Vincent-Auriol was elected on Jan. 31 President of the Constituent Assembly. *N. Y. T.*, Feb. 1, 1946, p. 2.
- 22 ARGENTINA-LEBANON. Argentina announced establishment of diplomatic relations. *N. Y. T.*, Nov. 22, 1945, p. 13.
- 22-January 4, 1946 INTERVENTION. Uruguayan note was handed Nov. 22 to American Ambassador, proposing collective intervention by American Republics in case any one should fail to grant essential rights to its people or to fulfill its international obligations. Text: *D. S. B.*, Nov. 25, 1945, pp. 864-866. Secretary Byrnes announced Nov. 27 unqualified adherence to the principle of collective action to prevent oppressive regimes. Text of statement: *N. Y. T.*, Nov. 28, 1945, pp. 1, 8; *D. S. B.*, Dec. 2, 1945, p. 392. The proposal was rejected by Chile on Dec. 7; by Venezuela, Dec. 10; by Mexico, Dec. 11; by Brazil, Dec. 17; by Cuba, Dec. 18. *N. Y. T.*, Dec. 11, 1945, pp. 1, 15; Dec. 12, p. 9; Dec. 20, p. 4. Colombian Foreign Office announced Jan. 4 it had replied negatively to the Uruguayan proposal looking toward hemispheric intervention in an American nation failing to follow democratic principles. *N. Y. T.*, Jan. 5, 1946, p. 5.
- 23/December 6 DARDANELLES. British Ambassador to Turkey presented a note containing his Government's views on the revision of the Montreux Convention. *London*



*Times*, Nov. 26, 1945, p. 3. On Dec. 6 the Turkish Premier announced his Government accepted as a basis for discussion the U. S. proposals of Nov. 7, 1945. *C. I. E. D.*, Nov. 26/Dec. 9, 1945, p. 267.

23-February 1, 1946 FAR EASTERN COMMISSION. U. S. Department of State announced Nov. 23 that the Commission had decided to go to Japan. *N. Y. T.*, Nov. 24, 1945, p. 3. Chief delegates: London *Times*, Dec. 22, 1945, p. 3. Russian Ambassador A. A. Gromyko was appointed a member on Jan. 2. *N. Y. T.*, Jan. 2, 1946, p. 2. On Jan. 3 the French Government agreed with reservations, to participate in the work of the Commission. *N. Y. T.*, Jan. 5, 1946, p. 1. The first meeting in Japan was held Jan. 10. *N. Y. T.*, Jan. 10, 1946, p. 7. Sessions closed and members sailed from Tokyo on Feb. 1. *N. Y. T.*, Feb. 2, 1946, p. 3; *D. S. B.*, Feb. 10, 1946, p. 219.

24 ALBANIAN RECOGNITION. Announced by Great Britain. *C. I. E. D.*, Nov. 26/Dec. 9, 1945, p. 255.

24-December 23 UNITED NATIONS. Preparatory Commission 500 delegates from 51 nations assembled in London Nov. 24. *N. Y. T.*, Nov. 25, 1945, pp. 1, 14; London *Times*, Nov. 26, 1945, pp. 3, 4. At the first business meeting on Nov. 26 elected Colombian, Ukrainian and Belgian delegates as Chairman and Vice-chairmen respectively and approved formation of committees. *N. Y. T.*, Nov. 27, 1945, p. 8; *D. S. B.*, Dec. 9, 1945, pp. 938-939. On Dec. 15 voted that headquarters of the United Nations should be in the United States. *N. Y. T.*, Dec. 16, 1945, p. 1. Prior to adjournment on Dec. 23 voted to set up an Interim Committee to make final recommendations to the Assembly on a site for United Nations permanent headquarters. *N. Y. T.*, Dec. 24, 1945, p. 6. Excerpts from report of the site inspection group of the Interim Committee: *N. Y. T.*, Feb. 5, 1946, p. 4.

24-January 28, 1946 IRAN. United States sent note Nov. 24 to Russia on the situation in Iran and proposed withdrawal of Soviet, British and American troops by Jan. 1, 1946. Text: *D. S. B.*, Dec. 2, 1945, pp. 884, 899. *N. Y. T.*, Nov. 27, 1945, p. 6. A similar note was sent by Great Britain. *C. I. E. D.*, Nov. 26/Dec. 9, 1945, p. 259. The "National Congress of Azerbaijan," founded at Tabriz on Nov. 20, demanded democratic autonomy Nov. 25 from the Teheran government. *N. Y. T.*, Nov. 26, 1945, pp. 1, 3. Russian note, delivered Nov. 29, refused U. S. proposal. Text: *N. Y. T.*, Dec. 9, 1945, p. 38; *D. S. B.*, Dec. 9, 1945, pp. 934-935. On Dec. 5 Iran made 3d request of Russia to permit its troops to go into Azerbaijan. *N. Y. T.*, Dec. 6, 1945, p. 15. Iran appealed Dec. 13 formally to Great Britain, Russia and U. S. to discuss the problem at the Foreign Ministers' meeting in Moscow. *N. Y. T.*, Dec. 14, 1945, p. 7; London *Times*, Dec. 14, 1945, p. 4. Department of State made public Dec. 14 the text of British note to U. S. on evacuation of troops. *N. Y. T.*, Dec. 15, 1945, p. 6. Text: *L. S. B.*, Dec. 16, 1945, p. 946. Moscow radio announced Dec. 16 that National Government of Iranian Azerbaijan had been established at Tabriz. *N. Y. T.*, Dec. 17, 1945, pp. 1, 2. The Iranian Minister in Washington presented a new note to the U. S. on Dec. 17. *N. Y. T.*, Dec. 18, 1945, p. 9. The Tabriz government issued manifesto Dec. 17, dealing with land reform, industrial development and establishment of a popular guard. Text of manifesto: London *Times*, Dec. 18, 1945, p. 4. Iranian delegation at United Nations meeting in London received instructions Jan. 28th to open direct negotiations with Russia. *N. Y. T.*, Jan. 29, 1946, p. 1.

26 GREAT BRITAIN-GREECE. Signed an air services agreement at Athens. Text: *Greece No. 1* (1946), Cmd. 8722.

28 AUSTRIA (Provisional Government). The Government, headed by Karl Renner,

resigned but was asked to continue in office until formation of a new régime. *N. Y. T.*, Nov. 29, 1945, p. 12.

- 29 WAR CRIMES. Text of President Truman's Executive Order 9630, conferring certain authority upon the Chief of Counsel in the preparation of charges of war crimes, etc.: *D. S. B.*, Dec. 2, 1945, pp. 398-399.

*December, 1945*

- 3/January 12, 1946 LEBANESE RECOGNITION. Was granted by Switzerland on Dec. 3. *C. I. E. D.*, Nov. 25/Dec. 9, 1945, p. 267. Ecuador took the same action Jan. 12. *N. Y. T.*, Jan. 13, 1946 p. 20.

- 3/January 12, 1946 SYRIAN RECOGNITION. Announced by Switzerland on Dec. 3. *C. I. E. D.*, Nov. 26/Dec. 9, 1945, p. 267. Ecuador announced recognition on Jan. 12. *N. Y. T.*, Jan. 13, 1946, p. 20.

- 3-January 30, 1946 PALESTINE. Arab League announced a boycott on all Jewish-produced goods from Palestine, effective Jan. 1st. *N. Y. T.*, Dec. 4, 1945, p. 9. Secretary Byrnes and British Ambassador exchanged notes at Washington Dec. 10 on the establishment of a Joint Anglo-American Committee of Inquiry on Palestine and European Jews. Text: *D. S. B.*, Dec. 16, 1945, pp. 958-959. President Truman named 5 members of the Committee. Sir John E. Singleton was appointed chairman of the British delegation. *N. Y. T.*, Dec. 11, 1945, pp. 1, 13. Full list of members: *London Times*, Dec. 11, 1945, p. 4. On Dec. 11 the Arab Council rejected coöperation with the Committee. *N. Y. T.*, Dec. 12, 1945, p. 11. The Committee held hearings in Washington Jan. 7-14, 1946. *N. Y. T.*, Jan. 8, 1946, p. 12 and Jan. 15, p. 5. Kings of Egypt and Saudi Arabia jointly reaffirmed on Jan. 16 at Cairo their belief that Palestine should be an Arab country. Text of joint communiqué: *N. Y. T.*, Jan. 17, 1946, p. 10; *London Times*, Jan. 17, 1946, p. 4. Arab Higher Committee refused Jan. 22 the British request for immigration of 1,500 Jews per month. *N. Y. T.*, Jan. 23, 1946, p. 14. The Committee of Inquiry held hearings in London from Jan. 25 to Feb. 5. *N. Y. T.*, Jan. 26, 1946, p. 5; *D. S. B.*, Feb. 17, 1946, p. 245. Great Britain announced Jan. 30 that immigration of 1,500 Jews per month would be resumed. Text of statement. *N. Y. T.*, Jan. 31, 1946, pp. 1, 10.

- 4 GREAT BRITAIN—UNITED STATES. Signed protocol at Bermuda covering exclusive telecommunications arrangements. Text: *D. S. B.*, Dec. 16, 1945, pp. 974-975.

- 6 DENMARK—GREAT BRITAIN. Signed agreement in London relating to money and property situated in both countries which have been subjected to special measures in consequence of enemy occupation of Denmark. Text: *C. E. T. S.* No. 11 (1945), *Cmd.* 6717.

- 6 GREAT BRITAIN—PORTUGAL. Signed two civil aviation agreements at Lisbon. *London Times*, Dec. 3, 1945, p. 4.

- 6 ITALY—UNITED STATES. Reached agreement by exchange of notes at Washington regarding economic relations. Text: *D. S. B.*, Dec. 9, 1945, pp. 936-937.

- 6 PORTUGAL—UNITED STATES. Concluded air-transport agreement at Lisbon. *D. S. B.*, Dec. 9, 1945, p. 941.

- 6-18 GREAT BRITAIN—UNITED STATES. Signed financial agreement at Washington on Dec. 6. Text: *D. S. B.*, Dec. 9, 1945, pp. 907-909. *N. Y. T.*, Dec. 7, 1945, p. 12; *Cong. Rec.* (daily), Jan. 30, 1946, pp. 604-605; Dept. of State *Commercial Policy Ser.* No. 80. Partial text: *London Times*, Dec. 7, 1945, p. 5. Text, together with Joint statement regarding settlement for lend-lease reciprocal aid, etc.: *Cmd.*

6708. The agreement was ratified by the House of Commons on Dec. 13, and by the House of Lords on Dec. 18. *N. Y. T.*, Dec. 19, 1945, p. 1; *London Times*, Dec. 19, 1945, p. 4. Joint statement regarding settlement for lend-lease, etc.: *D. S. B.*, Dec. 9, 1945, pp. 910-911; *London Times*, Dec. 7, 1945, p. 5. Proposals for consideration by an international conference on trade and employment: *G. B. M. S.* No. 15 (1945), *Cmd.* 6709; *D. S. B.*, Dec. 9, 1945, pp. 918-929. Analysis of proposals: pp. 914-918.

6-27 REPARATION CONFERENCE. Agreed Dec. 6 that the Inter-Allied Reparations Agency should be composed of a president, a secretary-general and two assistants, designated by Great Britain, France and United States, and an assembly on which all 17 nations at the Conference should be represented. The agency will sit in Brussels. *N. Y. T.*, Dec. 7, 1945, p. 3. The Conference closed Dec. 21 with the recommendation of an agreement fixing the percentages of total reparations from the three western zones of occupation allotted to each of the 17 nations participating. Summary of draft agreement: *N. Y. T.*, Dec. 22, 1945, p. 7. Text of draft agreement: *D. S. B.*, Jan. 27, 1946, pp. 114-121. Resolutions adopted: pp. 121-124. Text of Final Act [with annex]: *G. B. M. S.* No. 1 (1946), *Cmd.* 6721; Canada. *Treaty Ser.* 1945, No. 23. Greece announced Dec. 27 its rejection of the award to it. *N. Y. T.*, Dec. 28, 1945, p. 3; *C. I. E. D.*, Dec. 20, 1945/Jan. 6, 1946, p. 8.

7/15 CHINA—UNITED STATES. Secretary Byrnes and President Truman made statements on U. S. policy toward China. Text of Byrnes' statement: *D. S. B.*, Dec. 9, 1945, pp. 930-933. Text of President's statement: *N. Y. T.*, Dec. 16, 1945, p. 3; *D. S. B.*, Dec. 16, 1945, pp. 945-946.

9 PERMANENT COURT OF ARBITRATION. Colombia named Luis Lopez de Mesa, Jorge E. Gaitan and Silvio Villegas as judges. *N. Y. T.*, Dec. 10, 1945, p. 4.

9-January 20, 1946 JAPANESE OCCUPATION. Supreme Allied Headquarters ordered Japanese Government Dec. 9 to take steps to end the feudal system of land tenure, to eliminate absentee ownership, etc. *London Times*, Dec. 10, 1945, p. 2. General MacArthur issued 2,000-word order abolishing Shintoism as the national religion of Japan. *N. Y. T.*, Dec. 16, 1945, p. 1. General MacArthur's report on the occupation was released Jan. 2. Excerpts: *N. Y. T.*, Jan. 3, 1946, pp. 1, 2. Summary of the agreement of Jan. 30 between United States and the Australian Government, acting on behalf of the British Commonwealth Governments concerned on the British Commonwealth occupation force in Japan: *D. S. B.*, Feb. 10, 1946, pp. 220-221.

10 COMBINED BOARDS. Joint statement by President Truman, Prime Minister Attlee and Prime Minister Mackenzie King announced termination of the Combined Production and Resources Board, and the Combined Raw Materials Board by Dec. 31, 1945. The Combined Food Board will probably be dissolved on June 30, 1946. *London Times*, Dec. 11, 1945, p. 3; *D. S. B.*, Dec. 16, 1945, p. 975.

11 ARAB LEAGUE. Council decided to admit Egypt as a member. *C. I. E. D.*, Dec. 10/19, 1945, p. 289.

12 GERMAN OCCUPATION. Department of State issued declaration of its economic policy toward Germany for the guidance of U. S. occupying authorities, and transmitted it to the other occupying Powers. Text, with Secretary Byrnes' statement: *N. Y. T.*, Dec. 12, 1945, p. 2; *D. S. B.*, Dec. 16, 1945, pp. 960-965.

12/14 RHINE RIVER. Central Commission for the Navigation of the Rhine opened meeting Dec. 12 at Strasbourg. Belgium, France, Great Britain, Netherlands, Switzerland and the United States participated. *D. S. B.*, Dec. 16, 1945, pp. 957-958. [Disig-

- nated "first post-war meeting;" see, however, above, Nov. 23-25, for earlier meeting.] Appointed L. I. Merchant to head a technical committee to keep Rhine River navigators informed of removal of mines, etc. *N. Y. T.*, Dec. 15, 1945, p. 5. The next meeting will be at Brussels, Jan. 17-18, 1946. *D. S. B.*, Jan. 20, 1946, p. 74.
- 14 INTERNATIONAL FEDERATION OF TRADE UNIONS. Dissolved at a meeting of its general council in London. It came into existence in 1901. *London Times*, Dec. 15, 1945, p. 2.
- 15/26 SPAIN. Department of State in Washington acknowledged receipt of a French note Dec. 15, proposing tripartite discussions with the British on the question of policy toward the Franco régime. *N. Y. T.*, Dec. 16, 1945, pp. 1, 19. The United States and Great Britain announced on Dec. 26 readiness for a 3-nation discussion. *N. Y. T.*, Dec. 27, 1945, pp. 1, 8; *London Times*, Dec. 27, 1945, p. 3.
- 16-26 FOREIGN MINISTERS MEETING (Moscow). Secretary Byrnes, Foreign Commissar Molotov and Foreign Secretary Bevin opened meetings at Moscow on Dec. 16. *London Times*, Dec. 17, 1945, p. 4. Issued communiqué on Dec. 24, concerning procedure for the preparation of peace treaties. Text: *N. Y. T.*, Dec. 25, 1945, p. 12; *London Times*, Dec. 27, 1945, p. 4. Meetings ended Dec. 26, with the publication Dec. 27, of a joint communiqué regarding future peace treaties with former enemy countries, the Far Eastern Commission, Korea, China, Rumania, Bulgaria, and a United Nations Commission for the control of atomic energy. Text: *N. Y. T.*, Dec. 28, 1945, p. 4; *D. S. B.*, Dec. 30, 1945, pp. 1027-1032; *London Times*, Dec. 28, 1945, pp. 4 and 3; *C. I. E. L.*, Dec. 20, 1945/Jan. 6, 1946, pp. 22-29. Text of Secretary Byrnes' radio report of Dec. 30: *N. Y. T.*, Dec. 31, 1945, p. 4; *D. S. B.*, Dec. 30, 1945, pp. 1033-1036, 1047. Text, with text of joint communiqué: Dept. of State *Conference Ser.* No. 79. Summary of decisions reached at the meeting: *Fortnightly Summary of International Events* (N. Y.), Jan. 1, 1946, pp. 44-47.
- 17 FINLAND-UNITED STATES. Finland made payment of \$28,054.74 on its World War I debt. *N. Y. T.*, Dec. 18, 1945, p. 18.
- 20 ANGLO-AMERICAN CARIBBEAN COMMISSION. Announcement was made in Washington of French and Dutch acceptance of invitation to join the Commission. *N. Y. T.*, Dec. 21, 1945, p. 2; *D. S. B.*, Dec. 23, 1945, p. 1023.
- 20 AUSTRIA. Parliament chose Karl Renner as President of the second republic. *N. Y. T.*, Dec. 21, 1945, p. 8.
- 20/January 26, 1946 EGYPT-GREAT BRITAIN. Exchanged notes in London concerning revision of the 1936 treaty and looking to the independence of Egypt. Texts: *London Times*, Jan. 31, 1946, p. 3. Excerpts: *N. Y. T.*, Jan. 31, 1946, p. 10.
- 21 CANADA-GREAT BRITAIN. Signed air services agreement at Hamilton, Bermuda. *N. Y. T.*, Dec. 22, 1945, p. 7.
- 22/23 EGYPT-GREAT BRITAIN. Text of correspondence exchanged at Cairo concerning the prolongation of existing arrangements regarding Egyptian foreign exchange requirements: *Egypt* No. 1 (1946), *Cmd.* 6720.
- 22-February 6, 1946 TYROL. Austrian Government issued statement pointing out that in requesting the return of South Tyrol it was not claiming Trentino from Italy. Excerpts: *N. Y. T.*, Dec. 23, 1945, p. 11. Extracts from Chancellor's (Dr. Figl) address to Parliament: *London Times*, Dec. 22, 1945, p. 4. The Chancellor proposed Jan. 25 that Italy keep its Tyrolean investments, even if a new treaty should

cede the area to Austria. *N. Y. T.*, Jan. 26, 1946, p. 8. The Italian Government presented note to American, British, French Ambassadors in Rome, pressing its claim to a section of the South Tyrol. *N. Y. T.*, Feb. 5, 1946, p. 8. Italian Premier reiterated claims and opposed all plebiscites. *N. Y. T.*, Feb. 7, 1946, p. 6.

- 24 GERMANY—HUNGARY. Hungarian Government issued decree expelling all German-speaking residents from Hungary. *C. I. E. D.*, Dec. 20, 1945/Jan. 6, 1946, p. 9.

27-January 31, 1946 CHINA. Kuomintang and Communist representatives met in Chungking in effort to halt civil strife. The chief Communist delegate submitted written proposals. *N. Y. T.*, Dec. 28, 1945, pp. 1, 6. Generalissimo Chiang Kai-shek proposed that one member of his Government and one from the Communist group confer with U. S. General George C. Marshall on procedures for ending hostilities. *N. Y. T.*, Jan. 1, 1946, pp. 1, 12. Cessation of hostilities was ordered Jan. 9 by the Government and Yen-an régime. *London Times*, Jan. 10, 1946, p. 4; *N. Y. T.*, Jan. 10, 1946, p. 1. Text of Chinese announcement: *N. Y. T.*, Jan. 11, 1946, p. 10. The Chinese Armistice Commission announced Jan. 28 fighting had ceased in four northern provinces. *N. Y. T.*, Jan. 29, 1946, p. 11. The conference to arrange for a coalition government met Jan. 10-31, with General Marshall as adviser. *London Times*, Feb. 1, 1946, p. 4; *N. Y. T.*, Feb. 1, 1946, p. 1, 3.

28/29 FRANCE—UNITED STATES. Effectuated aviation agreement by exchange of notes Dec. 28/29 in Paris. Text: *D. S. B.*, Dec. 30, 1945, pp. 1059-1060.

29 FRANCE—SOVIET RUSSIA. Signed 5-year trade agreement on a most-favored-nation basis. *London Times*, Dec. 31, 1945, p. 3; *N. Y. T.*, Jan. 3, 1946, p. 8; Jan. 4, p. 11.

31 TRUSTEESHIP. Speaking in London, Prime Minister Peter Frazer of New Zealand made formal offer, placing Samoa under United Nations trusteeship. *N. Y. T.*, Jan. 1, 1946, p. 3.

31/January 14, 1946 POLAND (National Unity)—SOVIET RUSSIA. Moscow radio stated Polish National Council had ratified the treaty of Aug. 14, 1945, establishing their common frontier. *N. Y. T.*, Jan. 1, 1946, p. 15. Russia ratified on Jan. 14. *N. Y. T.*, Jan. 15, 1946, p. 8; *C. I. E. D.*, Jan. 7/20 1946, p. 48.

#### January, 1946

1 JAPAN. In an imperial rescript Emperor Hirohito disclaimed divinity. *N. Y. T.*, Jan. 1, 1946, p. 1. Texts of rescript and General MacArthur's message: p. 15.

1/10 GREAT BRITAIN—SIAM. Signed peace treaty Jan. 1 at Singapore, by which Siam agreed to conform to international control of rice distribution, and to joint international tin and rubber agreements of the United Nations. Text: *Cong. Rec.* (daily), Feb. 8, 1946, pp. 1153-1154; *N. Y. T.*, Jan. 2, 1946, p. 4. Summary: *London Times*, Jan. 2, 1946, p. 3; *C. I. E. D.*, Dec. 20, 1945/Jan. 5 1946, pp. 31-32. Announcement was made Jan. 10 of resumption of diplomatic relations. *N. Y. T.*, Jan. 11, 1946, p. 9; *London Times*, Jan. 11, 1946, p. 3.

2 POLAND (National Unity)—YUGOSLAVIA. Signed an agreement at Belgrade for repatriation within six months of 25,000 Poles who first settled near Banja Luka and Prijedor sixty years ago. *N. Y. T.*, Jan. 4, 1946, p. 3.

2-13 PEACE TREATIES. French Cabinet approved a note to the Allies asking further information on the peace treaty proposals drawn up by the Foreign Ministers at Moscow, Dec. 16-26. *N. Y. T.*, Jan. 3, 1946, p. 8. The note was handed to the U. S. Ambassador in Paris for relay to Great Britain, Russia and the United States on Jan. 3. *London Times*, Jan. 4, 1946, p. 4. Secretary Byrnes' note of Jan. 13 to France gave assurances in the name of the three countries that the views of the

- small nations would be considered when the final peace treaties are drafted after a proposed conference in Paris in the spring of 1946. Text of note: *N. Y. T.*, Jan. 19, 1946, p. 6; *D. S. B.*, Jan. 27, 1946, pp. 112-113.
3. **ALIEN ENEMIES.** Announcement of U. S. memorandum to twelve American Republics regarding disposition of cases of enemy aliens now in the United States, being persons deported for security reasons by these American Republics. Text of memorandum: *D. S. B.*, Jan. 6-13, 1946, pp. 33-34.
  3. **CZECHOSLOVAKIA—UNITED STATES.** Signed air transport agreement at Prague. *D. S. B.*, Jan. 20, 1946, p. 83.
  - 5/24 **SIAM—UNITED STATES.** Resumed diplomatic relations on Jan. 5. *N. Y. T.*, Jan. 6, 1946, p. 28; *D. S. B.*, Jan. 6-13, 1946, p. 5. Acting Secretary of State Acheson announced Jan. 24 that Siam had agreed to recognize the treaties and other international agreements in force between the two countries before the war, including the commercial treaty of 1937, extradition treaty of 1922 and the 1925 agreement for waiver of passport and visa fees. *N. Y. T.*, Jan. 25, 1946, p. 10; *D. S. B.*, Feb. 3, 1946, p. 178.
  6. **AMERICAN REPUBLICS.** Announcement was made in Washington of an Ecuadorian proposal for the creation of a permanent commission of conciliation and investigation to consider disputes arising in the Western Hemisphere. *N. Y. T.*, Jan. 7, 1946, p. 7.
  6. **COAL.** Signature on Jan. 4 was announced in London of an agreement for the establishment of the European Coal Organization, with headquarters in London, to operate for one year. Signatories: U. S., Great Britain, Belgium, France, Netherlands, Luxembourg, Norway, Denmark, Greece and Turkey. *N. Y. T.*, Jan. 7, 1946, p. 6; *London Times*, Jan. 7, 1946, p. 8. Text: *G. B. M. S.* No. 1 (1946), *Cmd.* 6732.
  7. **AUSTRIAN RECOGNITION** Granted by the United States, Great Britain, Russia and France. *N. Y. T.*, Jan. 8, 1946, p. 8; *D. S. B.*, Jan. 20, 1946, p. 81. Text of British statement: *London Times*, Jan. 8, 1946, p. 4.
  7. **TANGIER.** France and Great Britain exchanged ratifications in Paris of the agreement for the reestablishment of the international administration of Tangier, signed Aug. 31, 1945. *London Times*, Jan. 8, 1946, p. 4; *C. I. E. D.*, Jan. 7/20, 1946, p. 37.
  - 7/24 **ATOMIC ENERGY.** A Committee on Atomic Energy was set up Jan. 7 by the Department of State, under the chairmanship of Dean Acheson. Members and consultants: *D. S. B.*, Feb. 3, 1946, p. 177. Text of Secretary Byrnes' statement on resolution adopted at the Foreign Ministers' meeting in Moscow: *D. S. B.*, Jan. 20, 1946, p. 58; *N. Y. T.*, Jan. 8, 1946, p. 6. Secretary Byrnes made statement on control of atomic energy at the Jan. 24 session of the United Nations General Assembly. Text: *D. S. B.*, Feb. 3, 1946, p. 145.
  - 8/9 **KOREAN OCCUPATION.** American and Soviet Commanding Generals exchanged notes regarding conference of Russian and American representatives to discuss problems arising from the occupation. Texts: *D. S. B.*, Jan. 27, 1946, pp. 111-112.
  10. **ITALY—SPAIN.** Signed treaty of commerce in Rome. *London Times*, Jan. 11, 1946, p. 3; *C. I. E. D.*, Jan. 7/20, 1946, p. 42.
  - 10-February 15 **UNITED NATIONS.** General Assembly First session opened in London on Jan. 10, and elected as President Henri Spaak of Belgium. *N. Y. T.*, Jan. 11,

- 1946, p. 1. U. S. delegation and staff: *D. S. B.*, Dec. 30, 1945, p. 1056. On Jan. 12 it elected as non-permanent members of the Security Council, Brazil, Poland and Australia for two years; Mexico, Egypt and The Netherlands for one year; also elected seventeen of the eighteen members of the Economic and Social Council. List: *N. Y. T.*, Jan. 13, 1946, p. 1; *London Times*, Jan. 14, 1946, p. 3. On Jan. 14 New Zealand withdrew its candidacy and the final place on the Security Council was given to Yugoslavia. *N. Y. T.*, Jan. 15, 1946, p. 6; *London Times*, Jan. 15, 1946, p. 3. On Jan. 14 Secretary Byrnes pledged U. S. cooperation for world peace and urged adoption of the resolution proposed by the United Kingdom, China, Russia, France, Canada and the U. S., concerning control of atomic energy. Text of address: *N. Y. T.*, Jan. 15, 1946, p. 6; *U. N. A. J.*, Jan. 15, 1946, pp. 103-106; *London Times*, Jan. 15, 1946, p. 4. On Jan. 18 Russian delegate Gromyko spoke on the importance of cooperation and against revision of the Charter. Text of address: *N. Y. T.*, Jan. 19, 1946, p. 8; *U. N. A. J.*, Jan. 19, 1946, pp. 204-207. The Lebanese delegate on Jan. 19 urged withdrawal of British and French troops from Syria and Lebanon. *N. Y. T.*, Jan. 20, 1946, p. 1. Text of address: *U. N. A. J.*, Jan. 21, 1946, pp. 260-262. Adopted Jan. 24 a resolution calling for the establishment of a commission to study the control of atomic energy. *London Times*, Jan. 25, 1946, p. 3; *N. Y. T.*, Jan. 26, 1946, p. 1. Text of resolution: p. 3; *U. N. A. J.*, Jan. 25, 1946, pp. 291-292; *D. S. B.*, Feb. 10, 1946, p. 198. Approved terms of appointment of the Secretary General. *N. Y. T.*, Jan. 23, 1946, p. 3. On Jan. 29 adopted the report of the Social, Humanitarian and Cultural Committee, calling on the United Nations to continue the League of Nations' work for the control of drugs. *London Times*, Jan. 30, 1946, p. 3; *U. N. A. J.*, Jan. 30, 1946, p. 355. Ratified the appointment of Trygve Lie as Secretary General. *N. Y. T.*, Feb. 2, 1946, p. 3; *London Times*, Feb. 2, 1946, p. 4. He took office Feb. 2. *N. Y. T.*, Feb. 3, 1946, p. 3. Voted on Feb. 12 for an investigation of the European refugee problem. *N. Y. T.*, Feb. 13, 1946, p. 1. On Feb. 13 Cuba presented a draft declaration on human rights. *N. Y. T.*, Feb. 14, 1946, p. 6. Summary: *C. S. Monitor*, Feb. 14, 1946, p. 2. Approved the Fairfield (Conn.)-Westchester (N. Y.) area for the permanent site and New York City for an interim location on Feb. 14. *N. Y. T.*, Feb. 15, 1946, p. 1. Adjourned Feb. 15 until Sept. 3, when it will reconvene in New York. *N. Y. T.*, Feb. 15, 1946, pp. 1, 2. Member countries: p. 2. [Report of U. S. Delegation gives Feb. 14 as closing date. Text of report: Dept. of State. *Conf. Ser.*, No. 82.] Officers and members of committees: *C. S. Monitor*, Feb. 19, 1946, p. 9. Report by Sen. Arthur Vandenberg to the Senate: *Cong. Rec.* (daily) Feb. 27, 1946, pp. 1726-1729; *N. Y. T.*, Feb. 28, 1946, p. 4.
- 11 ALBANIA. Constituent Assembly voted for a republican form of government. *N. Y. T.*, Jan. 12, 1946, p. 4; *London Times*, Jan. 12, 1946, p. 3.
- 11 HAITI. President Elie Lescot was forced to resign. A three-member military junta assumed power. *N. Y. T.*, Jan. 12, 1946, p. 1.
- 12 GREECE—UNITED STATES. American Ambassador presented note to Greek Foreign Office informing the Greek authorities of the approval by the Export-Import Bank of a \$25,000,000 loan to the Greek Government. Text: *D. S. B.*, Jan. 20, 1946, pp. 78-79.
- 14 GREAT BRITAIN—UNITED STATES. Issued joint policy statement, setting forth recommendations affecting economic development of territorial and colonial possessions in the Caribbean area. *N. Y. T.*, Jan. 17, 1946, p. 8.
- 14/16 GREAT BRITAIN—GUATEMALA. Great Britain invited Guatemala to bring the dispute over British Honduras (Belize) before the International Court of Justice to be

created by the United Nations. London *Times*, Jan. 15, 1946, p. 4; *C. I. E. D.*, Jan. 7/20, 1946, p. 39. Announcement was made Jan. 16 of Guatemala's acceptance of the proposal. *N. Y. T.*, Jan. 17, 1946, p. 8.

14/19 REPARATIONS (German). Pursuant to the Reparation Conference held in Paris, Nov. 9-Dec. 21, 1945, representatives of 7 countries participating met in Paris and signed an agreement on reparation from Germany, on the establishment of an Inter-Allied Reparation Agency and on the restitution of monetary gold. Text: *D. S. B.*, Jan. 27, 1946, pp. 114-121. Sir Desmond Morton was appointed Jan. 19 as United Kingdom delegate to the Agency. London *Times*, Jan. 19, 1946, p. 4.

15-February 11 GREAT BRITAIN—UNITED STATES. U. S. delegation to the Civil Aviation Conference which opened in Bermuda Jan. 15: *D. S. B.* Jan. 20, 1946, p. 75. Signed Final Act, an Air Transport Agreement, and a document entitled Heads of an agreement for use by civil aircraft of naval and air bases in areas leased to the Government of the United States of America under an agreement with the Government of the United Kingdom, dated March 27, 1941. Text of documents: *Cong. Rec.* (daily), Feb. 18, 1946, Appendix, pp. A847-A85. Text of joint press release: *N. Y. T.*, Feb. 12, 1946, p. 4. Summary of Air Transport Agreement: London *Times*, Feb. 12, 1946, p. 4.

15-February 18 INTERNATIONAL MILITARY TRIBUNAL (Far East). Sir William Webb of Australia was named a member. London *Times*, Jan. 16, 1946, p. 3. General MacArthur issued order Jan. 19 establishing an international military tribunal for the Far East, and made public a charter under which the tribunal will work. Tokyo will be the permanent seat. Members will total not fewer than five, nor more than nine, and will be appointed by the Supreme Allied Command from names submitted by Allied signatories to the surrender document. *N. Y. T.*, Jan. 19, 1946, p. 5, and Jan. 20, p. 17. Announcement was made Jan. 25 that all nine nations signatory to the Japanese surrender had agreed to participate in the Tribunal. *N. Y. T.*, Jan. 25, 1946, p. 8. On Feb. 18 General MacArthur announced that Sir William Webb would head the 9-member Tribunal. Sessions are to open about April 15. *N. Y. T.*, Feb. 19, 1946, p. 12.

17-February 16 UNITED NATIONS. Security Council. Held first meeting in London and elected N. J. O. Makin of Australia as president on Jan. 17. List of members: *N. Y. T.*, Jan. 18, 1946, p. 10. On Jan. 19 Iran formally charged Russia with interfering in its internal affairs and asked the Council to investigate and make recommendations. Text of letter: *N. Y. T.*, Jan. 20, 1946, p. 1; *U. N. S. C. J.*, Jan. 24, 1946, p. 13. Russia and the Soviet Ukraine on Jan. 21 asked the Council to put an end to British military actions in Greece and Java. *N. Y. T.*, Jan. 22, 1946, p. 1. Texts of letters: p. 4; *U. N. S. C. J.*, Jan. 24, 1946, pp. 4-15. On Feb. 6 Mr. Vishinsky agreed not to press his charge that British troops in Greece constituted a threat to world peace and withdrew his demand that the Council recommend their withdrawal. *N. Y. T.*, Feb. 7, 1946, pp. 1, 11. On Feb. 7 the Ukrainian delegate asked the Council to investigate the Indonesian situation. *N. Y. T.*, Feb. 8, 1946, p. 1. The Council turned down this proposal on Feb. 13. *N. Y. T.*, Feb. 14, 1946, pp. 1, 6. On Feb. 15 Russia joined in the Syrian-Lebanese demand for withdrawal of foreign troops from the latter two countries. *N. Y. T.*, Feb. 16, 1946, pp. 1, 5. On Feb. 16 the United States proposed that Britain, France, Syria and Lebanon undertake negotiations for the removal of these troops. This proposal was vetoed by Russia. The Council adjourned after agreeing to meet in New York about April 1st. *N. Y. T.*, Feb. 17, 1946, p. 27.

18 HUNGARY—UNITED STATES. Diplomatic relations were resumed when Aladár



- Szegedy-Maszak presented letters of credence as Minister at Washington. *D. S. B.*, Jan. 27, 1946, p. 132.
- 18 ITALY—UNITED STATES. Thirty-year credit plan under which Italy will pay for its purchases of surplus war material was made known. Part of the payment may be elected by the United States in the form of support for an extended cultural relations program. *N. Y. T.*, Jan. 19, 1946, p. 6.
- 18 JAPANESE PROPERTY. Transfer of Japanese property in the Territory of Hawaii to the United States was effected by means of a protocol signed in Washington by agents of the U. S. and the Swedish Government, the latter having acted as custodian of the property from the outbreak of the war. *D. S. B.*, Jan. 27, 1946, p. 131.
- 18 TRANSJORDAN. British High Commissioner for Palestine and Transjordan communicated to the Emir Abdullah the British Government's decision to establish his country as a sovereign independent state. *London Times*, Jan. 19, 1946, p. 4.
- 18-February 1 COUNCIL OF FOREIGN MINISTERS. Deputies of the Foreign Ministers opened meetings Jan. 18 in London, and disposed of procedural matters, preparatory to the work of drafting the peace treaty with Italy. *London Times*, Jan. 20, 1946, p. 4; *N. Y. T.*, Jan. 20, 1946, p. 29. On Jan. 21 Italy entered a plea to administer its colonies. *N. Y. T.*, Jan. 22, 1946 p. 4. France made known Feb. 1 its insistence that the region of Briga and Tenda on the Italian frontier should be turned over to France. *N. Y. T.*, Feb. 2, 1946 pp. 1, 4.
- 19 RUMANIA. Announcement was made that the Rumanian Armistice Commission, serving as liaison between the people and the Allied Control Commission, had been abolished. *N. Y. T.*, Jan. 20, 1946, p. 32.
- 19/February 6 TRUSTEESHIP. Foreign Minister Bidaut of France stated in the General Assembly of the United Nations on Jan. 19 that his Government was ready to study terms by which arrangements could be defined for placing the mandates of Cameroons and Togoland under United Nations trusteeship. *London Times*, Jan. 21, 1946, p. 3. The French Cabinet authorized the Foreign Minister to negotiate an agreement placing the mandates under United Nations trusteeship. *N. Y. T.*, Feb. 7, 1946, p. 10.
- 20 BELGIUM. King Leopold expressed desire that the new Parliament about to be elected should pass a law providing for a plebiscite on the question of his return. *N. Y. T.*, Jan. 21, 1946, pp. 1, 2; *London Times*, Jan. 21, 1946, p. 4.
- 20 CHINA—FRANCE. Settled the case of François Clercopilo, thus paving the way for an agreement banning extraterritoriality. *N. Y. T.*, Jan. 21, 1946, p. 8.
- 21/22 AUSTRIAN OCCUPATION. John G. Erhardt was appointed on Jan. 21 the U. S. political representative to the Austrian Government—also to serve simultaneously as political adviser to General Clark, U. S. member of the Allied Council until such time as a 4-Power agreement is concluded to modify the present control machinery. *D. S. B.*, Feb. 3, 1946, p. 177. On Jan. 22 the Council agreed to permit a free exchange of surplus goods and services between the various zones. Commanders also agreed to ask their Governments to authorize them to make regulations to permit resumption of navigation on the Danube. *N. Y. T.*, Jan. 23, 1946, p. 12.
- 22 GERMAN NAVY. Text of Anglo-Soviet-American communiqué on the disposal of the German Navy; *D. S. B.*, Feb. 3, 1946, p. 173.
- 23 ITALY—YUGOSLAVIA. Announcement was made that disputed frontiers would be examined by a commission composed of British, American, Russian and French

- deputies of the Foreign Ministers, now preparing a draft peace treaty with Italy. *London Times*, Jan. 23, 1946, p. 4.
- 23-February 18 UNITED NATIONS. Economic and Social Council. 18-member Council held first meeting in London Jan. 23. Sir H. Ramaswami Mudaliar of India was elected president. *N. Y. T.*, Jan. 24, 1946, p. 5; *London Times*, Jan. 24, 1946, p. 4. Members: *N. Y. T.*, Feb. 15, 1946, p. 2. Session adjourned Feb. 18 until May 25 in New York. *N. Y. T.*, Feb. 19, 1946, p. 4; *London Times*, Feb. 19, 1946, p. 3.
- 24 CHINA-SIAM. Signed treaty of amity, providing for the establishment of diplomatic relations and protection of the nationals of either country in territory of the other. *N. Y. T.*, Jan. 24, 1946, p. 4.
- 25 GREAT BRITAIN-GREECE. Announced conclusion of negotiations on the economic, financial and currency situation in Greece. *London Times*, Jan. 25, 1946, p. 4. Summary of agreement: Jan. 26, p. 4.
- 25 GREECE-UNITED STATES. Announcement was made of exchange of notes Jan. 2 and 11 in which Greece promised to follow liberal economic policies. *N. Y. T.*, Jan. 26, 1946, p. 4. Texts: *D. S. B.*, Feb. 3, 1946, pp. 175-176.
- 28 BRETON WOODS AGREEMENTS. List of members of the International Monetary Fund and the International Bank for Reconstruction, and countries invited to send observers: *D. S. B.*, Feb. 10, 1946, p. 219.
- 28 SPAIN-SWEDEN. Announced signature of a commercial agreement. *N. Y. T.*, Jan. 29, 1946, p. 6.
- 29 JEWS IN AUSTRIA. Chancellor Figl and Foreign Minister Gruber gave assurances that Jews would regain their property. *N. Y. T.*, Jan. 31, 1946, p. 7.
- 31 BRAZIL. General Eurico Gaspar Dutra was inaugurated as President. *N. Y. T.*, Feb. 1, 1946, p. 2.

#### February, 1946

- 1 BELGIUM-UNITED STATES. Exchanged notes at Brussels, reciprocally granting interim air rights. *D. S. B.*, Feb. 17, 1946, p. 263.
- 1/4 HUNGARY. Hungary was proclaimed a republic on Feb. 1, and Premier Zoltan Tildy was sworn in as President. *N. Y. T.*, Feb. 2, 1946, p. 4; *C. I. E. D.*, Jan. 21/Feb. 3, 1946, p. 66. The National Assembly elected Ferenc Nagy Premier on Feb. 4. *N. Y. T.*, Feb. 5, 1946, p. 7.
- 4 FINLAND-FRANCE. Signed one-year commercial accord, accompanied by an accord on terms of payment. *N. Y. T.*, Feb. 5, 1946, p. 3.
- 4 WAR CRIMES. Supreme Court of the United States decided that the military commission trying General Yamashita had proceeded legally. *N. Y. T.*, Feb. 5, 1946, pp. 1, 12.
- 5 EGYPT-GREAT BRITAIN-UNITED STATES. Announcement was made in Cairo that Egyptian notes had formally inquired when troop withdrawals would be made. Both replies indicated that departures would depend on disposal of surplus property. *N. Y. T.*, Feb. 6, 1946, p. 12.
- 5 RUMANIAN RECOGNITION. Announcement was made of recognition by Great Britain and the United States of the government headed by Dr. Petru Groza. *N. Y. T.*, Feb. 6, 1946, pp. 1, 16; *London Times*, Feb. 6, 1946, p. 3. The U. S. Political Representative in Rumania transmitted a note to the President of the Rumanian Council of Ministers, stating that on the basis of requirements agreed to by Dr.

Groza and the Commission, set up in accordance with decisions of the Foreign Ministers meeting at Moscow, composed of A. M. Vishinsky, W. A. Harriman and Sir A. Clark Kerr, the U. S. is prepared to recognize the government of Rumania. Text: *D. S. B.*, Feb. 17, 1946, p. 256.

- 6 INTERNATIONAL BANK FOR RECONSTRUCTION & DEVELOPMENT. Fred M. Vinson and William L. Clayton were confirmed by the Senate as U. S. Governor and Alternate Governor of the Bank for 5-year terms, and Emilio G. Collado as U. S. Executive Director of the Bank for a 2-year term. *L. S. B.*, Feb. 17, 1946, p. 262.
- 6 INTERNATIONAL MONETARY FUND. Fred M. Vinson and William L. Clayton were confirmed by the Senate as U. S. Governor and Alternate Governor of the Fund for 5-year terms, and Harry D. White as U. S. Executive Director for a term of two years. *D. S. B.*, Feb. 17, 1946, p. 262.
- 6/9 INTERNATIONAL COURT OF JUSTICE. Fifteen judges were elected by the United Nations Assembly and Security Council on Feb. 6. Personnel: *N. Y. T.*, Feb. 7, 1946, p. 8. On Feb. 9 at the drawing to determine Court terms, the judges from United States, Russia, Mexico, Norway and Belgium received 6-year terms. 9-year terms went to France, United Kingdom, Brazil, Chile and El Salvador, while the 3-year terms were awarded to Canada, Yugoslavia, Poland, Egypt and China. *N. Y. T.*, Feb. 10, 1946, p. 24. Personnel: *N. Y. T.*, Feb. 15, 1946, p. 2.
- 7 MEXICAN OIL. British Foreign Office announced signature of agreement in Mexico City by Mexican, Dutch and British Governments, providing means for determining compensation to Dutch and British subjects for oil properties expropriated by Mexico in 1938. *N. Y. T.*, Feb. 8, 1946, p. 6; *London Times*, Feb. 8, 1946, p. 4.
- 10 INDONESIA. Acting Governor General in the Netherlands East Indies announced Dutch offer of a new status: a commonwealth with the right of self-determination of full freedom, or partnership within the kingdom. Text of announcement: *N. Y. T.*, Feb. 11, 1946, p. 2; *London Times*, Feb. 11, 1946, p. 4.
- 11 AUSTRIAN OCCUPATION. Unable to reach agreement on Russian claims to German assets in Austria the Allied Council for Austria referred the question to the United States, Great Britain and France for decision. *N. Y. T.*, Feb. 12, 1946, p. 12.
- 12 TURKEY—UNITED STATES. Signed air transport agreement at Ankara. *N. Y. T.*, Feb. 16, 1946, p. 26.
- 12/16 ARGENTINA—UNITED STATES. United States issued Blue Book charging that Germans were using Argentina as a base for building a new Nazi régime. Documents captured in Germany were the basis for the charges. *N. Y. T.*, Feb. 13, 1946, pp. 1, 17. Text: *Dept. of State. Inter-American Series* No. 29. Foreign Minister Cook's statement of Feb. 16 declared the Blue Book violated U. S. pledge of non-interference. *N. Y. T.*, Feb. 17, 1946, p. 1.
- 13 GERMAN PROPERTY. Spanish Government's "*note verbale*" recognized the Allied Control Council for Germany as the successor of the German Government, thus facilitating the work of searching out and sequestering German hidden assets. *N. Y. T.*, Feb. 15, 1946, p. 15.
- 14 ALBANIA. Belgrade radio reported that the Albanian Government had ordered expropriation of all foreign-owned companies and businesses in Albania. *N. Y. T.*, Feb. 15, 1946, p. 8.
- 14 CAMBODIA—FRENCH INDO-CHINA. King of Cambodia and High Commissioner of French Indo-China signed pact granting autonomy of administration to the French colony of Cambodia. *N. Y. T.*, Feb. 15, 1946, p. 2.

## MULTIPARTITE CONVENTIONS

AIR SERVICES TRANSIT AGREEMENT. Chicago, Dec. 7, 1944.

Acceptance:

Nicaragua. Dec. 28, 1945. *D. S. B.*, Feb. 3, 1946, p. 171.

AIR TRANSPORT AGREEMENT. Chicago, Dec. 7, 1944.

Acceptance:

Nicaragua. Dec. 28, 1945. *D. S. B.*, Feb. 3, 1946, p. 171.

AVIATION. Interim Agreement. Chicago, Dec. 7, 1944.

Acceptance:

Nicaragua. Dec. 28, 1945. *D. S. B.*, Feb. 3, 1946, p. 171.

AVIATION CONVENTION. Chicago, Dec. 7, 1944.

Ratifications deposited:

Nicaragua. Dec. 28, 1945.

Paraguay. Jan. 21, 1946. *D. S. B.*, Feb. 3, 1946, p. 171.

Poland. *N. Y. T.*, Jan. 24, 1946, p. 4.

Turkey. Dec. 20, 1945. *D. S. B.*, Feb. 3, 1946, p. 171.

INDUSTRIAL PROPERTY. London June 2, 1934.

Adherence:

Luxembourg (effective Dec. 30, 1945). *D. S. B.*, Jan. 21, 1946, p. 61.

INTER-AMERICAN INDIAN INSTITUTE. Mexico City, Nov. 29 1940.

Adherence deposited:

Guatemala. Oct. 30, 1945. *D. S. B.*, Jan. 20, 1946, p. 73.

RADIO COMMUNICATIONS REGULATIONS. Additional Protocol Cairo, April 8, 1938.

Adherence:

Luxembourg. June 13, 1945. *D. S. B.*, Dec. 23, 1945, p. 999.

RADIO COMMUNICATIONS REGULATIONS AND PROTOCOL. Revision, Cairo, April 8, 1938.

Adherence:

Luxembourg. June 13, 1945. *D. S. B.*, Dec. 23, 1945, p. 999.

SANITARY CONVENTION. Paris, June 21, 1926. Amendment Washington, Jan. 5, 1945.

Application to:

Certain British colonies and territories. Sept. 20, 1945. *D. S. E.*, Jan. 6-13, 1946 pp. 40-42.

Ratification deposited:

Canada. Nov. 20, 1945. *D. S. B.*, Jan. 6-13, 1946, p. 40.

SANITARY CONVENTION FOR AIR NAVIGATION. The Hague, April 12, 1933.

Acceptance deposited:

On behalf of certain British colonies and territories. Sept. 10, 1945. *D. S. B.*, Jan. 20, 1946, p. 81.

SANITARY CONVENTION FOR AIR NAVIGATION. The Hague, April 12, 1933. Amendment, Washington, Jan. 5, 1945.

Application to:

Certain British colonies and territories. Sept. 20, 1945. *D. S. B.*, Jan. 6-13, 1946, pp. 40-42.

Ratification deposited:

Canada. Nov. 20, 1945. *D. S. B.*, Jan. 6-13, 1946, p. 40.

TELECOMMUNICATIONS. Bermuda, Dec. 4, 1945.

Signatures:

United States, United Kingdom, Canada, Australia, New Zealand, South Africa, India, Southern Rhodesia.

Text: *D. S. B.*, Dec. 16, 1945, pp. 971-973.

TELEGRAPH REGULATIONS AND PROTOCOL. Cairo, April 4, 1938.

Adherence:

Luxembourg. June 13, 1945. *D. S. B.*, Dec. 23, 1945, p. 999.

TELEPHONE REGULATIONS AND PROTOCOL. Cairo, April 4, 1938.

Adherence:

Luxembourg. June 13, 1945. *D. S. B.*, Dec. 23, 1945, p. 999.

UNITED NATIONS BANK FOR RECONSTRUCTION & DEVELOPMENT. Washington, Dec. 27, 1945.

Signatures: List through Dec. 31, 1945. *D. S. B.*, Jan. 6-13, 1946, p. 36.

UNITED NATIONS CHARTER. San Francisco, June 26, 1945.

Ratifications deposited: List as of Dec. 30, 1945. *D. S. B.*, Dec. 30, 1945, pp. 1057-1058.

UNITED NATIONS MONETARY FUND. Washington, Dec. 27, 1945.

Signatures: List through Dec. 31, 1945. *D. S. B.*, Jan. 6-13, 1946, p. 36.

WAR CRIMES. London, August 8, 1945.

Accessions:

Australia, Belgium, Czechoslovakia, Denmark, Ethiopia, Greece, Haiti, Honduras, Luxembourg, Netherlands, New Zealand, Norway, Panama, Poland, Venezuela and Yugoslavia. *D. S. B.*, Feb. 17, 1946, p. 261.

DOROTHY R. DART

*See 375*

## JUDICIAL DECISIONS

*in re* YAMASHITA

SUPREME COURT OF THE UNITED STATES

[February 4, 1946.]

Belligerent may establish tribunals for trial of members of enemy forces for violation of the laws of war; such tribunal may be created and function after close of hostilities; the law of war imposes responsibility on commanding officers to take all possible and appropriate measures to prevent violations by troops under their command; such Military Tribunals are not bound by Constitutional requirement for due process in domestic sense of the term.

Mr. Chief Justice STONE delivered the opinion of the Court.

No. 61 Miscellaneous is an application for leave to file a petition for writs of habeas corpus and prohibition in this Court. No. 672 is a petition for certiorari to review an order of the Supreme Court of the Commonwealth of the Philippines (28 U.S.C. § 349), denying petitioner's application to that court for writs of habeas corpus and prohibition. As both applications raise substantially like questions, and because of the importance and novelty of some of those presented, we set the two applications down for oral argument as one case.

From the petitions and supporting papers it appears that prior to September 3, 1945, petitioner was the Commanding General of the Fourteenth Army Group of the Imperial Japanese Army in the Philippine Islands. On that date he surrendered to and became a prisoner of war of the United States Army Forces in Baguio, Philippine Islands. On September 25th, by order of respondent, Lieutenant General Wilhelm D. Styer, Commanding General of the United States Army Forces, Western Pacific, which command embraces the Philippine Islands, petitioner was served with a charge prepared by the Judge Advocate General's Department of the Army, purporting to charge petitioner with a violation of the law of war. On October 8, 1945, petitioner, after pleading not guilty to the charge, was held for trial before a military commission of five Army officers appointed by order of General Styer. The order appointed six Army officers, all lawyers, as defense counsel. Throughout the proceedings which followed, including those before this Court, defense counsel have demonstrated their professional skill and resourcefulness and their proper zeal for the defense with which they were charged.

On the same date a bill of particulars was filed by the prosecution, and the commission heard a motion made in petitioner's behalf to dismiss the charge on the ground that it failed to state a violation of the law of war. On October 29th the commission was reconvened, a supplemental bill of particulars was filed, and the motion to dismiss was denied. The trial then proceeded until its conclusion on December 7, 1945, the commission hearing two hundred and eighty-six witnesses, who gave over three thousand pages of testi-

\* Nos. 61 Miscellaneous and 672. October Term, 1945.

money. On that date petitioner was found guilty of the offense as charged and sentenced to death by hanging.

The petitions for habeas corpus set up that the detention of petitioner for the purpose of the trial was unlawful for reasons which are now urged as showing that the military commission was without lawful authority or jurisdiction to place petitioner on trial, as follows:

(a) That the military commission which tried and convicted petitioner was not lawfully created, and that no military commission to try petitioner for violations of the law of war could lawfully be convened after the cessation of hostilities between the armed forces of the United States and Japan;

(b) that the charge preferred against petitioner fails to charge him with a violation of the law of war;

(c) that the commission was without authority and jurisdiction to try and convict petitioner because the order governing the procedure of the commission permitted the admission in evidence of depositions, affidavits and hearsay and opinion evidence, and because the commission's rulings admitting such evidence were in violation of the 25th and 33rd Articles of War (10 U.S.C. §§ 1496, 1509) and the Geneva Convention (47 Stat. 2021), and deprived petitioner of a fair trial in violation of the due process clause of the Fifth Amendment;

(d) that the commission was without authority and jurisdiction in the premises because of the failure to give advance notice of petitioner's trial to the neutral power representing the interest of Japan as a belligerent as required by Article 60 of the Geneva Convention, 47 Stat. 2021, 2051.

On the same grounds the petitions for writs of prohibition set up that the commission is without authority to proceed with the trial.

The Supreme Court of the Philippine Islands, after hearing argument, denied the petition for habeas corpus presented to it, on the ground, among others, that its jurisdiction was limited to an inquiry as to the jurisdiction of the commission to place petitioner on trial for the offense charged, and that the commission, being validly constituted by the order of General Styer, had jurisdiction over the person of petitioner and over the trial for the offense charged.

In *Ex parte Quirin*, 317 U. S. 1, we had occasion to consider at length the sources and nature of the authority to create military commissions for the trial of enemy combatants for offenses against the law of war. We there pointed out that Congress, in the exercise of the power conferred upon it by Article I, § 8, Cl. 10 of the Constitution to "define and punish . . . Offenses against the Law of Nations . . .," of which the law of war is a part, had by the Articles of War (10 U.S.C. §§ 1471-1593) recognized the "military commission" appointed by military command, as it had previously existed in United States Army practice, as an appropriate tribunal for the trial and punishment of offenses against the law of war. Article 15 declares that "the provisions of these articles conferring jurisdiction upon courts martial shall

not be construed as depriving military commissions . . . or other military tribunals of concurrent jurisdiction in respect of offenders or offenses that by statute or by the law of war may be triable by such military commissions . . . or other military tribunals." See a similar provision of the Espionage Act of 1917, 50 U.S.C. § 38. Article 2 includes among those persons subject to the Articles of War the personnel of our own military establishment. But this, as Article 12 indicates, does not exclude from the class of persons subject to trial by military commissions "any other person who by the law of war is subject to trial by military tribunals," and who, under Article 12, may be tried by court martial, or under Article 15 by military commission.

We further pointed out that Congress, by sanctioning trial of enemy combatants for violations of the law of war by military commission, had not attempted to codify the law of war or to mark its precise boundaries. Instead, by Article 15 it had incorporated, by reference, as within the preëxisting jurisdiction of military commissions created by appropriate military command, all offenses which are defined as such by the law of war, and which may constitutionally be included within that jurisdiction. It thus adopted the system of military common law applied by military tribunals so far as it should be recognized and deemed applicable by the courts, and as further defined and supplemented by the Hague Convention, to which the United States and the Axis powers were parties.

We also emphasized in *Ex parte Quirin*, as we do here, that on application for habeas corpus we are not concerned with the guilt or innocence of the petitioners. We consider here only the lawful power of the commission to try the petitioner for the offense charged. In the present cases it must be recognized throughout that the military tribunals which Congress has sanctioned by the Articles of War are not courts whose rulings and judgments are made subject to review by this Court. See *Ex parte Vallandigham*, 1 Wall. 243; *In re Vidal* 179 U. S. 126; cf. *Ex parte Quirin* *supra* 39. They are tribunals whose determinations are reviewable by the military authorities either as provided in the military orders constituting such tribunals or as provided by the Articles of War. Congress conferred on the courts no power to review their determinations save only as it has granted judicial power "to grant writs of habeas corpus for the purpose of an inquiry into the cause of the restraint of liberty." 28 U.S.C. §§ 451, 452. The courts may inquire whether the detention complained of is within the authority of those detaining the petitioner. If the military tribunals have lawful authority to hear, decide and condemn, their action is not subject to judicial review merely because they have made a wrong decision on disputed facts. Correction of their errors of decision is not for the courts but for the military authorities which are alone authorized to review their decisions. See *Dynes v. Hoover*, 20 How. 65, 81; *Runkie v. United States*, 122 U. S. 543, 555-556; *Carter v. McClaghry*, 183 U. S. 365; *Collins v. McDonald*, 253 U. S. 416. Cf. *Matter of Moran*, 203 U. S. 96, 105.



Finally, we held in *Ex parte Quirin*, *supra*, 24, 25, as we hold now, that Congress by sanctioning trials of enemy aliens by military commission for offenses against the law of war had recognized the right of the accused to make a defense. Cf. *Ex parte Kawato*, 317 U. S. 69. It has not foreclosed their right to contend that the Constitution or laws of the United States withhold authority to proceed with the trial. It has not withdrawn, and the Executive branch of the government could not, unless there was suspension of the writ, withdraw from the courts the duty and power to make such inquiry into the authority of the commission as may be made by habeas corpus.

With these governing principles in mind we turn to the consideration of the several contentions urged to establish want of authority in the commission. We are not here concerned with the power of military commissions to try civilians. See *Ex parte Milligan* 4 Wall. 2, 32; *Sterling v. Constantin*, 287 U. S. 378; *Ex parte Quirin*, *supra*, 45. The government's contention is that General Styer's order creating the commission conferred authority on it only to try the purported charge of violation of the law of war committed by petitioner, an enemy belligerent, while in command of a hostile army occupying United States territory during time of war. Our first inquiry must therefore be whether the present commission was created by lawful military command and, if so, whether authority could thus be conferred on the commission to place petitioner on trial after the cessation of hostilities between the armed forces of the United States and Japan.

*The authority to create the Commission.* General Styer's order for the appointment of the commission was made by him as Commander of the United States Army Forces, Western Pacific. His command includes, as part of a vastly greater area, the Philippine Islands, where the alleged offenses were committed, where petitioner surrendered as a prisoner of war, and where, at the time of the order convening the commission, he was detained as a prisoner in custody of the United States Army. The Congressional recognition of military commissions and its sanction of their use in trying offenses against the law of war to which we have referred, sanctioned their creation by military command in conformity to long established American precedents. Such a commission may be appointed by any field commander, or by any commander competent to appoint a general court martial, as was General Styer, who had been vested with that power by order of the President. 2 Winthrop, *Military Law and Precedents*, 2d ed., \*1302; cf. Article of War 8.

Here the commission was not only created by a commander competent to appoint it, but his order conformed to the established policy of the Government and to higher military commands authorizing his action. In a proclamation of July 2, 1942 (56 Stat. 1964), the President proclaimed that enemy belligerents who, during time of war, enter the United States, or any territory possession thereof, and who violate the law of war, should be subject to the law of war and to the jurisdiction of military tribunals. Paragraph 10 of the Declaration of Potsdam of July 6, 1945, declared that "... stern justice

shall be meted out to all war criminals including those who have visited cruelties upon prisoners." U. S. Dept. of State Bull., Vol. XIII, No. 318, pp. 137-138. This Declaration was accepted by the Japanese government by its note of August 10, 1945. U. S. Dept. of State Bull. Vol. XIII, No. 320, p. 205.

By direction of the President, the Joint Chiefs of Staff of the American Military Forces, on September 12, 1945, instructed General MacArthur, Commander in Chief, United States Army Forces, Pacific, to proceed with the trial, before appropriate military tribunals, of such Japanese war criminals "as have been or may be apprehended." By order of General MacArthur of September 24, 1945, General Styer was specifically directed to proceed with the trial of petitioner upon the charge here involved. This order was accompanied by detailed rules and regulations which General MacArthur prescribed for the trial of war criminals. These regulations directed, among other things, that review of the sentence imposed by the commission should be by the officer convening it, with "authority to approve, mitigate, remit, commute, suspend, reduce or otherwise alter the sentence imposed," and directed that no sentence of death should be carried into effect until confirmed by the Commander in Chief, United States Army Forces, Pacific.

It thus appears that the order creating the commission for the trial of petitioner was authorized by military command, and was in complete conformity to the Act of Congress sanctioning the creation of such tribunals for the trial of offenses against the law of war committed by enemy combatants. And we turn to the question whether the authority to create the commission and direct the trial by military order continued after the cessation of hostilities.

An important incident to the conduct of war is the adoption of measures by the military commander, not only to repel and defeat the enemy, but to seize and subject to disciplinary measures those enemies who, in their attempt to thwart or impede our military effort, have violated the law of war. *Ex parte Quirin*, *supra*, 28. The trial and punishment of enemy combatants who have committed violations of the law of war is thus not only a part of the conduct of war operating as a preventive measure against such violations, but is an exercise of the authority sanctioned by Congress to administer the system of military justice recognized by the law of war. That sanction is without qualification as to the exercise of this authority so long as a state of war exists—from its declaration until peace is proclaimed. See *United States v. Anderson*, 9 Wall. 56, 70; *The Protector*, 12 Wall. 701, 702; *McElrath v. United States*, 102 U. S. 426, 438; *Kahn v. Anderson*, 255 U. S. 1, 9-10. The war power, from which the commission derives its existence, is not limited to victories in the field, but carries with it the inherent power to guard against the immediate renewal of the conflict, and to remedy, at least in ways Congress has recognized, the evils which the military operations have produced. See *Stewart v. Kahn*, 11 Wall. 493, 537.

We cannot say that there is no authority to convene a commission after

hostilities have ended to try violations of the law of war committed before their cessation, at least until peace has been officially recognized by treaty or proclamation of the political branch of the Government. In fact, in most instances the practical administration of the system of military justice under the law of war would fail if such authority were thought to end with the cessation of hostilities. For only after their cessation could the greater number of offenders and the principal ones be apprehended and subjected to trial.

No writer on international law appears to have regarded the power of military tribunals, otherwise competent to try violations of the law of war, as terminating before the formal state of war has ended.<sup>1</sup> In our own military history there have been numerous instances in which offenders were tried by military commission after the cessation of hostilities and before the proclamation of peace, for offenses against the law of war committed before the cessation of hostilities.<sup>2</sup>

The extent to which the power to prosecute violations of the law of war shall be exercised before peace is declared rests, not with the courts, but with the political branch of the Government, and may itself be governed by the terms of an armistice or the treaty of peace. Here, peace has not been agreed upon or proclaimed. Japan, by her acceptance of the Potsdam Declaration and her surrender, has acquiesced in the trials of those guilty of violations of the law of war. The conduct of the trial by the military commission has been authorized by the political branch of the Government, by military command, by international law and usage, and by the terms of the surrender of the Japanese government.

*The Charge.* Neither Congressional action nor the military orders constituting the commission authorized it to place petitioner on trial unless the charge preferred against him is of a violation of the law of war. (The charge, so far as now relevant, is that petitioner, between October 9, 1944 and September 2, 1945, in the Philippine Islands, "while commander of armed forces of Japan at war with the United States of America and its allies, unlawfully disregarded and failed to discharge his duty as commander to con-

<sup>1</sup> The Commission on the Responsibility of the Authors of the War and on the Enforcement of Penalties of the Versailles Peace Conference, which met after cessation of hostilities in the First World War, were of the view that violators of the law of war could be tried by military tribunals. See Report of the Commission, March 9, 1919, 14 *Am. J. Int. L.* 95, 121. See also memorandum of American commissioners concurring on this point, *id.*, at p. 141. The treaties of peace concluded after World War I recognized the right of the Allies and of the United States to try such offenders before military tribunals. See Art. 228 of Treaty of Versailles, June 28, 1919; Art. 173 of Treaty of St. Germain, Sept. 10, 1919; Art. 157 of Treaty of Trianon, June 4, 1920.

The terms of the agreement which ended hostilities in the Boer War reserved the right to try, before military tribunals, enemy combatants who had violated the law of war. 95 *British and Foreign State Papers* (1901-1902) 160. See also trials cited in Colby, *War Crimes*; 23 *Michigan Law Rev.* 482, 496-7.

<sup>2</sup> See cases mentioned in *Ex parte Quirin*, *supra*, p. 32, note 13, and in 2 Winthrop, *supra*, \*1310-1311, n. 5; 14 *Op. A. G.* 249 (*Modoc Indian Prisoners*).

trol the operations of the members of his command, permitting them to commit brutal atrocities and other high crimes against people of the United States and of its allies and dependencies, particularly the Philippines; and he . . . thereby violated the laws of war.")

Bills of particulars, filed by the prosecution by order of the commission, allege a series of acts, one hundred and twenty-three in number, committed by members of the forces under petitioner's command during the period mentioned. The first item specifies the execution of "a deliberate plan and purpose to massacre and exterminate a large part of the civilian population of Batangas Province, and to devastate and destroy public, private and religious property therein, as a result of which more than 25,000 men, women and children, all unarmed noncombatant civilians, were brutally mistreated and killed, without cause or trial, and entire settlements were devastated and destroyed wantonly and without military necessity." Other items specify acts of violence, cruelty and homicide inflicted upon the civilian population and prisoners of war, acts of wholesale pillage and the wanton destruction of religious monuments.

It is not denied that such acts directed against the civilian population of an occupied country and against prisoners of war are recognized in international law as violations of the law of war. Articles 4, 23, 46, and 47, Annex to Fourth Hague Convention, 1907, 36 Stat. 2277, 2296, 2303, 2306-7. But it is urged that the charge does not allege that petitioner has either committed or directed the commission of such acts, and consequently that no violation is charged as against him. But this overlooks the fact that the gist of the charge is an unlawful breach of duty by petitioner as an army commander to control the operations of the members of his command by "permitting them to commit" the extensive and widespread atrocities specified. The question then is whether the law of war imposes on an army commander a duty to take such appropriate measures as are within his power to control the troops under his command for the prevention of the specified acts which are violations of the law of war and which are likely to attend the occupation of hostile territory by an uncontrolled soldiery, and whether he may be charged with personal responsibility for his failure to take such measures when violations result. That this was the precise issue to be tried was made clear by the statement of the prosecution at the opening of the trial.

[It is evident that the conduct of military operations by troops whose excesses are unrestrained by the orders or efforts of their commander would almost certainly result in violations which it is the purpose of the law of war to prevent. Its purpose to protect civilian populations and prisoners of war from brutality would largely be defeated if the commander of an invading army could with impunity neglect to take reasonable measures for their protection. Hence the law of war presupposes that its violation is to be avoided through the control of the operations of war by commanders who are to some extent responsible for their subordinates.)

This is recognized by the Annex to Fourth Hague Convention of 1907, respecting the laws and customs of war on land. Article I lays down as a condition which an armed force must fulfill in order to be accorded the rights of lawful belligerents, that it must be "commanded by a person responsible for his subordinates." 36 Stat. 2295. Similarly Article 19 of the Tenth Hague Convention, relating to bombardment by naval vessels, provides that commanders in chief of the belligerent vessels "must see that the above Articles are properly carried out." 36 Stat. 2389. And Article 26 of the Geneva Red Cross Convention of 1929, 47 Stat. 2074, 2092, for the amelioration of the condition of the wounded and sick in armies in the field, makes it "the duty of the commander-in-chief of the belligerent armies to provide for the details of execution of the foregoing articles, [of the convention] as well as for unforeseen cases." And, finally, Article 43 of the Annex of the Fourth Hague Convention, 36 Stat. 2306, requires that the commander of a force occupying enemy territory, as was petitioner, "shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country."

These provisions plainly imposed on petitioner, who at the time specified was military governor of the Philippines, as well as commander of the Japanese forces, an affirmative duty to take such measures as were within his power and appropriate in the circumstances to protect prisoners of war and the civilian population. This duty of a commanding officer has heretofore been recognized, and its breach penalized by our own military tribunals.<sup>3</sup> A like principle has been applied so as to impose liability on the United States in international arbitrations. *Case of Jenaud*, 3 Moore, International Arbitrations, 3000; *Case of "The Zafiro"*, 5 Hackworth, Digest of International Law, 707.

We do not make the laws of war but we respect them so far as they do not conflict with the commands of Congress or the Constitution. There is no contention that the present charge, thus read, is without the support of evidence, or that the commission held petitioner responsible for failing to take measures which were beyond his control or inappropriate for a commanding officer to take in the circumstances.<sup>4</sup> We do not here appraise the evidence

<sup>3</sup> Failure of an officer to take measures to prevent murder of an inhabitant of an occupied country committed in his presence. Gen. Orders No. 221, Hq. Div. of the Philippines, August 17, 1901. And in Gen. Orders No. 264, Hq. Div. of the Philippines, September 9, 1901, it was held that an officer could not be found guilty for failure to prevent a murder unless it appeared that the accused had "the power to prevent" it.

<sup>4</sup> In its findings the commission took account of the difficulties "faced by the accused, with respect not only to the swift and overpowering advance of American forces, but also to errors of his predecessors, weakness in organization, equipment, supply . . . , training, communication, discipline and morale of his troops", and "the tactical situation, the character, training and capacity of staff officers and subordinate commanders, as well as the traits of character of his troops." It nonetheless found that petitioner had not taken such measures to control his troops as were "required by the circumstances." We do not weight the evidence.

on which petitioner was convicted. We do not consider what measures, if any, petitioner took to prevent the commission, by the troops under his command, of the plain violations of the law of war detailed in the bill of particulars, or whether such measures as he may have taken were appropriate and sufficient to discharge the duty imposed upon him. These are questions within the peculiar competence of the military officers composing the commission and were for it to decide. See *Smith v. Whiting*, *supra*, 178. It is plain that the charge on which petitioner was tried charged him with a breach of his duty to control the operations of the members of his command, by permitting them to commit the specified atrocities. This was enough to require the commission to hear evidence tending to establish the culpable failure of petitioner to perform the duty imposed on him by the law of war and to pass upon its sufficiency to establish guilt.

Obviously charges of violations of the law of war triable before a military tribunal need not be stated with the precision of a common law indictment. Cf. *Collins v. McDonald*, *supra*, 420. But we conclude that the allegations of the charge, tested by any reasonable standard, adequately allege a violation of the law of war and that the commission had authority to try and decide the issue which it raised. Cf. *Dealy v. United States*, 152 U. S. 539; *Williamson v. United States*, 207 U. S. 425, 447; *Glasser v. United States*, 315 U. S. 60, 66, and cases cited.

*The Proceedings before the Commission.* The regulations prescribed by General MacArthur governing the procedure for the trial of petitioner by the commission directed that the commission should admit such evidence "as in its opinion would be of assistance in proving or disproving the charge, or such as in the commission's opinion would have probative value in the mind of a reasonable man," and that in particular it might admit affidavits, depositions or other statements taken by officers detailed for that purpose by military authority. The petitions in this case charged that in the course of the trial the commission received, over objection by petitioner's counsel, the deposition of a witness taken pursuant to military authority by a United States Army captain. It also, over like objection, admitted hearsay and opinion evidence tendered by the prosecution. Petitioner argues as ground for the writ of habeas corpus, that Article 25<sup>5</sup> of the Articles of War prohibited the reception in evidence by the commission of depositions on behalf of the prosecution in a capital case, and that Article 38<sup>6</sup> prohibited the reception of hearsay and of opinion evidence.

We merely hold that the charge sufficiently states a violation against the law of war, and that the commission, upon the facts found, could properly find petitioner guilty of such a violation.

<sup>5</sup> Article 25 provides: "A duly authenticated deposition taken upon reasonable notice to the opposite party may be read in evidence before any military court or commission in any case not capital, or in any proceeding before a court of inquiry or a military board, . . . *Provided*, That testimony by deposition may be adduced for the defense in capital cases."

<sup>6</sup> Article 38 provides: "The President may, by regulations, which he may modify from

We think that neither Article 25 nor Article 38 is applicable to the trial of an enemy combatant by a military commission for violations of the law of war. Article 2 of the Articles of War enumerates "the persons . . . subject to these articles," who are denominated, for purposes of the Articles, as "persons subject to military law." In general, the persons so enumerated are members of our own Army and of the personnel accompanying the Army. Enemy combatants are not included among them. Articles 12, 13 and 14, before the adoption of Article 15 in 1916, made all "persons subject to military law" amenable to trial by courts-martial for any offense made punishable by the Articles of War. Article 12 makes triable by general court martial "any other person who by the law of war is triable by military tribunals." Since Article 2, in its 1916 form, includes some persons who, by the law of war, were, prior to 1916, triable by military commission, it was feared by the proponents of the 1916 legislation that in the absence of a saving provision, the authority given by Articles 12, 13 and 14 to try such persons before courts-martial might be construed to deprive the non-statutory military commission of a portion of what was considered to be its traditional jurisdiction. To avoid this, and to preserve that jurisdiction intact, Article 15 was added to the Articles.<sup>7</sup> It declared that "The provisions of these articles conferring jurisdiction upon courts-martial shall not be construed as depriving military commissions . . . of concurrent jurisdiction in respect of offenders or offenses that . . . by the law of war may be triable by such military commissions."

By thus recognizing military commissions in order to preserve their traditional jurisdiction over enemy combatants unimpaired by the Articles, Congress gave sanction, as we held in *Ex parte Quirin*, to any use of the military commission contemplated by the common law of war. But it did not thereby make subject to the Articles of War persons other than those defined by Article 2 as being subject to the Articles, nor did it confer the benefits of the Articles upon such persons. The Articles recognized but one kind of military

time to time, prescribe the procedure, including modes of proof, in cases before courts-martial, courts of inquiry, military commissions, and other military tribunals, which regulations shall insofar as he shall deem practicable, apply the rules of evidence generally recognized in the trial of criminal cases in the district courts of the United States: *Provided*, That nothing contrary to or inconsistent with these articles shall be so prescribed: . . ."

<sup>7</sup> General Crowder, the Judge Advocate General, who appeared before Congress as sponsor for the adoption of Article 15 and the accompanying amendment of Article 25, in explaining the purpose of Article 15, said:

"Article 15 is new. - We have included in article 2 as subject to military law a number of persons who are also subject to trial by military commission. A military commission is our common-law war court. It has no statutory existence, though it is recognized by statute law. As long as the articles embraced them in the designation 'persons subject to military law,' and provided that they might be tried by court-martial, I was afraid that, having made a special provision for their trial by court-martial, [Arts. 12, 13, and 14] it might be held that the provision operated to exclude trials by military commission and other war courts; so this new article was introduced. . . ." [Sen. R. 130, 64th Cong., 1st Sess., p. 40.]

commission, not two. But they sanctioned the use of that one for the trial of two classes of persons, to one of which the Articles do, and to the other of which they do not apply in such trials. Being of this latter class, petitioner cannot claim the benefits of the Articles, which are applicable only to the members of the other class. Petitioner, an enemy combatant, is therefore not a person made subject to the Articles of War by Article 2, and the military commission before which he was tried, though sanctioned, and its jurisdiction saved, by Article 15, was not convened by virtue of the Articles of War, but pursuant to the common law of war. It follows that the Articles of War, including Articles 25 and 38, were not applicable to petitioner's trial and imposed no restrictions upon the procedure to be followed. The Articles left the control over the procedure in such a case where it had previously been, with the military command.

Petitioner further urges that by virtue of Article 33 of the Geneva Convention of 1929, 47 Stat. 2052, he is entitled to the benefits afforded by the 25th and 38th Articles of War to members of our own forces. Article 63 provides: "Sentence may be pronounced against a prisoner of war only by the same courts and according to the same procedure as in the case of persons belonging to the armed forces of the detaining Power." Since petitioner is a prisoner of war, and as the 25th and 38th Articles of War apply to the trial of any person in our own armed forces, it is said that Article 63 requires them to be applied in the trial of petitioner. But we think examination of Article 63 in its setting in the Convention plainly shows that it refers to sentence "pronounced against a prisoner of war" for an offense committed while a prisoner of war, and not for a violation of the law of war committed while a combatant.

Article 63 of the Convention appears in part 3, entitled "Judicial Suits," of Chapter 3, "Penalties Applicable to Prisoners of War," of Section V, "Prisoners' Relations with the Authorities," one of the sections of Title III, "Captivity". All taken together relate only to the conduct and control of prisoners of war while in captivity as such. Chapter 1 of Section V, Article 42, deals with complaints of prisoners of war because of the conditions of captivity. Chapter 2, Articles 43 and 44, relates to those of their number chosen by prisoners of war to represent them.

Chapter 3 of Section V, Articles 45 through 67, is entitled "Penalties Applicable to Prisoners of War." Part 1 of that chapter, Articles 45 through 53, indicate what acts of prisoners of war, committed while prisoners, shall be considered offenses, and defines to some extent the punishment which the detaining power may impose on account of such offenses.<sup>3</sup> Punishment is of

<sup>3</sup> Part 1 of Chapter 3, "General Provisions," provides in Articles 45 and 46 that prisoners of war are subject to the regulations in force in the armies of the detaining power, that punishments other than those provided "for the same acts for soldiers of the national armies" may not be imposed on prisoners of war, and that "collective punishment for individual acts" is forbidden. Article 47 provides that "Acts constituting an offense against discipline, and particularly attempted escape, shall be verified immediately; for all prisoners of war,



two kinds—"disciplinary" and "judicial," the latter being the more severe. Article 52 requires that leniency be exercised in deciding whether an offense requires disciplinary or judicial punishment. Part 2 of Chapter 3 is entitled "Disciplinary Punishments," and further defines the extent of such punishment, and the mode in which it may be imposed. Part 3, entitled "Judicial Suits," in which Article 63 is found, describes the procedure by which "judicial" punishment may be imposed. The three parts of Chapter 3, taken together, are thus a comprehensive description of the substantive offenses which prisoners of war may commit during their imprisonment, of the penalties which may be imposed on account of such offenses, and of the procedure by which guilt may be adjudged and sentence pronounced.

We think it clear, from the context of these recited provisions, that part 3, and Article 63 which it contains, apply only to judicial proceedings directed against a prisoner of war for offenses committed while a prisoner of war. Section V gives no indication that this part was designed to deal with offenses other than those referred to in parts 1 and 2 of chapter 3.

We cannot say that the commission, in admitting evidence to which objection is now made, violated any act of Congress, treaty or military command defining the commission's authority. For reasons already stated we hold that the commission's rulings on evidence and on the mode of conducting these proceedings against petitioner are not reviewable by the courts, but only by the reviewing military authorities. From this viewpoint it is unnecessary to consider what, in other situations, the Fifth Amendment might require, and as to that no intimation one way or the other is to be implied. Nothing we have said is to be taken as indicating any opinion on the question of the wisdom of considering such evidence, or whether the action of a military tribunal in admitting evidence, which Congress or controlling military command has directed to be excluded, may be drawn in question by petition for habeas corpus or prohibition.

*Effect of failure to give notice of the trial to the protecting power.* Article 60

commissioned or not, preventive arrest shall be reduced to the absolute minimum. . . . Judicial proceedings against prisoners of war shall be conducted as rapidly as the circumstances permit. . . . In all cases the duration of preventive imprisonment shall be deducted from the disciplinary or the judicial punishment inflicted."

Article 48 provides that prisoners of war, after having suffered "the judicial or disciplinary punishment which has been imposed on them" are not to be treated differently from other prisoners, but provides that "prisoners punished as a result of attempted escape may be subjected to special surveillance." Article 49 recites that prisoners "given disciplinary punishment may not be deprived of the prerogatives attached to their rank." Articles 50 and 51 deal with escaped prisoners who have been retaken or prisoners who have attempted to escape. Article 52 provides: "Belligerents shall see that the competent authorities exercise the greatest leniency in deciding the question of whether an infraction committed by a prisoner of war should be punished by disciplinary or judicial measures. . . . This shall be the case especially when it is a question of deciding on acts in connection with escape or attempted escape. . . . A prisoner may not be punished more than once because of the same act or the same count."

of the Geneva Convention of July 27, 1929, 47 Stat. 2051, to which the United States and Japan were signatories, provides that "At the opening of a judicial proceeding directed against a prisoner of war the detaining power shall advise the representative of the protecting power thereof as soon as possible and always before the date set for the opening of the trial." Petitioner relies on the failure to give the prescribed notice to the protecting power<sup>9</sup> to establish want of authority in the commission to proceed with the trial.

For reasons already stated we conclude that Article 60 of the Geneva Convention, which appears in part 3, Chapter 3, Section V, Title III of the Geneva Convention, applies only to persons who are subjected to judicial proceedings for offenses committed while prisoners of war.<sup>10</sup>

<sup>9</sup> Switzerland, at the time of the trial, was the power designated by Japan for the protection of Japanese prisoners of war detained by the United States, except in Hawaii. U. S. Dept. of State bull., Vol. XIII, No. 317, p. 125.

<sup>10</sup> One of the items of the bill of particulars, in support of the charge against petitioner, specifies that he permitted members of the armed forces under his command to try and execute three named and other prisoners of war, "subjecting to trial without prior notice to a representative of the protecting power, without opportunity to defend, and without counsel; denying opportunity to appeal from the sentence rendered; failing to notify the protecting power of the sentence pronounced and executing a death sentence without communicating to the representative of the protecting power the nature and circumstances of the offense charged." It might be suggested that if Article 60 is inapplicable to petitioner it is inapplicable in the cases specified, and that hence he could not be lawfully held or convicted on a charge of failing to require the notice, provided for in Article 60, to be given.

As the Government insists, it does not appear from the charge and specifications that the prisoners in question were not charged with offenses committed by them as prisoners rather than with offenses against the law of war committed by them as enemy combatants. But apart from this consideration, independently of the notice requirements of the Geneva Convention, it is a violation of the law of war, on which there could be a conviction if supported by evidence, to inflict capital punishment on prisoners of war without affording to them opportunity to make a defense. 2 Winthrop, *supra*, \*434-435, 1241; Article 84, Oxford Manual; U. S. War Dept., Basic Field Manual, Rules of Land Warfare (1940) par. 356; Lieber's Code, G. O. No. 100 (1863) Instructions for the Government of Armies of the United States in the Field, par. 12; Spaight, War Rights on Land, 462, n.

Further, the commission, in making its findings, summarized as follows the charges, on which it acted, in three classes, any one of which, independently of the others if supported by evidence, would be sufficient to support the conviction: (1) execution or massacre without trial and maladministration generally of civilian internees and prisoners of war; (2) brutalities committed upon the civilian population and (3) burning and demolition, without adequate military necessity, of a large number of homes, places of business, places of religious worship, hospitals, public buildings and educational institutions.

The commission concluded: "(1) that a series of atrocities and other high crimes have been committed by members of the Japanese armed forces" under command of petitioner "against people of the United States, their allies and dependencies; . . . that they were not sporadic in nature, but in many cases were methodically supervised by Japanese officers and non-commissioned officers"; (2) that during the period in question petitioner "failed to provide effective control of [his] troops, as was required by the circumstances." The commission said: "Where murder and rape and vicious, revengeful actions are widespread offenses, and there is no effective attempt by a commander to discover and control the criminal acts, such a commander may be held responsible, even criminally liable, for the lawless

It thus appears that the order convening the commission was a lawful order, that the commission was lawfully constituted, that petitioner was charged with violation of the law of war, and that the commission had authority to proceed with the trial, and in doing so did not violate any military, statutory or constitutional command. We have considered, but find it unnecessary to discuss, other contentions which we find to be without merit. We therefore conclude that the detention of petitioner for trial and his detention upon his conviction, subject to the prescribed review by the military authorities, were lawful, and that the petition for certiorari, and leave to file in this Court petitions for writs of habeas corpus and prohibition should be, and they are

*Denied.*

Mr. Justice JACKSON took no part in the consideration or decision of these cases.

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Mr. Justice MURPHY, dissenting.

The significance of the issue facing the Court today cannot be overemphasized. An American military commission has been established to try a fallen military commander of a conquered nation for an alleged war crime. The authority for such action grows out of the exercise of the power conferred upon Congress by Article I, § 8, Cl. 10 of the Constitution to "define and punish . . . Offenses against the Law of Nations. . . ." The grave issue raised by this case is whether a military commission so established and so authorized may disregard the procedural rights of an accused person as guaranteed by the Constitution, especially by the due process clause of the Fifth Amendment.

The answer is plain. The Fifth Amendment guarantee of due process of law applies to "Any person" who is accused of a crime by the Federal Government or any of its agencies. No exception is made as to those who are accused of war crimes or as to those who possess the status of an enemy belligerent. Indeed, such an exception would be contrary to the whole philosophy of human rights which makes the Constitution the great living document that it is. The immutable rights of the individual, including those secured by the due process clause of the Fifth Amendment, belong not

acts of his troops, depending upon their nature and the circumstances surrounding them."

The commission made no finding of non-compliance with the Geneva Convention. Nothing has been brought to our attention from which we could conclude that the alleged non-compliance with Article 60 of the Geneva Convention had any relation to the commission's finding of a series of atrocities committed by members of the forces under petitioner's command, and that he failed to provide effective control of his troops, as was required by the circumstances; or which could support the petitions for habeas corpus on the ground that petitioner had been charged with or convicted for failure to require the notice prescribed by Article 60 to be given.

alone to the members of those nations that excel on the battlefield or that subscribe to the democratic ideology. They belong to every person in the world, victor or vanquished, whatever may be his race, color or beliefs. They rise above any status of belligerency or outlawry. They survive any popular passion or frenzy of the moment. No court or legislature or executive, not even the mightiest army in the world, can ever destroy them. Such is the universal and indestructible nature of the rights which the due process clause of the Fifth Amendment recognizes and protects when life or liberty is threatened by virtue of the authority of the United States.

The existence of these rights, unfortunately, is not always respected. They are often trampled under by those who are motivated by hatred, aggression or fear. But in this nation individual rights are recognized and protected, at least in regard to governmental action. They cannot be ignored by any branch of the Government, even the military, except under the most extreme and urgent circumstances.

The failure of the military commission to obey the dictates of the due process requirements of the Fifth Amendment is apparent in this case. The petitioner was the commander of an army totally destroyed by the superior power of this nation. While under heavy and destructive attack by our forces, his troops committed many brutal atrocities and other high crimes. Hostilities ceased and he voluntarily surrendered. At that point he was entitled, as an individual protected by the due process clause of the Fifth Amendment, to be treated fairly and justly according to the accepted rules of law and procedure. He was also entitled to a fair trial as to any alleged crimes and to be free from charges of legally unrecognized crimes that would serve only to permit his accusers to satisfy their desires for revenge.

A military commission was appointed to try the petitioner for an alleged war crime. The trial was ordered to be held in territory over which the United States has complete sovereignty. No military necessity or other emergency demanded the suspension of the safeguards of due process. Yet petitioner was rushed to trial under an improper charge, given insufficient time to prepare an adequate defense, deprived of the benefits of some of the most elementary rules of evidence and summarily sentenced to be hanged. In all this needless and unseemly haste there was no serious attempt to charge or to prove that he committed a recognized violation of the laws of war. He was not charged with personally participating in the acts of atrocity or with ordering or condoning their commission. Not even knowledge of these crimes was attributed to him. It was simply alleged that he unlawfully disregarded and failed to discharge his duty as commander to control the operations of the members of his command, permitting them to commit the acts of atrocity. The recorded annals of warfare and the established principles of international law afford not the slightest precedent for such a charge. This indictment in effect permitted the military commission to make the crime whatever it willed, dependent upon its biased view as to petitioner's

duties and his disregard thereof, a practice reminiscent of that pursued in certain less respected nations in recent years.

In my opinion, such a procedure is unworthy of the traditions of our people or of the immense sacrifices that they have made to advance the common ideals of mankind. The high feelings of the moment doubtless will be satisfied. But in the sober afterglow will come the realization of the boundless and dangerous implications of the procedure sanctioned today. No one in a position of command in an army, from sergeant to general, can escape those implications. Indeed, the fate of some future President of the United States and his chiefs of staff and military advisers may well have been sealed by this decision. But even more significant will be the hatred and ill-will growing out of the application of this unprecedented procedure. That has been the inevitable effect of every method of punishment disregarding the element of personal culpability. The effect in this instance, unfortunately, will be magnified infinitely for here we are dealing with the rights of man on an international level. To subject an enemy belligerent to an unfair trial, to charge him with an unrecognized crime, or to vent on him our retributive emotions only antagonizes the enemy nation and hinders the reconciliation necessary to a peaceful world.

That there were brutal atrocities inflicted upon the helpless Filipino people, to whom tyranny is no stranger, by Japanese armed forces under the petitioner's command is undeniable. Starvation, execution or massacre without trial, torture, rape, murder and wanton destruction of property were foremost among the outright violations of the laws of war and of the conscience of a civilized world. That just punishment should be meted out to all those responsible for criminal acts of this nature is also beyond dispute. But these factors do not answer the problem in this case. They do not justify the abandonment of our devotion to justice in dealing with a fallen enemy commander. To conclude otherwise is to admit that the enemy has lost the battle but has destroyed our ideals.

War breeds atrocities. From the earliest conflicts of recorded history to the global struggles of modern times inhumanities, lust and pillage have been the inevitable by-product of man's resort to force and arms. Unfortunately, such despicable acts have a dangerous tendency to call forth primitive impulses of vengeance and retaliation among the victimized peoples. The satisfaction of such impulses in turn breeds resentment and fresh tension. Thus does the spiral of cruelty and hatred grow.

If we are ever to develop an orderly international community based upon a recognition of human dignity it is of the utmost importance that the necessary punishment of those guilty of atrocities be as free as possible from the impulse of revenge and vindictiveness. Justice must be tempered by compassion rather than by vengeance. In this the first case involving this momentous problem ever to reach this Court, our responsibility is both lofty and difficult. We must insist, within the confines of our proper jurisdiction,

that the highest standards of justice be applied in this trial of an enemy commander conducted under the authority of the United States. Otherwise stark retribution will be free to masquerade in a cloak of false legalism. And the hatred and cynicism engendered by that retribution will supplant the great ideals to which this nation is dedicated.

This Court fortunately has taken the first and most important step toward insuring the supremacy of law and justice in the treatment of an enemy belligerent accused of violating the laws of war. Jurisdiction properly has been asserted to inquire "into the cause of restraint of liberty" of such a person. 28 U.S.C. § 452. Thus the obnoxious doctrine asserted by the Government in this case, to the effect that restraints of liberty resulting from military trials of war criminals are political matters completely outside the arena of judicial review, has been rejected fully and unquestionably. This does not mean, of course, that the foreign affairs and policies of the nation are proper subjects of judicial inquiry. But when the liberty of any person is restrained by reason of the authority of the United States the writ of habeas corpus is available to test the legality of that restraint, even though direct court review of the restraint is prohibited. The conclusive presumption must be made, in this country at least, that illegal restraints are unauthorized and unjustified by any foreign policy of the Government and that commonly accepted juridical standards are to be recognized and enforced. On that basis judicial inquiry into these matters may proceed within its proper sphere.

The determination of the extent of review of war trials calls for judicial statesmanship of the highest order. The ultimate nature and scope of the writ of habeas corpus are within the discretion of the judiciary unless validly circumscribed by Congress. Here we are confronted with a use of the writ under circumstances novel in the history of the Court. For my own part, I do not feel that we should be confined by the traditional lines of review drawn in connection with the use of the writ by ordinary criminals who have direct access to the judiciary in the first instance. Those held by the military lack any such access; consequently the judicial review available by habeas corpus must be wider than usual in order that proper standards of justice may be enforceable.

But for the purposes of this case I accept the scope of review recognized by the Court at this time. As I understand it, the following issues in connection with war criminal trials are reviewable through the use of the writ of habeas corpus: (1) whether the military commission was lawfully created and had authority to try and to convict the accused of a war crime; (2) whether the charge against the accused stated a violation of the laws of war; (3) whether the commission, in admitting certain evidence, violated any law or military command defining the commission's authority in that respect; and (4) whether the commission lacked jurisdiction because of a failure to give advance notice to the protecting power as required by treaty or convention.

The Court, in my judgment, demonstrates conclusively that the military

commission was lawfully created in this instance and that petitioner could not object to its power to try him for a recognized war crime. Without pausing here to discuss the third and fourth issues, however, I find it impossible to agree that the charge against the petitioner stated a recognized violation of the laws of war.

It is important, in the first place, to appreciate the background of events preceding this trial. From October 9, 1944, to September 2, 1945, the petitioner was the Commanding General of the 14th Army Group of the Imperial Japanese Army, with headquarters in the Philippines. The reconquest of the Philippines by the armed forces of the United States began approximately at the time when the petitioner assumed this command. Combined with a great and decisive sea battle, an invasion was made on the island of Leyte on October 20, 1944. "In the six days of the great naval action the Japanese position in the Philippines had become extremely critical. Most of the serviceable elements of the Japanese Navy had become committed to the battle with disastrous results. The strike had miscarried, and General MacArthur's land wedge was firmly implanted in the vulnerable flank of the enemy. . . . There were 250,000 Japanese troops scattered over the Philippines but most of them might as well have been on the other side of the world so far as the enemy's ability to shift them to meet the American thrusts was concerned. If General MacArthur succeeded in establishing himself in the Visayas where he could stage, exploit, and spread under cover of overwhelming naval and air superiority, nothing could prevent him from overrunning the Philippines." Biennial Report of the Chief of Staff of the United States Army, July 1, 1943, to June 30, 1945, to the Secretary of War, p. 74.

By the end of 1944 the island of Leyte was largely in American hands. And on January 9, 1945, the island of Luzon was invaded. "Yamashita's inability to cope with General MacArthur's swift moves, his desired reaction to the deception measures, the guerrillas, and General Kenney's aircraft combined to place the Japanese in an impossible situation. The enemy was forced into a piecemeal commitment of his troops." *Ibid*, p. 78. It was at this time and place that most of the alleged atrocities took place. Organized resistance around Manila ceased on February 23. Repeated land and air assaults pulverized the enemy and within a few months there was little left of petitioner's command except a few remnants which had gathered for a last stand among the precipitous mountains.

As the military commission here noted, "The Defense established the difficulties faced by the Accused with respect not only to the swift and overpowering advance of American forces, but also to the errors of his predecessors, weaknesses in organization, equipment, supply with especial reference to food and gasoline, training, communication, discipline and morale of his troops. It was alleged that the sudden assignment of Naval and Air Forces to this tactical command presented almost insurmountable difficulties. This situation was followed, the Defense contended, by failure to obey his orders to withdraw

troops from Manila, and the subsequent massacre of unarmed civilians, particularly by Naval forces. Prior to the Luzon Campaign, Naval forces had reported to a separate ministry in the Japanese Government and Naval Commanders may not have been receptive or experienced in this instance with respect to a joint land operation under a single commander who was designated from the Army Service."

The day of final reckoning for the enemy arrived in August, 1945. On September 3, the petitioner surrendered to the United States Army at Baguio, Luzon. He immediately became a prisoner of war and was interned in prison in conformity with the rules of international law. On September 25, approximately three weeks after surrendering, he was served with the charge in issue in this case. Upon service of the charge he was removed from the status of a prisoner of war and placed in confinement as an accused war criminal. Arraignment followed on October 8 before a military commission specially appointed for the case. Petitioner pleaded not guilty. He was also served on that day with a bill of particulars alleging 64 crimes by troops under his command. A supplemental bill alleging 59 more crimes by his troops was filed on October 29, the same day that the trial began. No continuance was allowed for preparation of a defense as to the supplemental bill. The trial continued uninterrupted until December 5, 1945. On December 7 petitioner was found guilty as charged and was sentenced to be hanged.

The petitioner was accused of having "unlawfully disregarded and failed to discharge his duty as commander to control the operations of the members of his command, permitting them to commit brutal atrocities and other high crimes." The bills of particular further alleged that specific acts of atrocity were committed by "members of the armed forces of Japan under the command of the accused." Nowhere was it alleged that the petitioner personally committed any of the atrocities, or that he ordered their commission, or that he had any knowledge of the commission thereof by members of his command.

The findings of the military commission bear out this absence of any direct personal charge against the petitioner. The commission merely found that atrocities and other high crimes "have been committed by members of the Japanese armed forces under your command . . . that they were not sporadic in nature but in many cases were methodically supervised by Japanese officers and noncommissioned officers . . . that during the period in question you failed to provide effective control of your troops as was required by the circumstances."

In other words, read against the background of military events in the Philippines subsequent to October 9, 1944, these charges amount to this: "We, the victorious American forces, have done everything possible to destroy and disorganize your lines of communication, your effective control of your personnel, your ability to wage war. In those respects we have succeeded. We have defeated and crushed your forces. And now we charge and condemn



you for having been inefficient in maintaining control of your troops during the period when we were so effectively besieging and eliminating your forces and blocking your ability to maintain effective control. Many terrible atrocities were committed by your disorganized troops. Because these atrocities were so widespread we will not bother to charge or prove that you committed, ordered or condoned any of them. We will assume that they must have resulted from your inefficiency and negligence as a commander. In short, we charge you with the crime of inefficiency in controlling your troops. We will judge the discharge of your duties by the disorganization which we ourselves created in large part. Our standards of judgment are whatever we wish to make them."

Nothing in all history or in international law, at least as far as I am aware, justifies such a charge against a fallen commander of a defeated force. To use the very inefficiency and disorganization created by the victorious forces as the primary basis for condemning officers of the defeated armies bears no resemblance to justice or to military reality.

International law makes no attempt to define the duties of a commander of an army under constant and overwhelming assault; nor does it impose liability under such circumstances for failure to meet the ordinary responsibilities of command. The omission is understandable. Duties, as well as ability to control troops, vary according to the nature and intensity of the particular battle. To find an unlawful deviation from duty under battle conditions requires difficult and speculative calculations. Such calculations become highly untrustworthy when they are made by the victor in relation to the actions of a vanquished commander. Objective and realistic norms of conduct are then extremely unlikely to be used in forming a judgment as to deviations from duty. The probability that vengeance will form the major part of the victor's judgment is an unfortunate but inescapable fact. So great is that probability that international law refuses to recognize such a judgment as a basis for a war crime, however fair the judgment may be in a particular instance. It is this consideration that undermines the charge against the petitioner in this case. The indictment permits, indeed compels, the military commission of a victorious nation to sit in judgment upon the military strategy and actions of the defeated enemy and to use its conclusions to determine the criminal liability of an enemy commander. Life and liberty are made to depend upon the biased will of the victor rather than upon objective standards of conduct.

The Court's reliance upon vague and indefinite references in certain of the Hague Conventions and the Geneva Red Cross Convention is misplaced. Thus the statement in Article 1 of the Annex to Hague Convention No. IV of October 18, 1907, 36 Stat. 2277, 2295, to the effect that the laws, rights and duties of war apply to military and volunteer corps only if they are "commanded by a person responsible for his subordinates," has no bearing upon the problem in this case. Even if it has, the clause "responsible for his sub-

ordinates" fails to state to whom the responsibility is owed or to indicate the type of responsibility contemplated. The phrase has received differing interpretations by authorities on international law. In Oppenheim, *International Law* (6th ed., rev. by Lauterpacht, 1940, vol. 2, p. 204, fn. 3) it is stated that "The meaning of the word 'responsible' . . . is not clear. It probably means 'responsible to some higher authority,' whether the person is appointed from above or elected from below; . . ." Another authority has stated that the word "responsible" in this particular context means "presumably to a higher authority," or "possibly it merely means one who controls his subordinates and who therefore can be called to account for their acts." Wheaton, *International Law* (14th ed., by Keith, 1944, p. 172, fn. 30). Still another authority, Westlake, *International Law* (1907, Part II, p. 61), states that "probably the responsibility intended is nothing more than a capacity of exercising effective control." Finally, Edwards and Oppenheim, *Land Warfare* (1912, p. 19, par. 22) state that it is enough "if the commander of the corps is regularly or temporarily commissioned as an officer or is a person of position and authority." It seems apparent beyond dispute that the word "responsible" was not used in this particular Hague Convention to hold the commander of a defeated army to any high standard of efficiency when he is under destructive attack; nor was it used to impute to him any criminal responsibility for war crimes committed by troops under his command under such circumstances.

The provisions of the other conventions referred to by the Court are on their face equally devoid of relevance or significance to the situation here in issue. Neither Article 19 of Hague Convention No. X, 36 Stat. 2371, 2389, nor Article 26 of the Geneva Red Cross Convention of 1929, 47 Stat. 2074, 2092, refers to circumstances where the troops of a commander commit atrocities while under heavily adverse battle conditions. Reference is also made to the requirement of Article 43 of the Annex to Hague Convention No. IV, 36 Stat. 2295, 2306, that the commander of a force occupying enemy territory "shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country." But the petitioner was more than a commander of a force occupying enemy territory. He was the leader of an army under constant and devastating attacks by a superior re-invading force. This provision is silent as to the responsibilities of a commander under such conditions as that.

Even the laws of war heretofore recognized by this nation fail to impute responsibility to a fallen commander for excesses committed by his disorganized troops while under attack. Paragraph 347 of the War Department publication, *Basic Field Manual, Rules of Land Warfare, FM 27-10* (1940), states the principal offenses under the laws of war recognized by the United States. This includes all of the atrocities which the Japanese troops were alleged to have committed in this instance. Originally this paragraph con-

cluded with the statement that "The commanders ordering the commission of such acts, or under whose authority they are committed by their troops, may be punished by the belligerent into whose hands they may fall." The meaning of the phrase "under whose authority they are committed" was not clear. On November 15, 1944, however, this sentence was deleted and a new paragraph was added relating to the personal liability of those who violate the laws of war. Change 1, FM 27-10. The new paragraph 345.1 states that "Individuals and organizations who violate the accepted laws and customs of war may be punished therefor. However, the fact that the acts complained of were done pursuant to order of a superior or government sanction may be taken into consideration in determining culpability, either by way of defense or in mitigation of punishment. The person giving such orders may also be punished." From this the conclusion seems inescapable that the United States recognizes individual criminal responsibility for violations of the laws of war only as to those who commit the offenses or who order or direct their commission. Such was not the allegation here. Cf. Article 67 of the Articles of War, 10 U.S.C. § 1539.

There are numerous instances, especially with reference to the Philippine Insurrection in 1900 and 1901, where commanding officers were found to have violated the laws of war by specifically ordering members of their command to commit atrocities and other war crimes. Francisco Frani, G. O. 143, Dec. 13, 1900, Hq. Div. Phil.; Eugenio Fernandez and Juan Soriano, G. O. 28, Feb. 6, 1901, Hq. Div. Phil.; Ciriaco Jabungal, G. O. 188, Jul. 22, 1901, Hq. Div. Phil.; Natalio Valencia, G. O. 221, Aug. 17, 1901, Hq. Div. Phil.; Aniceta Angeles, G. O. 246, Sept. 2, 1901, Hq. Div. Phil.; Francisco Braganza, G. O. 291, Sept. 26, 1901, Hq. Div. Phil.; Lorenzo Andaya, G. O. 328, Oct. 25, 1901, Hq. Div. Phil. And in other cases officers have been held liable where they knew that a crime was to be committed, had the power to prevent it and failed to exercise that power. Pedro Abad Santos, G. O. 130, June 19, 1901, Hq. Div. Phil. Cf. Pedro A. Cruz, G. O. 264, Sept. 9, 1901, Hq. Div. Phil. In no recorded instance, however, has the mere inability to control troops under fire or attack by superior forces been made the basis of a charge of violating the laws of war.

The Government claims that the principle that commanders in the field are bound to control their troops has been applied so as to impose liability on the United States in international arbitrations. *Case of Jeannaud* (1880), 3 Moore, International Arbitrations (1898) 300; *Case of the Zafiro* (1910), 5 Hackworth, Digest of International Law (1943) 707. The difference between arbitrating property rights and charging an individual with a crime against the laws of war is too obvious to require elaboration. But even more significant is the fact that even these arbitration cases fail to establish any principle of liability where troops are under constant assault and demoralizing influences by attacking forces. The same observation applies to the common law and statutory doctrine, referred to by the Government, that

one who is under a legal duty to take protective or preventive action is guilty of criminal homicide if he willfully or negligently omits to act and death is proximately caused. *State v. Harrison*, 107 N.J.L. 213. *State v. Irvine*, 126 La. 434; Holmes, *The Common Law*, p. 278. No one denies that inaction or negligence may give rise to liability, civil or criminal. But it is quite another thing to say that the inability to control troops under highly competitive and disastrous battle conditions renders one guilty of a war crime in the absence of personal culpability. Had there been some element of knowledge or direct connection with the atrocities the problem would be entirely different. Moreover, it must be remembered that we are not dealing here with an ordinary tort or criminal action; precedents in those fields are of little if any value. Rather we are concerned with a proceeding involving an international crime, the treatment of which may have untold effects upon the future peace of the world. That fact must be kept uppermost in our search for precedent.

The only conclusion I can draw is that the charge made against the petitioner is clearly without precedent in international law or in the annals of recorded military history. This is not to say that enemy commanders may escape punishment for clear and unlawful failures to prevent atrocities. But that punishment should be based upon charges fairly drawn in light of established rules of international law and recognized concepts of justice.

But the charge in this case, as previously noted, was speedily drawn and filed but three weeks after the petitioner surrendered. The trial proceeded with great dispatch without allowing the defense time to prepare an adequate case. Petitioner's rights under the due process clause of the Fifth Amendment were grossly and openly violated without any justification. All of this was done without any thorough investigation and prosecution of those immediately responsible for the atrocities, out of which might have come some proof or indication of personal culpability on petitioner's part. Instead the loose charge was made that great numbers of atrocities had been committed and that petitioner was the commanding officer; hence he must have been guilty of disregard of duty. Under that charge the commission was free to establish whatever standard of duty on petitioner's part that it desired. By this flexible method a victorious nation may convict and execute any or all leaders of a vanquished foe, depending upon the prevailing degree of vengeance and the absence of any objective judicial review.

At a time like this when emotions are understandably high it is difficult to adopt a dispassionate attitude toward a case of this nature. Yet now is precisely the time when that attitude is most essential. While peoples in other lands may not share our beliefs as to due process and the dignity of the individual, we are not free to give effect to our emotions in reckless disregard of the rights of others. We live under the Constitution, which is the embodiment of all the high hopes and aspirations of the new world and which is applicable in both war and peace. We must act accordingly. Indeed, an

uncurbed spirit of revenge and retribution, masked in formal legal procedure for purposes of dealing with a fallen enemy commander, can do more lasting harm than all of the atrocities giving rise to that spirit. The people's faith in the fairness and objectiveness of the law can be seriously undercut by that spirit. The fires of nationalism can be further kindled. And the hearts of all mankind can be embittered and filled with hatred, leaving forlorn and impoverished the noble ideal of malice toward none and charity to all. These are the reasons that lead me to dissent in these terms.

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Mr. Justice RUTLEDGE, dissenting.

Not with ease does one find his views at odds with the Court's in a matter of this character and gravity. Only the most deeply felt convictions could force one to differ. That reason alone leads me to do so now, against strong considerations for withholding dissent.

More is at stake than General Yamashita's fate. There could be no possible sympathy for him if he is guilty of the atrocities for which his death is sought. But there can be and should be justice administered according to law. In this stage of war's aftermath it is too early for Lincoln's great spirit, best lighted in the Second Inaugural, to have wide hold for the treatment of foes. It is not too early, it is never too early, for the nation steadfastly to follow its great constitutional traditions, none older or more universally protective against unbridled power than due process of law in the trial and punishment of men, that is, of all men, whether citizens, aliens, alien enemies or enemy belligerents. It can become too late.

This long-held attachment marks the great divide between our enemies and ourselves. Theirs was a philosophy of universal force. Ours is one of universal law, albeit imperfectly made flesh of our system and so dwelling among us. Every departure weakens the tradition, whether it touches the high or the low, the powerful or the weak, the triumphant or the conquered. If we need not or cannot be magnanimous, we can keep our own law on the plane from which it has not descended hitherto and to which the defeated foes' never rose.

With all deference to the opposing views of my brethren, whose attachment to that tradition needless to say is no less than my own, I cannot believe in the face of this record that the petitioner has had the fair trial our Constitution and laws command. Because I cannot reconcile what has occurred with their measure, I am forced to speak. At bottom my concern is that we shall not forsake in any case, whether Yamashita's or another's, the basic standards of trial which, among other guaranties, the nation fought to keep; that our system of military justice shall not alone among all our forms of judging be above or beyond the fundamental law or the control of Congress within its orbit of authority; and that this Court shall not fail in its part under the Constitution to see that these things do not happen.

This trial is unprecedented in our history. Never before have we tried and convicted an enemy general for action taken during hostilities or otherwise in the course of military operations or duty. Much less have we condemned one for failing to take action. The novelty is not lessened by the trial's having taken place after hostilities ended and the enemy, including the accused, had surrendered. Moreover, so far as the time permitted for our consideration has given opportunity, I have not been able to find precedent for the proceeding in the system of any nation founded in the basic principles of our constitutional democracy, in the laws of war or in other internationally binding authority or usage.

The novelty is legal as well as historical. We are on strange ground. Precedent is not all-controlling in law. There must be room for growth, since every precedent has an origin. But it is the essence of our tradition for judges, when they stand at the end of the marked way, to go forward with caution keeping sight, so far as they are able, upon the great landmarks left behind and the direction they point ahead. If, as may be hoped, we are now to enter upon a new era of law in the world, it becomes more important than ever before for the nations creating that system to observe their greatest traditions of administering justice, including this one, both in their own judging and in their new creation. The proceedings in this case veer so far from some of our time-tested road signs that I cannot take the large strides validating them would demand.

# I

It is not in our tradition for anyone to be charged with crime which is defined after his conduct, alleged to be criminal, has taken place;<sup>1</sup> or in language not sufficient to inform him of the nature of the offense or to enable him to make defense.<sup>2</sup> Mass guilt we do not impute to individuals, perhaps in any case but certainly in none where the person is not charged or shown actively to have participated in or knowingly to have failed in taking action to prevent the wrongs done by others, having both the duty and the power to do so.

It is outside our basic scheme to condemn men without giving reasonable opportunity for preparing defense;<sup>3</sup> in capital or other serious crimes to convict on "official documents . . . ; affidavits; . . . documents or translations thereof; diaries . . . , photographs, motion picture films, and . . . newspapers"<sup>4</sup> or on hearsay, once, twice or thrice removed,<sup>5</sup> more particularly

<sup>1</sup> *Cummings v. Missouri*, 4 Wall. 277; *Kring v. Missouri*, 107 U. S. 221.

<sup>2</sup> *Armour Packing Co. v. United States*, 209 U. S. 56, 83-84; *United States v. Cohen Grocery Co.*, 255 U. S. 81; cf. *Screws v. United States*, 325 U. S. 91. See note 17 and text.

<sup>3</sup> *Hawk v. Olson*, No. 17, October Term, 1945, decided November 13, 1945; *Snyder v. Massachusetts*, 291 U. S. 97 105: "What may not be taken away is notice of the charge and an adequate opportunity to be heard in defense of it." See Part III.

<sup>4</sup> The commission's findings state: "We have received for analysis and evaluation 423 exhibits consisting of official documents of the United States Army, the United States Depart-

when the documentary evidence or some of it is prepared *ex parte* by the prosecuting authority and includes not only opinion but conclusions of guilt. Nor in such cases do we deny the rights of confrontation of witnesses and cross-examination.<sup>6</sup>

Our tradition does not allow conviction by tribunals both authorized and bound<sup>7</sup> by the instrument of their creation to receive and consider evidence which is expressly excluded by Act of Congress or by treaty obligation; nor is it in accord with our basic concepts to make the tribunal, specially constituted for the particular trial, regardless of those prohibitions the sole and exclusive judge of the credibility, probative value and admissibility of whatever may be tendered as evidence.

The matter is not one merely of the character and admissibility of evidence. It goes to the very competency of the tribunal to try and punish consistently with the Constitution; the laws of the United States made in pursuance thereof, and treaties made under the nation's authority.

All these deviations from the fundamental law, and others, occurred in the course of constituting the commission, the preparation for trial and defense, the trial itself, and therefore, in effect, in the sentence imposed. Whether taken singly in some instances as departures from specific constitutional mandates or in totality as in violation of the Fifth Amendment's command that no person shall be deprived of life, liberty or property without due process of law, a trial so vitiated cannot withstand constitutional scrutiny.

One basic protection of our system and one only, petitioner has had. He has been represented by able counsel, officers of the army he fought. Their difficult assignment has been done with extraordinary fidelity, not only to the accused, but to their high conception of military justice, always to be administered in subordination to the Constitution and consistent Acts of Congress and treaties. But, as will appear, even this conceded shield was taken away in much of its value, by denial of reasonable opportunity for them to perform their function.

On this denial and the commission's invalid constitution specifically, but also more generally upon the totality of departures from constitutional norms inherent in the idea of a fair trial, I rest my judgment that the commission was without jurisdiction from the beginning to try or punish the petitioner and that, if it had acquired jurisdiction then, its power to proceed was lost in the course of what was done before and during trial

ment, and the Commonwealth of the Philippines; affidavits; captured enemy documents or translations thereof; diaries taken from Japanese personnel, photographs, motion picture films, and Manila newspapers." See notes 19 and 20.

Concerning the specific nature of these elements in the proof, the issues to which they were directed, and their prejudicial effects, see text *infra* and notes in Part II.

<sup>6</sup> *Queen v. Hepburn*, 7 Cranch. 289; *Donnelly v. United States*, 228 U. S. 243, 273. See Part II; note 21.

<sup>7</sup> *Motes v. United States*, 178 U. S. 471; *Paoni v. United States*, 281 Fed. 801. See Parts II and III.

<sup>8</sup> See Part II at notes 10, 19; Part III.

Only on one view, in my opinion, could either of these conclusions be avoided. This would be that an enemy belligerent in petitioner's position is altogether beyond the pale of constitutional protection, regardless of the fact that hostilities had ended and he had surrendered with his country. The Government has so argued, urging that we are still at war with Japan and all the power of the military effective during active hostilities in theatres of combat continues in full force unaffected by the events of August 14, 1945, and after.

In this view the action taken here is one of military necessity, exclusively within the authority of the President as Commander-in-Chief and his military subordinates to take in warding off military danger and subject to no judicial restraint on any account, although somewhat inconsistently it is said this Court may "examine" the proceedings generally.

As I understand the Court, this is in substance the effect of what has been done. For I cannot conceive any instance of departure from our basic concepts of fair trial, if the failures here are not sufficient to produce that effect.

We are technically still at war, because peace has not been negotiated finally or declared. But there is no longer the danger which always exists before surrender and armistice. Military necessity does not demand the same measures. The nation may be more secure now than at any time after peace is officially concluded. In these facts is one great difference from *Ex parte Quirin*, 317 U. S. 1. Punitive action taken now can be effective only for the next war, for purposes of military security. And enemy aliens, including belligerents, need the attenuated protections our system extends to them more now than before hostilities ceased or than they may after a treaty of peace is signed. Ample power there is to punish them or others for crimes, whether under the laws of war during its course or later during occupation. There can be no question of that. The only question is how it shall be done, consistently with universal constitutional commands or outside their restricting effects. In this sense I think the Constitution follows the flag.

The other thing to be mentioned in order to be put aside is that we have no question here of what the military might have done in a field of combat. There the maxim about the law becoming silent in the noise of arms applies. The purpose of battle is to kill. But it does not follow that this would justify killing by trial after capture or surrender, without compliance with laws or treaties made to apply in such cases, whether trial is before or after hostilities end.

I turn now to discuss some of the details of what has taken place. My basic difference is with the Court's view that provisions of the Articles of War and of treaties are not made applicable to this proceeding and with its ruling that, absent such applicable provisions, none of the things done so vitiated the trial and sentence as to deprive the commission of jurisdiction.

My brother MURPHY has discussed the charge with respect to the substance of the crime. With his conclusions in this respect I agree. My



own primary concern will be with the constitution of the commission and other matters taking place in the course of the proceedings, relating chiefly to the denial of reasonable opportunity to prepare petitioner's defense and the sufficiency of the evidence, together with serious questions of admissibility, to prove an offense, all going as I think to the commission's jurisdiction.

Necessarily only a short sketch can be given concerning each matter. And it may be stated at the start that, although it was ruled in *Ex parte Quirin, supra*, that this Court had no function to review the evidence, it was not there or elsewhere determined that it could not ascertain whether conviction is founded upon evidence expressly excluded by Congress or treaty; nor does the Court purport to do so now.

## II

### *Invalidity of the Commission's Constitution*

The fountainhead of the commission's authority was General MacArthur's directive by which General Styer was ordered to and pursuant to which he did proceed with constituting the commission.<sup>8</sup> The directive was accompanied by elaborate and detailed rules and regulations prescribing the procedure and rules of evidence to be followed, of which for present purposes Section 16, set forth below,<sup>9</sup> is crucial.

Section 16, as will be noted, permits reception of documents, reports, affi-

<sup>8</sup> The line of authorization within the military hierarchy extended from the President, through the Joint Chiefs of Staff and General MacArthur, to General Styer, whose order of September 25th and others were made pursuant to and in conformity with General MacArthur's directive. The charge was prepared by the Judge Advocate General's Department of the Army. There is no dispute concerning these facts or that the directive was binding on General Styer and the commission, though it is argued his own authority as area commanding general was independently sufficient to sustain what was done.

<sup>9</sup> "16. Evidence.—a. The commission shall admit such evidence as in its opinion would be of assistance in proving or disproving the charge, or such as in the commission's opinion would have probative value in the mind of a reasonable man. In particular, and without limiting in any way the scope of the foregoing general rules, the following evidence may be admitted:

(1) Any document which appears to the commission to have been signed or issued officially by any officer, department, agency, or member of the armed forces of any government, without proof of the signature or of the issuance of the document.

(2) Any report which appears to the commission to have been signed or issued by the International Red Cross or a member thereof, or by a medical doctor or any medical service personnel, or by an investigator or intelligence officer, or by any other person whom the commission finds to have been acting in the course of his duty when making the report.

(3) Affidavits, depositions, or other statements taken by an officer detailed for that purpose by military authority.

(4) Any diary, letter or other document appearing to the commission to contain information relating to the charge.

(5) A copy of any document or other secondary evidence of its contents, if the commission believes that the original is not available or cannot be produced without undue delay. . . ."

deposits, depositions, diaries, letters, copies of documents or other secondary evidence of their contents, hearsay, opinion evidence and conclusions; in fact of anything which in the commission's opinion "would be of assistance in proving or disproving the charge," without any of the usual modes of authentication.

A more complete abrogation of customary safeguards relating to the proof, whether in the usual rules of evidence or any reasonable substitute and whether for use in the trial of crime in the civil courts or military tribunals, hardly could have been made. So far as the admissibility and probative value of evidence was concerned, the directive made the commission a law unto itself.

It acted accordingly. As against insistent and persistent objection to the reception of all kinds of "evidence," oral, documentary and photographic, for nearly every kind of defect under any of the usual prevailing standards for admissibility and probative value, the commission not only consistently ruled against the defense, but repeatedly stated it was bound by the directive to receive the kinds of evidence it specified,<sup>10</sup> reprimanded counsel for continuing to make objection, declined to hear further objections, and in more than one instance during the course of the proceedings reversed its rulings favorable to the defense, where initially it had declined to receive what the prosecution offered. Every conceivable kind of statement, rumor, report, at first, second, third, or further hand, written, printed or oral, and one "propaganda" film were allowed to come in, most of this relating to atrocities committed by troops under petitioner's command throughout the several thousand islands of the Philippine Archipelago during the period of active hostilities covered by the American forces' return to and recapture of the Philippines.<sup>11</sup>

The findings reflect the character of the proof and the charge. The statement quoted above<sup>12</sup> gives only a numerical idea of the instances in which ordinary safeguards in reception of written evidence were ignored. In addition to these 423 "exhibits," the findings state the commission "has heard 286 persons during the course of this trial, most of whom have given eye-witness accounts of what they endured or what they saw."

But there is not a suggestion in the findings that petitioner personally participated in, was present at the occurrence of, or ordered any of these incidents, with the exception of the wholly inferential suggestion noted below. Nor is there any express finding that he knew of any one of the incidents in particular or of all taken together. The only inferential findings that he had

<sup>10</sup> In one instance the president of the commission said: "The rules and regulations which guide this Commission are binding upon the Commission and agencies provided to assist the Commission. . . . We have been authorized to receive and weigh such evidence as we can consider to have probative value, and further comments by the Defense on the right which we have to accept this evidence is decidedly out of order." But see note 19.

<sup>11</sup> Cf. text *infra* at note 19 concerning the prejudicial character of the evidence.

<sup>12</sup> Note 4.

knowledge, or that the commission so found, are in the statement that "the crimes *alleged to have been permitted* by the accused in violation of the laws of war may be grouped into three categories" set out below,<sup>13</sup> in the further statement that "the prosecution presented evidence to show that the crimes were so extensive and so widespread, both as to time and area,<sup>14</sup> that *they must* either have been *wilfully permitted* by the accused, *or secretly ordered* by" him; and in the conclusion of guilt and the sentence.<sup>15</sup> (Emphasis added.) Indeed the commission's ultimate findings<sup>16</sup> draw no express conclusion of knowledge, but state only two things: (1) the fact of widespread atrocities and crimes; (2) that petitioner "failed to provide effective control . . . as required by the circumstances."

This vagueness, if not vacuity, in the findings runs throughout the proceedings, from the charge itself through the proof and the findings, to the conclusion. It affects the very gist of the offense, whether that was wilful, informed and intentional omission to restrain and control troops *known* by petitioner to be committing crimes or was only a negligent failure on his part *to discover* this and take whatever measures he then could to stop the conduct.

<sup>13</sup> Namely, "(1) Starvation, execution or massacre without trial and maladministration generally of civilian internees and prisoners of war; (2) Torture, rape, murder and mass execution of very large numbers of residents of the Philippines including women and children and members of religious orders, by starvation, beheading, bayoneting, clubbing, hanging, burning alive, and destruction by explosives; (3) Burning and demolition without adequate military necessity of large numbers of homes, places of business, places of religious worship, hospitals, public buildings, and educational institutions. In point of time, the offenses extended throughout the period the Accused was in command of Japanese troops in the Philippines. In point of area, the crimes extended through the Philippine Archipelago, although by far the most of the incredible acts occurred on Luzon."

<sup>14</sup> Cf. note 13.

<sup>15</sup> In addition the findings set forth that captured orders of subordinate officers gave proof that "they, at least," ordered acts "leading directly to" atrocities; that "the proof offered to the Commission *alleged criminal neglect* . . . as well as complete failure *by the higher echelons* of command *to detect* and prevent cruel and inhuman treatment accorded by local commanders and guards"; and that, although "the defense had established the difficulties faced by the Accused" with special reference among other things to the discipline and morale of his troops under the "swift and overpowering advance of American forces," and notwithstanding he had stoutly maintained his complete ignorance of the crimes, still he was an officer of long experience; his assignment was one of broad responsibility; it was his duty "*to discover* and control" crimes by his troops, if widespread, and therefore

"The Commission concludes: (1) That a series of atrocities and other high crimes have been committed by members of the Japanese armed forces under your command against the people of the United States, their allies and dependencies throughout the Philippine Islands; that they were not sporadic in nature but in many cases were methodically supervised by Japanese officers and noncommissioned officers; (2) that during the period in question you failed to provide effective control of your troops as was required by the circumstances.

"Accordingly upon secret written ballot, two-thirds or more of the members concurring, the Commission finds you guilty as charged and sentences you to death by hanging." (Emphasis added.)

<sup>16</sup> See note 15.

Although it is impossible to determine from what is before us whether petitioner in fact has been convicted of one or the other or of both these things,<sup>17</sup> the case has been presented on the former basis and, unless as is noted below there is fatal duplicity, it must be taken that the crime charged and sought to be proved was only the failure, with knowledge, to perform the commander's function of control, although the Court's opinion nowhere expressly declares that knowledge was essential to guilt or necessary to set forth in the charge.

It is in respect to this feature especially, quite apart from the reception of unverified rumor, report, etc., that perhaps the greatest prejudice arose from the admission of untrustworthy, unverified, unauthenticated evidence which could not be probed by cross-examination or other means of testing credibility, probative value or authenticity.

Counsel for the defense have informed us in the brief and at the argument that the sole proof of knowledge introduced at the trial was in the form of ex parte affidavits and depositions. Apart from what has been excerpted from the record in the applications and the briefs, and such portions of the record as I have been able to examine, it has been impossible for me fully to verify counsel's statement in this respect. But the Government has not disputed it; and it has maintained that we have no right to examine the record upon any question "of evidence." Accordingly, without concession to that view, the statement of counsel is taken for the fact. And in that state of things petitioner has been convicted of a crime in which knowledge is an essential

<sup>17</sup> The charge, set forth at the end of this note, is consistent with either theory—or both—and thus ambiguous, as were the findings. See note 15. The only word implying knowledge was "permitting." If "wilfully" is essential to constitute a crime or charge of one, otherwise subject to the objection of "vagueness," cf. *Screws v. United States*, 325 U. S. 91, it would seem that "permitting" alone would hardly be sufficient to charge "wilful and intentional" action or omission; and, if taken to be sufficient to charge knowledge, it would follow necessarily that the charge itself was not drawn to state and was insufficient to support a finding of mere failure to detect or discover the criminal conduct of others.

At the most "permitting" could charge knowledge only by inference or implication. And reasonably the word could be taken in the context of the charge to mean "allowing" or "not preventing," a meaning consistent with absence of knowledge and mere failure to discover. In capital cases such ambiguity is wholly out of place. The proof was equally ambiguous in the same respect, so far as we have been informed, and so, to repeat, were the findings. The use of "wilfully," even qualified by a "must have," one time only in the findings hardly can supply the absence of that or an equivalent word or language in the charge or in the proof to support that essential element in the crime.

The charge was as follows: "Tomoyuki Yamashita, General Imperial Japanese Army, between 9 October 1944 and 2 September 1945, at Manila and at other places in the Philippine Islands, while commander of armed forces of Japan at war with the United States of America and its allies, unlawfully disregarded and failed to discharge his duty as commander to control the operations of the members of his command, permitting them to commit brutal atrocities and other high crimes against people of the United States and of its allies and dependencies, particularly the Philippines; and he, General Tomoyuki Yamashita, thereby violated the laws of war."

element, with no proof of knowledge other than what would be inadmissible in any other capital case or proceeding under our system, civil or military, and which furthermore Congress has expressly commanded shall not be received in such cases tried by military commissions and other military tribunals.<sup>18</sup>

Moreover counsel assert in the brief, and this also is not denied, that the sole proof made of certain of the specifications in the bills of particulars was by ex parte affidavits. It was in relation to this also vital phase of the proof that there occurred one of the commission's reversals of its earlier rulings in favor of the defense,<sup>19</sup> a fact in itself conclusive demonstration of the necessity to the prosecution's case of the prohibited type of evidence and of its prejudicial effects upon the defense.

These two basic elements in the proof, namely, proof of knowledge of the crimes and proof of the specifications in the bills, that is, of the atrocities themselves, constitute the most important instances perhaps, if not the most flagrant,<sup>20</sup> of departure not only from the express command of Congress against receiving such proof but from the whole British-American tradition of the common law and the Constitution. Many others occurred, which there is neither time nor space to mention.<sup>21</sup>

<sup>18</sup> Cf. text *infra* Part IV.

<sup>19</sup> On November 1, early in the trial, the president of the commission stated: "I think the Prosecution should consider the desirability of striking certain items. The Commission feels that there must be witnesses introduced on each of the specifications or times. *It has no objection to considering affidavits, but it is unwilling to form an opinion of a particular item based solely on an affidavit.* Therefore, until evidence is introduced, these particular exhibits are rejected." (Emphasis added.)

Later evidence of the excluded type was offered, to introduction of which the defense objected on various grounds including the prior ruling. At the prosecution's urging the commission withdrew to deliberate. Later it announced that "after further consideration, the Commission reverses that ruling [of November 1] and affirms its prerogative of receiving and considering affidavits or depositions, if it chooses to do so, for whatever probative value the Commission believes they may have, without regard to the presentation of some partially corroborative oral testimony." It then added: "The Commission *directs* the prosecution again to introduce the affidavits or depositions then in question, and other documents of similar nature which the prosecution stated has been prepared for introduction." (Emphasis added.)

Thereafter this type of evidence was consistently received and again, by the undisputed statement of counsel, as the sole proof of many of the specifications of the bills, a procedure which they characterize correctly in my view as having "in effect, stripped the proceeding of all semblance of a trial and converted it into an ex parte investigation."

<sup>20</sup> This perhaps consisted in the showing of the so-called "propaganda" film, "Orders from Tokyo," portraying scenes of battle destruction in Manila, which counsel say "was not in itself seriously objectionable." Highly objectionable, inflammatory and prejudicial, however, was the accompanying scound track with comment that the film was "evidence which will convict," mentioning petitioner specifically by name.

<sup>21</sup> Innumerable instances of hearsay, once or several times removed, relating to all manner of incidents, rumors, reports, etc., were among these. Many instances, too, are shown of the use of opinion evidence and conclusions of guilt, including reports made after ex parte investigations by the War Crimes Branch of the Judge Advocate General's Department, which

Petitioner asserts, and there can be no reason to doubt, that by the use of all this forbidden evidence he was deprived of the right of cross-examination and other means to establish the credibility of the deponents or affiants, not to speak of the authors of reports, letters, documents and newspaper articles; of opportunity to determine whether the multitudinous crimes specified in the bills were committed in fact by troops under his command or by naval or air force troops not under his command at the time alleged; to ascertain whether the crimes attested were isolated acts of individual soldiers or were military acts committed by troop units acting under supervision of officers; and, finally, whether "in short, there was such a 'pattern' of conduct as the prosecution alleged and its whole theory of the crime and the evidence required to be made out."

He points out in this connection that the commission based its decision on a finding as to the extent and number of the atrocities and that this of itself establishes the prejudicial effect of the affidavits, etc., and of the denial resulting from their reception of any means of probing the evidence they contained, including all opportunity for cross-examination. Yet it is said there is no sufficient showing of prejudice. The effect could not have been other than highly prejudicial. The matter is not one merely of "rules of evidence." It goes, as will appear more fully later, to the basic right of defense, including some fair opportunity to test probative value.

Insufficient as this recital is to give a fair impression of what was done, it is enough to show that this was no trial in the traditions of the common law and the Constitution. If the tribunal itself was not strange to them otherwise, it was in its forms and modes of procedure, in the character and substance of the evidence it received, in the denial of all means to the accused and his counsel for testing the evidence, in the brevity and ambiguity of its findings made upon such a mass of material and, as will appear, in the denial of any reasonable opportunity for preparation of the defense. Because this last deprivation not only is important in itself, but is closely related to the departures from all limitations upon the character of and modes of making the proof, it will be considered before turning to the important legal questions relating to whether all these violations of our traditions can be brushed aside as not forbidden by the valid Acts of Congress, treaties and the Constitution, in that order. If all these traditions can be so put away, then indeed will we have entered upon a new but foreboding era of law.

### III

#### *Denial of Opportunity to Prepare Defense*

Petitioner surrendered September 3, 1945, and was interned as a prisoner of war in conformity with Article 9 of the Geneva Convention of July 27,

it was and is urged had the effect of "putting the prosecution on the witness stand" and of usurping the commission's function as judge of the law and the facts. It is said also that some of the reports were received as the sole proof of some of the specifications.

1929.<sup>22</sup> He was served with the charge on September 25 and put in confinement as an accused war criminal. On October 8 he was arraigned and pleaded not guilty. On October 29 the trial began and it continued until December 7, when sentence was pronounced, exactly four years almost to the hour from the attack on Pearl Harbor.

On the day of arraignment, October 8, three weeks before the trial began, petitioner was served with a bill of particulars specifying 64 items setting forth a vast number of atrocities and crimes allegedly committed by troops under his command.<sup>23</sup> The six officers appointed as defense counsel thus had three weeks, it is true at the prosecution's suggestion a week longer than they sought at first, to investigate and prepare to meet all these items and the large number of incidents they embodied, many of which had occurred in distant islands of the archipelago. There is some question whether they then anticipated the full scope and character of the charge or the evidence they would have to meet. But, as will appear, they worked night and day at the task. Even so it would have been impossible to do thoroughly, had nothing more occurred.

But there was more. On the first day of the trial, October 29, the prosecution filed a supplemental bill of particulars, containing 59 more specifications of the same general character, involving perhaps as many incidents occurring over an equally wide area.<sup>24</sup> A copy had been given the defense three days earlier. One item, No. 89, charged that American soldiers, prisoners of war, had been tried and executed without notice having been given to the protecting power of the United States in accordance with the requirements of the Geneva Convention, which it is now argued, strangely, the United States was not required to observe as to petitioner's trial.<sup>25</sup>

But what is more important is that defense counsel, as they felt was their duty, at once moved for a continuance.<sup>26</sup> The application was denied.

<sup>22</sup> Also with Paragraph 82 of the Rules of Land Warfare.

<sup>23</sup> Typical of the items are allegations that members of the armed forces of Japan under the command of the accused committed the acts "During the months of October, November and December 1944 [of] brutally mistreating and torturing numerous unarmed noncombatant civilians at the Japanese Military Police Headquarters located at Cortabitarte and Mabini Streets, Manila" and "On or about 19 February 1945, in the Town of Cuenca, Batangas Province, brutally mistreating, massacring, and killing Jose M. Laguio, Esteban Magsamdol, Jose Lanbo, Felisa Apuntar, Elfidio Lunar, Victoriana Ramo, and 978 other persons, all unarmed noncombatant civilians, pillaging and unnecessarily, deliberately and wantonly devastating, burning and destroying large areas of that town."

<sup>24</sup> The supplemental bill contains allegations similar to those set out in the original bill. See note 23. For example, it charge that members of the armed forces of Japan under the command of the accused "during the period from 9 October 1944 to about 1 February 1945, at Cavite City, Imus and elsewhere in Cavite Province," were permitted to commit the acts of "brutally mistreating, torturing, and killing or attempting to kill, without cause or trial, unarmed noncombatant civilians."

<sup>25</sup> See note 39 and text, Part V.

<sup>26</sup> In support of the motion counsel indicated surprise by saying that, though it was as-

However the commission indicated that if, at the end of the prosecution's presentation concerning the original bill, counsel should "believe they require additional time . . . the Commission will consider such a motion at that time," before taking up the items of the supplemental bill. Counsel again indicated, without other result, that time was desired at once "as much, if not more" to prepare for cross-examination "as the Prosecutor's case goes in" as to prepare affirmative defense.

On the next day, October 30, the commission interrupted the prosecutor to say it would not then listen to testimony or discussion upon the supplemental bill. After colloquy it adhered to its prior ruling and, in response to inquiry from the prosecution, the defense indicated it would require two weeks before it could proceed on the supplemental bill. On November 1 the commission ruled it would not receive affidavits without corroboration by witnesses on any specification, a ruling reversed four days later.

On November 2, after the commission had received an affirmative answer to its inquiry whether the defense was prepared to proceed with an item in the supplemental bill which the prosecution proposed to prove, it announced: "Hereafter, then, unless there is no [sic] objection by the Defense, the Commission will assume that you are prepared to proceed with any items in the Supplemental Bill." On November 8, the question arose again upon the prosecution's inquiry as to when the defense would be ready to proceed on the supplemental bill, the prosecutor adding: "Frankly, sir, it took the War Crimes Commission some three months to investigate these matters and I cannot conceive of the Defense undertaking a similar investigation with any less period of time." Stating it realized "the tremendous burden which we have placed on the Defense" and its "determination to give them the time they require," the commission again adhered to its ruling of October 29.

Four days later the commission announced it would grant a continuance "only for the most urgent and unavoidable reasons."<sup>27</sup>

sumed two or three new specifications might be added, there had been no expectation of 59 "about entirely new persons and lines." The statement continued:

"We have worked earnestly seven days a week in order to prepare the defense on 64 specifications. And when I say 'prepare the defense,' sir, I do not mean merely an affirmative defense, but to acquaint ourselves with the facts so that we could properly cross-examine the Prosecution's witnesses.

" . . . 'In advance of trial' means: Sufficient time to allow the Defense a chance to prepare its defense.

"We earnestly state that we must have this time in order adequately to prepare the defense. I might add, sir, we think this is important to the Accused, but far more important than any rights of this Accused, we believe, is the proposition that this Commission should not deviate from a fundamental American concept of fairness. . . ."

<sup>27</sup> The commission went on to question the need for all of the six officers representing the defense to be present during presentation of all the case, suggested one or two would be adequate and others "should be out of the courtroom" engaged in other matters and strongly suggested bringing in additional counsel in the midst of the trial, all to the end that "need to request continuance may not arise."



On November 20, when the prosecution rested, senior defense counsel moved for a reasonable continuance, recalling the commission's indication that it would then consider such a motion and stating that since October 29 the defense had been "working night and day," with "no time whatsoever to prepare any affirmative defense," since counsel had been fully occupied trying "to keep up with the new Bill of Particulars."

The commission thereupon retired for deliberation and, on resuming its sessions shortly, denied the motion. Counsel then asked for "a short recess of a day." The commission suggested a recess until 1:30 in the afternoon. Counsel responded this would not suffice. The commission stated it felt "that the Defense should be prepared at least on its opening statement," to which senior counsel answered: "We haven't had time to do that, sir." The commission then recessed until 8:30 the following morning.

Further comment is hardly required. Obviously the burden placed upon the defense, in the short time allowed for preparation on the original bill, was not only "tremendous." In view of all the facts, it was an impossible one, even though the time allowed was a week longer than asked. But the grosser vice was later when the burden was more than doubled by service of the supplemental bill on the eve of trial, a procedure which taken in connection with the consistent denials of continuance and the commission's later reversal of its rulings favorable to the defense was wholly arbitrary, cutting off the last vestige of adequate chance to prepare defense and imposing a burden the most able counsel could not bear. This sort of thing has no place in our system of justice, civil or military. Without more, this wide departure from the most elementary principles of fairness vitiated the proceeding. When added to the other denials of fundamental right sketched above, it deprived the proceeding of any semblance of trial as we know that institution.

#### IV

##### *Applicability of the Articles of War*

The Court's opinion puts the proceeding and the petitioner, in so far as any rights relating to his trial and conviction are concerned, wholly outside the Articles of War. In view of what has taken place, I think the decision's necessary effect is also to place them entirely beyond limitation and protection, respectively, by the Constitution. I disagree as to both conclusions or effects.

The Court rules that Congress has not made Articles 25 and 38 applicable to this proceeding. I think it has made them applicable to this and all other military commissions or tribunals. If so the commission not only lost all power to punish petitioner by what occurred in the proceedings. It never acquired jurisdiction to try him. For the directive by which it was con-

stituted, in the provisions of Section 16,<sup>28</sup> was squarely in conflict with Articles 25 and 38 of the Articles of War<sup>29</sup> and therefore was void.

Article 25 allows reading of depositions in evidence, under prescribed conditions, in the plainest terms "before *any* military court or commission in *any* case not capital," providing, however, that "testimony by deposition may be adduced *for the defense in capital cases.*" (Emphasis added.) This language clearly and broadly covers every kind of military tribunal, whether "court" or "commission." It covers all capital cases. It makes no exception or distinction for *any* accused.

Article 38 authorizes the President by regulations to prescribe procedure, including modes of proof, even more all-inclusively if possible, "in cases before courts-martial, courts of inquiry, military commissions, and other military tribunals." Language could not be more broadly inclusive. No exceptions are mentioned or suggested, whether of tribunals or of accused persons. Every kind of military body for performing the function of trial is covered. That is clear from the face of the Article.

Article 38 moreover limits the President's power. He is so far as practicable to prescribe "the rules of evidence generally recognized in the trial of criminal cases in the district courts of the United States," a clear mandate that Congress intended all military trials to conform as closely as possible to our customary procedural and evidentiary protections, constitutional and statutory, for accused persons. But there are also two unqualified limitations, one "that nothing contrary to or inconsistent with *these* articles [specifically here Article 25] shall be so prescribed"; the other "that all rules made in pursuance of this article shall be laid before the Congress annually."

Notwithstanding these broad terms the Court, resting chiefly on Article 2, concludes the petitioner was not among the persons there declared to be

<sup>28</sup> See note 9.

<sup>29</sup> Article 25 is as follows: "A duly authenticated deposition taken upon reasonable notice to the opposite party may be read in evidence before *any* military court or commission in *any* case not capital, or in any proceeding before a court of inquiry or a military board, if such deposition be taken when the witness resides, is found, or is about to go beyond the State, Territory, or district in which the court, commission, or board is ordered to sit, or beyond the distance of one hundred miles from the place of trial or hearing or when it appears to the satisfaction of the court, commission, board, or appointing authority that the witness, by reason of age, sickness, bodily infirmity, imprisonment or other reasonable cause, is unable to appear and testify in person at the place of trial or hearing: *Provided, That testimony by deposition may be adduced for the defense in capital cases.*" (Emphasis added.) 10 U.S.C. § 1496.

Article 38 reads: "The President may, by regulations which he may modify from time to time, prescribe the procedure, *including modes of proof*, in cases before courts-martial, courts of inquiry, military commissions, and other military tribunals, which regulations shall insofar as he shall deem practicable, apply the rules of evidence generally recognized in the trial of criminal cases in the district courts of the United States. *Provided, That nothing contrary to or inconsistent with these articles shall be so prescribed: Provided further, That all rules made in pursuance of this article shall be laid before the Congress annually.*" (Emphasis added.) 10 U.S.C. § 1509.

subject to the Articles of War and therefore the commission which tries him is not subject to them. That Article does not cover prisoners of war or war criminals. Neither does it cover civilians in occupied territories, theatres of military operations or other places under military jurisdiction within or without the United States or territory subject to its sovereignty, whether they be neutrals or enemy aliens, even citizens of the United States, unless they are connected in the manner Article 2 prescribes with our armed forces, exclusive of the Navy.

The logic which excludes petitioner on the basis that prisoners of war are not mentioned in Article 2 would exclude all these. I strongly doubt the Court would go so far, if presented with a trial like this in such instances. Nor does it follow necessarily that, because some persons may not be mentioned in Article 2, they can be tried without regard to any of the limitations placed by any of the other Articles upon military tribunals.

Article 2 in defining persons "subject to the articles of war" was, I think, specifying those to whom the Articles in general were applicable. And there is no dispute that most of the Articles are not applicable to the petitioner. It does not follow, however, and Article 2 does not provide, that there may not be in the Articles specific provisions covering persons other than those specified in Article 2. Had it so provided, Article 2 would have been contradictory not only of Articles 25 and 38 but also of Article 15 among others.

In 1916, when the last general revision of the Articles of War took place,<sup>30</sup> for the first time certain of the Articles were specifically made applicable to military commissions. Until then they had applied only to courts-martial. There were two purposes, the first to give statutory recognition to the military commission without loss of prior jurisdiction and the second to give those tried before military commissions some of the more important protections afforded persons tried by courts-martial.

In order to effectuate the first purpose, the Army proposed Article 15.<sup>31</sup>

<sup>30</sup> Another revision of the Articles of War took place in 1920. At this time Article 15 was slightly amended.

In 1916 Article 15 was enacted to read: "The provisions of these articles conferring jurisdiction upon courts-martial shall not be construed as depriving military commissions, provost courts, or other military tribunals of *concurrent jurisdiction* in respect of offenders or offenses that by the law of war may be lawfully triable by such military commissions, provost courts, or other military tribunals." (Emphasis added.)

The 1920 amendment put in the words "by statute or" before the words "by the law of war" and omitted the word "lawfully."

<sup>31</sup> Speaking at the Hearings before the Committee on Military Affairs, House of Representatives, 62nd Cong., 2d Sess., printed as an Appendix to S. Rep. 229, 63rd Cong., 2d Sess., General Crowder said:

"The next article, No. 15, is entirely new, and the reasons for its insertion in the code are these: In our War with Mexico two war courts were brought into existence by orders of Gen. Scott, viz. the military commission and the council of war. By the military commission Gen. Scott tried cases cognizable in time of peace by civil courts, and by the council of war he tried offenses against the laws of war. *The council of war did not survive the Mexican War period, and in our subsequent wars its jurisdiction has been taken*

over by the military commission, which during the Civil War period tried more than 2,000 cases. While the military commission has not been formally authorized by statute, its jurisdiction as a war court has been upheld by the Supreme Court of the United States. It is an institution of the greatest importance in a period of war and should be preserved. In the new code the jurisdiction of courts-martial has been somewhat amplified by the introduction of the phrase *Persons subject to military law*. There will be more instances in the future than in the past when the jurisdiction of courts-martial will overlap that of the war courts, and the question would arise whether Congress having vested jurisdiction on by statute the common law of war jurisdiction was not ousted. I wish to make it perfectly plain by the new article that in such cases the jurisdiction of the war court is concurrent." S. Rep. No. 228, 63rd Cong., 2d Sess., p. 53. (Emphasis added.)

And later, in 1916 speaking before the Subcommittee on Military Affairs of the Senate at their Hearings on S. 3191, a project for the revision of the Articles of War, 64th Cong., 1st Sess., printed as an Appendix to S. Rep. 230, 64th Cong. 1st Sess., General Crowder explained at greater length:

"Article 15 is new. We have included in article 2 as subject to military law a number of persons who are also subject to trial by military commissions. A military commission is our common-law war court. It has no statutory existence, though it is recognized by statute law. As long as the articles embraced them in the designation 'persons subject to military law' and provided that they might be tried by court-martial, I was afraid that, having made a special provision for their court-martial, it might be held that the provision operated to exclude trials by military commission and the war courts; so this new article was introduced. . . ."

"It just saves to these war courts the jurisdiction they now have and makes it a concurrent jurisdiction with courts-martial, so that the military commander in the field in time of war will be at liberty to employ either form of court that happens to be convenient. Both classes of courts have the same procedure. For the information of the committee and in explanation of these war courts to which I have referred I insert here an explanation from Winthrop's Military Law and Precedents—

"The military commission—a war court—had its origin in G. O. 20, Headquarters of the Army at Tampico, February 19, 1847 (Gen. Scott). Its jurisdiction was confined mainly to criminal offenses of the class cognizable by civil courts in time of peace committed by inhabitants of the theater of hostilities. A further war court was originated by Gen. Scott at the same time, called 'council of war,' with jurisdiction to try the same classes of persons for violations of the laws of war, mainly guerrillas. These two jurisdictions were united in the later war court of the Civil War and Spanish War periods, for which the general designation of 'military commission' was retained. The military commission was given statutory recognition in section 30, act of March 3, 1863, and in various other statutes of that period. The United States Supreme Court has acknowledged the validity of its judgments (*Ex parte Vallandigham*, 1 Wall. 243 and *Coleman v. Tennessee*, 97 U. S. 509). It tried more than 2,000 cases during the Civil War and reconstruction period. Its composition, constitution, and procedure follows the analogy of courts-martial. Another war court is the provost court, an inferior court with jurisdiction assimilated to that of justices of the peace and police courts; and other war courts variously designated 'courts of conciliation,' 'arbitrators,' 'military tribunals' have been convened by military commanders in the exercise of the war power as occasion and necessity dictated."

"Yet, as I have said, these war courts never have been formally authorized by statute."

"SENATOR COLT: They grew out of usage and necessity?"

"GEN. CROWDER: Out of usage and necessity. I thought it was just as well, as inquiries would arise, to put this information in the record." S. Rep. No. 130, 64th Cong., 1st Sess. (1916) p. 50. (Emphasis added.)

Article 15 was also explained in the "Report of a committee on the proposed revision of the articles of war, pursuant to instructions of the Chief of Staff, March 10, 1915," included in *Revision of the Articles of War, Comparative Prints, Etc., 1904-1920*, J.A.C.C., as follows:

"A number of articles . . . of the revision have the effect of giving courts-martial jurisdiction over certain offenses and offenses which, under the law of war or by statute, are also triable by military commissions, provost courts, etc. Article 15 is introduced for the purpose of making clear that in such cases a court martial has only a concurrent jurisdiction with such war tribunals."

To effectuate the second purpose, Articles 25 and 38 and several others were proposed.<sup>32</sup> But as the Court now construes the Articles of War, they have no application to military commissions before which alleged offenders against the laws of war are tried. What the Court holds in effect is that there are two types of military commission, one to try offenses which might be cognizable by a court-martial, the other to try war crimes, and that Congress intended the Articles of War referring in terms to military commissions without exception to be applicable only to the first type.

This misconceives both the history of military commissions and the legislative history of the Articles of War. There is only one kind of military commission. It is true, as the history noted shows, that what is now called "the military commission" arose from two separate military courts instituted during the Mexican War. The first military court, called by General Scott a "military commission," was given jurisdiction in Mexico over criminal offenses of the class cognizable by civil courts in time of peace. The other military court, called a "council of war" was given jurisdiction over offenses against the laws of war. Winthrop, *Military Law and Precedents* (2d ed., reprinted 1920) \*1298-1299. During the Civil War "the two jurisdictions of the earlier commission and council respectively . . . [were] united in the . . . war-court, for which the general designation of 'military commission' was retained as the preferable one." Winthrop, *supra*, at \*1299. Since that time there has been only one type of military tribunal called the military commission, though it may exercise different kinds of jurisdiction,<sup>33</sup> according to the circumstances under which and purposes for which it is convened.

The testimony of General Crowder is perhaps the most authoritative evidence of what was intended by the legislation, for he was its most active official sponsor, spending years in securing its adoption and revision. Articles 15, 25 and 38 particularly are traceable to his efforts. His concern to secure statutory recognition for military commissions was equalled by his concern that the statutory provisions giving this should not restrict their preëxisting jurisdiction. He did not wish by securing additional jurisdic-

<sup>32</sup> Of course, Articles 25 and 38, at the same time that they gave protection to defendants before military commissions, also provided for the application by such tribunals of modern rules of procedure and evidence.

<sup>33</sup> Winthrop, speaking of military commissions at the time he was writing, 1896, says: "The offenses cognizable by military commissions may thus be classed as follows: (1) Crimes and statutory offenses cognizable by State or U. S. courts, and which would properly be tried by such courts if open and acting; (2) *Violations of the laws and usages of war* cognizable by military tribunals only; (3) Breaches of military orders or regulations for which offenders are not legally triable by court-martial under the Articles of War." (Emphasis added.) Winthrop, at \*1309. And cf. Fairman, *The Law of Martial Rule* (2d ed. 1943): Military commissions take cognizance of three categories of criminal cases: *offenses against the laws of war*, breaches of military regulations, and civil crimes which, where the ordinary courts have ceased to function, cannot be tried normally." (Emphasis added.) Fairman, 265-266. See also Davis, *A Treatise on the Military Law of the United States* (1915) 309-310.

tion, overlapping partially that of the court-martial, to surrender other. Hence Article 15. That Article had one purpose and one only. It was to make sure that the acquisition of partially concurrent jurisdiction with courts-martial should not cause loss of any other. And it was jurisdiction, not procedure, which was covered by other Articles, with which he and Congress were concerned in the Article. It discloses no purpose to deal in any way with procedure or to qualify Articles 25 and 38. And it is clear that General Crowder at all times regarded all military commissions as being governed by the identical procedure. In fact, so far as Articles 25 and 38 are concerned, this seems obvious for all types of military tribunals. The same would appear to be true of other Articles also, e.g., 24 (prohibiting compulsory self-incrimination), 26, 27, 32 (contempt), all except the last dealing with procedural matters.

Article 12 is especially significant. It empowers general courts-martial to try two classes of offenders: (1) "any person *subject to military law*," under the definition of Article 2, for any offense "made punishable by these articles," (2) "and any other person who *by the law of war* is subject to trial *by military tribunals*," not covered by the terms of Article 2. (Emphasis added.)

Article 12 thus, in conformity with Article 15, gives the general court-martial concurrent jurisdiction of war crimes and war criminals with military commissions. Neither it nor any other Article states or indicates there are to be *two* kinds of general courts-martial for trying war crimes; yet this is the necessary result of the Court's decision, unless in the alternative that would be to imply that in exercising such jurisdiction there is only one kind of general court-martial, but there are two or more kinds of military commission, with wholly different procedures and with the result that "the commander in the field" will not be free to determine whether general court-martial or military commission shall be used as the circumstances may dictate, but must govern his choice by the kind of procedure he wishes to have employed.

The only reasonable and, I think, possible conclusion to draw from the Articles is that the Articles which are in terms applicable to military commissions are so uniformly and those applicable to both such commissions and to courts-martial when exercising jurisdiction over offenders against the laws of war likewise are uniformly applicable, and not diversely according to the person or offense being tried.

Not only the face of the Articles, but specific statements in General Crowder's testimony support this view. Thus in the portion quoted above<sup>34</sup> from his 1916 statement, after stating expressly the purpose of Article 15 to preserve unimpaired the military commission's jurisdiction, and to make it concurrent with that of courts-martial in so far as the two would overlap, "so that the *military commander in the field* in the time of war will be at liberty to employ either form of court that happens to be convenient," he went on to say: "Both classes of courts have the same procedure," a statement so un-

<sup>34</sup> Note 31.

equivocal as to leave no room for question. And his quotation from Winthrop supports his statement, namely: "Its [i.e., the military commission's] composition, constitution and procedure follow the analogy of courts-martial."

At no point in the testimony is there suggestion that there are two types of military commission, one bound by the procedural provisions of the Articles, the other wholly free from their restraints or, as the Court strangely puts the matter, that there is only one kind of commission, but that it is bound or not bound by the Articles applicable in terms, depending upon who is being tried and for what offense; for that very difference makes the difference between one and two. The history and the discussion show conclusively that General Crowder wished to secure and Congress intended to give statutory recognition to all forms of military tribunals to enable commanding officers in the field to use either court-martial or military commission as convenience might dictate, thus broadening to this extent the latter's jurisdiction and utility; but at the same time to preserve its full preëxisting jurisdiction; and also to lay down identical provisions for governing or providing for the government of the procedure and rules of evidence of every type of military tribunal, wherever and however constituted.<sup>35</sup>

Finally, unless Congress was legislating with regard to all military commissions, Article 38, which gives the President the power to "prescribe the procedure, including modes of proof, in cases before courts-martial, courts of

<sup>35</sup> In addition to the statements of General Crowder with relation to Article 15, set out in note 31 *supra*, see the following statements made with reference to Article 25, in 1912 at a hearing before the Committee on Military Affairs of the House: "We come now to article 25, which relates to the admissibility of depositions. . . . It will be noted further that *the application of the old article has been broadened to include military commissions, courts of inquiry, and military boards.*"

"Mr. SWEET. Please explain what you mean by military commission."

"Gen. CROWDER. That is our common law of war court, and was referred to by me in a prior hearing. [The reference is to the discussion of Article 15.] This war court came into existence during the Mexican War, and was created by orders of Gen. Scott. It had jurisdiction to try all cases usually cognizable in time of peace by civil courts. Gen. Scott created another war court, called the 'council of war,' with jurisdiction to try offenses against the laws of war. The constitution, composition, and jurisdiction of these courts *have never been regulated by statute.* The council of war did not survive the Mexican War period, since which its jurisdiction has been taken over by the military commission. The military commission received express recognition in the reconstruction acts, and its *jurisdiction* has been affirmed and supported by all our courts. It was extensively employed during the Civil War period and also during the Spanish-American War. It is highly desirable that this important war court should be continued to be governed as heretofore, by the laws of war rather than by statute." S. Rep. No. 229, 63d Cong., 2d Sess., 59; cf. S. Rep. 130, 64th Cong., 1st Sess., 54-55. (Emphasis added.) See also Hearings before the Subcommittee of the Committee on Military Affairs of the Senate on Establishment of Military Justice, 66th Cong., 1st Sess., 1182-1183.

Further evidence that procedural provisions of the Articles were intended to apply to all forms of military tribunal is given by Article 24, 10 U.S.C. § 1495, which provides against compulsory self-incrimination "before a military court commission, court of inquiry, or board, or before an officer conducting an investigation." This article was drafted so that "The prohibition should reach all witnesses, *irrespective of the class of military tribunal* before

inquiry, military commissions, and other military tribunals" takes on a rather senseless meaning; for the President would have such power only with respect to those military commissions exercising concurrent jurisdiction with courts-martial.

All this seems so obvious, upon a mere reading of the Articles themselves and the legislative history, as not to require demonstration. And all this Congress knew, as that history shows. In the face of that showing I cannot accept the Court's highly strained construction, first, because I think it is in plain contradiction of the facts disclosed by the history of Articles 15, 25 and 38 as well as their language; and also because that construction defeats at least two of the ends General Crowder had in mind, namely, to secure statutory recognition for every form of military tribunal and to provide for them a basic uniform mode of procedure or method of providing for their procedure.

Accordingly, I think Articles 25 and 38 are applicable to this proceeding; that the provisions of the governing directive in Section 16 are in direct conflict with those Articles; and for that reason the commission was invalidly constituted, was without jurisdiction, and its sentence is therefore void.

## V

### *The Geneva Convention of 1929*

If the provisions of Articles 25 and 38 were not applicable to the proceeding by their own force as Acts of Congress, I think they would still be made applicable by virtue of the terms of the Geneva Convention of 1929, in particular Article 63. And in other respects, in my opinion, the petitioner's trial was not in accord with that treaty, namely, with Article 60.

The Court does not hold that the Geneva Convention is not binding upon the United States and no such contention has been made in this case.<sup>30</sup> It relies on other arguments to show that Article 60, which provides that the protecting power shall be notified in advance of a judicial proceeding directed against a prisoner of war, and Article 63, which provides that a prisoner of war may be tried only by the same courts and according to the same procedure

which they appear. . . ." (Emphasis added.) Comparative Print showing S. 3191 with the Present Articles of War and other Related Statutes, and Explanatory Notes, Printed for use of the Senate Committee on Military Affairs, 64th Cong., 1st Sess., 17, included in Revision of the Articles of War, Comparative Prints, Etc., 1904-1920. J.A.G.O.

<sup>30</sup> We are informed that Japan has not ratified the Geneva Convention. See discussion of Article 82 in the paragraphs below. We are also informed, however—and the record shows this at least as to Japan—that at the beginning of the war both the United States and Japan announced their intention to adhere to the provisions of that treaty. The force of that understanding continues, perhaps with greater reason if not effect, despite the end of hostilities. See note 40 and text.

Article 83 provides:

"The provisions of the present Convention must be respected by the High Contracting Parties under all circumstances.

"In case, in time of war, one of the belligerents is not a party to the Convention, its provisions shall nevertheless remain in force as between the belligerents who are parties thereto."



ture as in the case of persons belonging to the armed forces of the detaining power, are not properly invoked by the petitioner. Before considering the Court's view that these Articles are not applicable to this proceeding by their terms, it may be noted that on his surrender petitioner was interned in conformity with Article 9 of this Convention.

The chief argument is that Articles 60 and 63 have reference only to offenses committed by a prisoner of war while a prisoner of war and not to violations of the law of war committed while a combatant. This conclusion is derived from the setting in which these articles are placed. I do not agree that the context gives any support to this argument. The argument is in essence of the same type as the argument the Court employs to nullify the application of Articles 25 and 38 of the Articles of War by restricting their own broader coverage by reference to Article 2. For reasons set forth in the margin,<sup>37</sup> I think it equally invalid here.

Neither Article 60 nor Article 63 contains such a restriction of meaning as

It is not clear whether the Article means that during a war, when one of the belligerents is not a party to the Convention, the provisions must nevertheless be applied by all the other belligerents to the prisoners of war not only of one another but also of the power that was not a party thereto or whether it means that they need not be applied to soldiers of the non-participating party who have been captured. If the latter meaning is accepted, the first paragraph would seem to contradict the second.

"Legislative history" here is of some, if little, aid. A suggested draft of a convention on war prisoners drawn up in advance of the Geneva meeting by the International Committee of the Red Cross (*Actes de la Conférence Diplomatique de Genève*, edited by Des Gouttes, pp. 21-34) provided in Article 92 that the provisions of the Convention "ne cesseront d'être obligatoires qu'au cas où l'un des Etats belligérants participe à la Convention se trouve avoir à combattre les forces armées d'un autre Etat que n'y serait par partie et à l'égard de cet Etat seulement." See Rasmussen, *Code des Prisonniers de Guerre* (1931) 70. The fact that this suggested article was not included in the Geneva Convention would indicate that the nations in attendance were avoiding a decision on this problem. But I think it shows more, that is, it manifests an intention not to foreclose a future holding that under the terms of the Convention a state is bound to apply the provisions to prisoners of war of nonparticipating state. And not to foreclose such a holding is to invite one. We should, in my opinion, so hold, for reasons of security to members of our own armed forces taken prisoner, if for no others.

Moreover, if this view is wrong and the Geneva Convention is not strictly binding upon the United States as a treaty, it is strong evidence of and should be held binding as representing what have become the civilized rules of international warfare. Yamashita is as much entitled to the benefit of such rules as to the benefit of a binding treaty which codifies them. See U. S. War Dep't, *Basic Field Manual, Rules of Land Warfare* (1940), par. 5-b.

<sup>37</sup> Title III of the Convention, which comprises Articles 7 to 37, is called "Captivity." It contains Section I, "Evacuation of Prisoners of War" (Articles 7-8); Section II, "Prisoners-of-War Camps" (Articles 9-26); Section III, "Labor of Prisoners of War" (Articles 27-34); Section IV, "External Relations of Prisoners of War" (Articles 35-41); and Section V, "Prisoners' Relations with the Authorities" (Articles 42-67). Thus Title III regulates all the various incidents of a prisoner of war's life while in captivity.

Section V, with which we are immediately concerned, is divided into three chapters. Chapter 1 (Article 42) gives a prisoner of war the right to complain of his condition of captivity. Chapter 2 (Articles 43-44) gives prisoners of war the right to appoint agents to represent them. Chapter 3 is divided into three subsections and is termed "Penalties Applicable

the Court reads into them.<sup>38</sup> In the absence of any such limitation, it would seem that they were intended to cover all judicial proceedings, whether instituted for crimes allegedly committed before capture or later. Policy supports this view: For such a construction is required for the security of our own soldiers, taken prisoner, as much as for that of prisoners we take. And the opposite one leaves prisoners of war open to any form of trial and punishment for offenses against the law of war their captors may wish to use, while safeguarding them to the extent of the treaty limitations, in cases of disciplinary offense. This, in many instances, would be to make the treaty strain at a gnat and swallow the camel.

to Prisoners of War." Subsection 1 (Articles 45-53) contains various miscellaneous articles to be considered in detail later. Subsection 2 (Articles 54-59) contains provisions with respect to disciplinary punishments. And subsection 3 (Articles 60-67) which is termed "Judicial Suits" contains various provisions for protection of a prisoner's rights in judicial proceedings instituted against him.

Thus, subsection 3, which contains Articles 60 and 63, as opposed to subsection 2, of Chapter 3, is concerned not with mere problems of discipline, as is the latter, but with the more serious matters of trial leading to imprisonment or possible sentence of death; cf. Brereton, *The Administration of Justice Among Prisoners of War by Military Courts* (1935) 1 *Proc. Australian & New Zealand Society of International Law* 143, 153. The Court, however, would have the distinction between subsection 2 and subsection 3 one between minor disciplinary action against a prisoner of war for acts committed while a prisoner and major judicial action against a prisoner of war for acts committed while a prisoner. This narrow view not only is highly strained, confusing the different situations and problems treated by the two subdivisions. It defeats the most important protections subsection 3 was intended to secure, for our own as well as for enemy captive military personnel.

At the most there would be logic in the Court's construction if it could be said that all of Chapter 3 deals with acts committed while a prisoner of war. Of course, subsection 2 does, because of the very nature of its subject-matter. Disciplinary action will be taken by a captor power against prisoners of war only for acts committed by prisoners after capture.

But it is said that subsection 2 deals exclusively with acts committed by a prisoner of war after having become a prisoner and this indicates subsection 3 is limited similarly. This ignores the fact that some of the articles in subsection 1 appear, on their face, to apply to all judicial proceedings for whatever purpose instituted. Article 46, for example, provides in part:

"Punishments other than those provided for the same acts for soldiers of the national armies may not be imposed upon prisoners of war by the military authorities and courts of the detaining Power."

This seems to refer to war crimes as well as to other offenses; for surely a country cannot punish soldiers of another army for offenses against the law of war, when it would not punish its own soldiers for the same offenses. Similarly, Article 47 in subsection 1 appears to refer to war crimes as well as to crimes committed by a prisoner after his capture. It reads in part:

"Judicial proceedings against prisoners of war shall be conducted as rapidly as the circumstances permit; preventive imprisonment shall be limited as much as possible."

Thus, at the most, subsection 1 contains, in some of its articles, the same ambiguities and is open to the same problem that we are faced with in construing Articles 60 and 63. It cannot be said, therefore, that all of Chapter 3 and especially subsection 3 relate only to acts committed by prisoners of war after capture, for the meaning of subsection 3, in this argument, is related to the meaning of subsection 1; and subsection 1 is no more clearly restricted to punishments and proceedings in disciplinary matters than is subsection 3.

<sup>38</sup> Article 60 pertinently is as follows: "At the opening of a judicial proceeding directed

The United States has complied with neither of these Articles. It did not notify the protecting power of Japan in advance of trial as Article 60 requires it to do, although the supplemental bill charges the same failure to petitioner in Item 89.<sup>39</sup> It is said that, although this may be true, the proceeding is not thereby invalidated. The argument is that our noncompliance merely gives Japan a right of indemnity against us and that Article 60 was not intended to give Yamashita any personal rights. I cannot agree. The treaties made by the United States are by the Constitution made the supreme law of the land. In the absence of something in the treaty indicating that its provisions were not intended to be enforced, upon breach, by more than subsequent indemnification, it is, as I conceive it, the duty of the courts of this country to insure the nation's compliance with such treaties, except in the case of political questions. This is especially true where the treaty has provisions—such as Article 60—for the protection of a man being tried for an offense the punishment for which is death for to say that it was intended to provide for enforcement of such provisions solely by claim, after breach, of indemnity would be in many instances, especially those involving trial of nationals of a defeated nation by a conquering one, to deprive the Articles of all force. Executed men are not much aided by post-war claims for indemnity. I do not think the adhering powers' purpose was to provide only for such ineffective relief.

Finally, the Government has argued that Article 60 has no application after the actual cessation of hostilities, as there is no longer any need for an intervening power between the two belligerents. The premise is that Japan no longer needs Switzerland to intervene with the United States to protect the rights of Japanese nationals, since Japan is now in direct communication with this Government. This of course is in contradiction of the Government's position that, against a prisoner of war, the detaining Power shall advise the representative of the protecting Power thereof as soon as possible, and always before the date set for the opening of the trial.

"This advice shall contain the following information:

"a) Civil state and rank of prisoner;

"b) Place of sojourn or imprisonment;

"c) Specification of the [count] or counts of the indictment, giving the legal provisions applicable.

"If it is not possible to mention in that advice the court which will pass upon the matter, the date of opening the trial and the place where it will take place, this information must be furnished to the representative of the protecting Power later, as soon as possible, and at all events, at least three weeks before the opening of the trial."

Article 63 reads: "Sentence may be pronounced against a prisoner of war only by the same courts and according to the same procedure as in the case of persons belonging to the armed forces of the detaining Power."

<sup>39</sup> Item 89 charged the armed forces of Japan with subjecting to trial certain named and other prisoners of war "without prior notice to a representative of the protecting power; without opportunity to defend, and without counsel; denying opportunity to appeal from the sentence rendered; failing to notify the protecting power of the sentence pronounced; and executed a death sentence without communicating to the representative of the protecting power the nature and circumstances of the offense charged."

ment's theory, in other connections, that the war is not over and military necessity still requires use of all the power necessary for actual combat.

Furthermore the premise overlooks all the realities of the situation. Japan is a defeated power, having surrendered, if not unconditionally then under the most severe conditions. Her territory is occupied by American military forces. She is scarcely in a position to bargain with us or to assert her rights. Nor can her nationals. She no longer holds American prisoners of war.<sup>40</sup> Certainly, if there was the need of an independent neutral to protect her nationals during the war, there is more now. In my opinion the failure to give the notice required by Article 60 is only another instance of the commission's failure to observe the obligations of our law.

What is more important, there was no compliance with Article 63 of the same Convention. Yamashita was not tried "according to the same procedure as in the case of persons belonging to the armed forces of the detaining Power." Had one of our soldiers or officers been tried for alleged war crimes, he would have been entitled to the benefits of the Articles of War. I think that Yamashita was equally entitled to the same protection. In any event, he was entitled to their benefits under the provisions of Article 63 of the Geneva Convention. Those benefits he did not receive. Accordingly, his trial was in violation of the Convention.

## VI

### *The Fifth Amendment*

Wholly apart from the violation of the Articles of War and of the Geneva Convention, I am completely unable to accept or to understand the Court's ruling concerning the applicability of the due process clause of the Fifth Amendment to this case. Not heretofore has it been held that any human being is beyond its universally protecting spread in the guaranty of a fair trial in the most fundamental sense. That door is dangerous to open. I will have no part in opening it. For once it is ajar, even for enemy belligerents, it can be pushed back wider for others, perhaps ultimately for all.

The Court does not declare expressly that petitioner as an enemy belligerent has no constitutional rights, a ruling I could understand but not accept. Neither does it affirm that he has some, if but little, constitutional protection. Nor does the Court defend what was done. I think the effect of what it does is in substance to deny him all such safeguards. And this is the great issue in the cause.

For it is exactly here we enter wholly untrodden ground. The safe signposts to the rear are not in the sum of protections surrounding jury trials or any other proceeding known to our law. Nor is the essence of the Fifth Amendment's elementary protection comprehended in any single one of our

<sup>40</sup> Nations adhere to international treaties regulating the conduct of war at least in part because of the fear of retaliation. Japan no longer has the means of retaliating.

time-honored specific constitutional safeguards in trial, though there are some without which the words "fair trial" and all they connote become a mockery.

Apart from a tribunal concerned that the law as applied shall be an instrument of justice, albeit stern in measure to the guilt established, the heart of the security lies in two things. One is that conviction shall not rest in any essential part upon unchecked rumor, report, or the results of the prosecution's *ex parte* investigations, but shall stand on proven fact; the other, correlative, lies in a fair chance to defend. This embraces at the least the rights to know with reasonable clarity in advance of the trial the exact nature of the offense with which one is to be charged; to have reasonable time for preparing to meet the charge and to have the aid of counsel in doing so, as also in the trial itself; and if, during its course, one is taken by surprise, through the injection of new charges or reversal of rulings which brings forth new masses of evidence, then to have further reasonable time for meeting the unexpected shift.

So far as I know, it has not yet been held that any tribunal in our system, of whatever character, is free to receive "such evidence as *in its opinion*" would be "*of assistance* in proving or disproving the charge" or; again as in its opinion, "would have probative value in the mind of a reasonable man"; and, having received what in its unlimited discretion it regards as sufficient, is also free to determine what weight may be given to the evidence received without restraint.<sup>41</sup>

When to this fatal defect in the directive, however innocently made, are added the broad departures from the fundamentals of fair play in the proof and in the right to defend which occurred throughout the proceeding, there can be no accommodation with the due process of law which the Fifth Amendment demands.

All this the Court puts to one side with the short assertion that no question of due process under the Fifth Amendment or jurisdiction reviewable here is presented. I do not think this meets the issue, standing alone or in conjunction with the suggestion which follows that the Court gives no intimation one way or the other concerning what Fifth Amendment due process might require in other situations.

It may be appropriate to add here that, although without doubt the directive was drawn in good faith in the belief that it would expedite the trial and

<sup>41</sup> There can be no limit to the admissibility or the use of evidence if the only test to be applied concerns probative value and the only test of probative value, as the directive commanded and the commission followed out, lies "in the Commission's opinion," whether that be concerning the assistance the "evidence" tendered would give in proving or disproving the charge or as it might think would "have value in the mind of a reasonable man." Nor is it enough to establish the semblance of a constitutional right that the commission declares, in receiving the evidence, that it comes in as having only such probative value, if any, as the commission decides to award it and this is accepted as conclusive.

that enemy belligerents in petitioner's position were not entitled to more, that state of mind and purpose cannot cure the nullification of basic constitutional standards which has taken place.

It is not necessary to recapitulate. The difference between the Court's view of this proceeding and my own comes down in the end to the view, on the one hand, that there is no law restrictive upon these proceedings other than whatever rules and regulations may be prescribed for their government by the executive authority or the military and, on the other hand, that the provisions of the Articles of War, of the Geneva Convention and the Fifth Amendment apply.

I cannot accept the view that anywhere in our system resides or lurks a power so unrestrained to deal with any human being through any process of trial. What military agencies or authorities may do with our enemies in battle or invasion, apart from proceedings in the nature of trial and some semblance of judicial action, is beside the point. Nor has any human being heretofore been held to be wholly beyond elementary procedural protection by the Fifth Amendment. I cannot consent to even implied departure from that great absolute.

It was a great patriot who said:

He that would make his own liberty secure must guard even his enemy from oppression; for if he violates this duty he establishes a precedent that will reach himself.<sup>42</sup>

Mr. Justice MURPHY joins in this opinion.

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### *in re* HOMMA

SUPREME COURT OF THE UNITED STATES\*

[February 11, 1946.]

Mr. Justice MURPHY, dissenting.†

This case, like *In re Yamashita*, decided February 4, 1946, poses a problem that cannot be lightly brushed aside or given momentary consideration. It involves something more than the guilt of a fallen enemy commander under the law of war or the jurisdiction of a military commission. This nation's very honor, as well as its hopes for the future, is at stake. Either we conduct such a trial as this in the noble spirit and atmosphere of our Constitution or we abandon all pretense to justice, let the ages slip away and

<sup>42</sup> II *Complete Writings of Thomas Paine*, ed. by Foner, 1945, p. 538.

\* Nos. 93 Miscellaneous and 813. October Term, 1945.

† The Court denied a motion and petitions for writs of habeas corpus and certiorari without opinion; for substance of holding see *in re Yamashita*, above p. 432.

descend to the level of revengeful blood purges. Apparently the die has been cast in favor of the latter course. But I, for one, shall have no part in it, not even through silent acquiescence.

Petitioner, a civilian for the past three and a half years, was the victorious commander of the 14th Army of the Imperial Japanese Army in the Philippines from December 12, 1941, to August 5, 1942. It may well be that the evidence of his guilt under the law of war is more direct and clear than in the case of General Yamashita, though this could be determined only by an examination of the evidence such as we have had no opportunity to make. But neither clearer proof of guilt nor the acts of atrocity of the Japanese troops could excuse the undue haste with which the trial was conducted or the promulgation of a directive containing such obviously unconstitutional provisions as those approving the use of coerced confessions or evidence and findings of prior mass trials. To try the petitioner in a setting of reason and calm, to issue and use constitutional directives and to obey the dictates of a fair trial are not impossible tasks. Hasty, revengeful action is not the American way. All those who act by virtue of the authority of the United States are bound to respect the principles of justice codified in our Constitution. Those principles, which were established after so many centuries of struggle, can scarcely be dismissed as narrow artificialities or arbitrary technicalities. They are the very life blood of our civilization.

Today the lives of Yamashita and Homma, leaders of enemy forces vanquished in the field of battle, are taken without regard to due process of law. There will be few to protest. But tomorrow the precedent here established can be turned against others. A procession of judicial lynchings without due process of law may now follow. No one can foresee the end of this failure of objective thinking and of adherence to our high hopes of a new world. The time for effective vigilance and protest, however, is when the abandonment of legal procedure is first attempted. A nation must not perish because, in the natural frenzy of the aftermath of war, it abandoned its central theme of the dignity of the human personality and due process of law.

Mr. Justice RUTLEDGE agrees with these views.

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Mr. Justice RUTLEDGE, dissenting.

I dissent upon the grounds stated in the dissenting opinions in the *Yamashita* case, Nos. 61 Misc. and 672, O. T. 1945, decided February 4, 1946, all of which are exemplified in these applications, and for additional reasons presented by them.

For the first time the Court, by its denial of the applications with the effect of sustaining the commission's jurisdiction permits trial for a capital offense under a binding procedure which allows forced confessions to be

received in evidence;<sup>1</sup> makes proof in prior trials of groups for mass offenses "*prima facie* evidence that the accused is likewise guilty of that offense";<sup>2</sup> and requires that the findings and judgment in such a mass trial "be given full faith and credit" in any subsequent trial of an individual person charged as a member of the group.<sup>3</sup> These provisions of the directive ordering the creation of the commission in my judgment vitiate the entire proceeding.

Moreover the time allowed for preparation of the defense was cut from the three weeks given to Yamashita to fifteen days between arraignment and the beginning of trial. Motions at arraignment for 30 days to prepare defense before the trial began and on the opening day of trial for a ten-day continuance, the latter supported by counsel's affidavit of insufficient time, were denied.<sup>4</sup>

Other serious questions, affecting the validity and fairness of the commission's constitution are presented which were not raised in the *Yamashita* petitions.

I think the motion and petition respectively should be granted and determined on the merits.

Mr. Justice MURPHY joins in this opinion.

<sup>1</sup> The directive or order prescribing the regulations governing the trial was issued December 5, 1945, and provided in Paragraph 5d *Evidence* (7): "All purported confessions or statements of the accused shall be admissible without prior proof that they were voluntarily given, it being for the Commission to determine *only* the truth or falsity of such confessions or statements." (Emphasis added.) In addition to the further provisions set forth in notes 2 and 3, the order provided for the reception of evidence in even broader terms if possible than the directive relating to similar matters which covered General Yamashita's trial.

<sup>2</sup> Paragraph 5d *Evidence* also contained the following subdivision (4): "If the accused is charged with an offense involving concerted criminal action upon the part of a military or naval unit, or any group or organization, evidence which has been given previously at a trial resulting in the conviction of any other member of that unit, group or organization, relative to that concerted offense, may be received as *prima facie* evidence that the accused likewise guilty of that offense."

<sup>3</sup> Paragraph 5d *Evidence* (5) is as follows: "The findings and judgment of a commission in any trial of a unit, group, or organization with respect to the criminal character, purpose or activities thereof shall be given full faith and credit in any subsequent trial, by that or any other commission, of an individual person charged with criminal responsibility through membership in that unit, group or organization. Upon proof of membership in that unit, group or organization convicted by a commission, the burden shall be on the accused to establish by proof any mitigating circumstances relating to his membership or participation therein."

<sup>4</sup> The following is a bare chronological statement concerning the constitution of the commission and subsequent events: On December 5, 1945 the regulations governing the trial were issued; December 6, the order to General Styer to appoint the commission followed; on December 12, petitioner was transferred from Japan to Manila; December 15, counsel for the defense was appointed; December 17, the charge was served on petitioner, substantially identical with that in the *Yamashita* case, containing 47 specifications of the same general type there involved, together with a supplemental charge that on May 6, 1942, petitioner refused to grant quarter to the armed forces of the United States and its allies in Manila Bay, Philippines; December 19, the commission convened counsel were sworn, petitioner was arraigned, pleaded not guilty and entered a motion for thirty days time to prepare defense



REISIG AND POPPLE *v.* ASSOCIATED JEWISH CHARITIES  
OF BALTIMORE AND THE HEBREW UNIVERSITY  
OF JERUSALEM

MARYLAND COURT OF APPEALS\*

[December 15, 1943]

In suit to determine right of foreign unincorporated membership association, organized and functioning under the law of a foreign jurisdiction to receive devise of real estate in this state, the courts of Maryland are required by statute to take notice of such foreign law and to apply it to the facts of the case as would be proper if such foreign law were domestic law.

A university association organized and functioning under the laws covering associations of Palestine, for the sole purpose of governing and dealing with a Hebrew university at Jerusalem, has the legal right under the law of Palestine to receive and hold for such university a one-half interest in a ground rent devised to it for that purpose, by the last will and testament of a resident of this state, and has in addition to power of sale of disposition of the ground rent so as to convert same into a funds of the association.

MELVIN, J.

The appellants are the leasehold owners of property in Baltimore City, 1916 E. 31st Street, in which the appellees hold the reversion, as beneficiaries under the codicil to the last will and testament of the late Miss Eleanor S. Cohen, of that city. In response to due notice from appellants of their

before trial. The motion was denied. On January 3, 1946, the commission reconvened. The prosecution then filed a bill of particulars to two of the specifications. Petitioner's plea to the jurisdiction, motion to dismiss, motions for bills of particulars relating to certain items in the specifications, and for further particulars concerning other items were denied. The commission also then denied the motion of counsel for the defense to postpone the trial for ten days. This motion was supported by affidavit of chief counsel, dated January 2, 1945, which set forth that he and his associates began work on preparing the defense on December 16; that "each of the 48 specifications requires a detailed investigation and that eighteen days have proved insufficient time to accomplish even a small portion of this investigation"; that two members of the defense staff who had left for Tokyo on December 25 to interview witnesses and secure other evidence had not returned; that two of three investigators originally assigned to the defense were ill and in the hospital, one from December 21, the other from December 24, and that only one additional investigator had been assigned to the defense, though others had been promised; that on January 2 the defense had received from the prosecution eleven "typical cases" on which proof was to be offered under specification 4 and nine "representative instances" under specification 47, which the defense had no opportunity to investigate. The affidavit concluded with the statement that a minimum period of ten days was required before counsel could be prepared to proceed with the trial.

The trial began in the afternoon of January 3. On January 18 petitions for writs of habeas corpus and prohibition were filed in the Supreme Court of the Philippines. They were denied January 23 without argument. The petitions and motions constituting this application were filed in this Court February 7, 1946.

\* No. 53, October Term, 1943; 182 Md. 432.

desire to redeem this interest and to acquire thereby the complete fee simple title to the property in question, both of the appellees tendered their respective deeds and disclaimed the necessity for the appointment of a trustee to accomplish that end. The appellants (Plaintiffs below) in their bill of complaint raised the point that a trusteeship is necessary because of the alleged fact that one of the appellees, The Hebrew University of Jerusalem (the correct legal title of which is "The Hebrew University Association") is an unincorporated association and as such cannot hold or convey real property in Maryland. It is not disputed that the New York corporation it chose as its channel for transferring the title to appellants,—the "American Friends of The Hebrew University, Inc.,"—to which it executed its deed in February, 1942, is legally qualified to pass a valid title, as it offers to do, or that the other appellee, The Associated Jewish Charities of Baltimore, is likewise qualified. The issue in the case is, therefore, confined to the legal status of the particular appellee which is located in Palestine. The Court below held that a valid title could pass through the proffered deed, without the intervention of a trustee, and it is from this decree that the leaseholders have appealed.

In their admirable presentation of the case counsel for both sides have greatly facilitated the Court's determination of the nice questions of title involved, concerning the applicability of the laws of Palestine and the laws of Maryland to a situation which is unusual, if not unique, in this jurisdiction.

The facts of the case are undisputed. The deviser of the ground rents, Miss Eleanor S. Cohen, in a carefully prepared codicil thereto, made plain her desire and intention to execute a charitable trust for the benefit of her co-religionists in Palestine, Baltimore and elsewhere. To that end, she devised in her will her residuary estate to Dr. Harry Friedenwald of Baltimore, Maryland, with the late Justice Louis D. Brandeis as an alternate devisee, coupled with the request, however, that the same may be used "for my co-religionists in Palestine, Baltimore, or wherever he may consider that most good can be accomplished." That will was dated April 18, 1934, and under date of November 1, 1935, Miss Cohen made the following codicil to it: "By my will I have devised and bequeathed my residuary estate to Dr. Harry Friedenwald, or alternatively to Justice Louis D. Brandeis, with the intent and purpose that the same be used for the benefit of my co-religionists in Palestine, Baltimore or elsewhere. As I am advised that such disposition of my residuary estate might subject my estate to greater taxation upon my death than would be the case if I had devised and bequeathed my residuary estate to a corporation, I do therefore now modify such disposition of my residuary estate by devising and bequeathing one-half of the same to The Associated Jewish Charities of Baltimore and the other half thereof to The Hebrew University of Jerusalem; to be applied to the respective purposes of said corporations."

Miss Cohen died in August, 1937, and the devise of her residuary estate became effective in due course thereafter, apparently without any question

having been raised until the filing of this suit. It is quite evident that when she named in her codicil these two particular devisees, in lieu of the individuals named in her will, she had no other thought in mind than that said devisees were both bodies corporate and thus entirely free to operate as such in carrying out her expressed intention. When it subsequently developed that the correct nomenclature of The Hebrew University of Jerusalem is The Hebrew University Association, that made no difference legally, but only directed the court's inquiry to the status of the Association instead of the University.

In order to establish this status two thoroughly competent witnesses—one of them an expert on Palestine law—were presented, and their testimony, with the documentary evidence, clears the path of legal difficulties in the way of transferring a valid title by both of these devisees, without the appointment of a trustee.

The testimony of this expert, Mr. Haim Margalith, whose qualifications are conceded, as well as that of Mr. Salamann Schocken, Chairman of The Hebrew University of Jerusalem, is altogether of a most enlightening character and leaves no doubt that The Hebrew University Association is to all intents and purposes an organization of such nature as to qualify it to hold and transfer title to real property in Maryland. It is, as Mr. Margalith describes it, "a legal entity, a juridic person," and is so recognized by the authorities in Palestine.

This Association was formed in 1925 for the sole purpose of governing and dealing with The Hebrew University at Jerusalem. The members of the Association are members of the Board of Governors of the University and form an association which was organized, and continues to function, under the Law Covering Associations of Palestine, otherwise known as "The Law of Societies." As Mr. Margalith states, this law is used to a large extent by various philanthropic and educational organizations where there is no profit-making in view.

Rules of each of such associations are required by law to be filed promptly after organization with the office of the District Commissioner of each district, one of which is Palestine, and kept there on file; also, various changes that take place subsequent to the time of organization are to be reported to the District Commissioner's office.

The Hebrew University Association, having been thus organized, formulated its rules and filed them with the District Commissioner at Jerusalem, as required. It thus became an association organized and functioning under the Law of Societies. This law became effective in 1909 under the Ottoman regime and is one of the Laws which were retained when Palestine came under the mandate granted to Great Britain after World War No. 1. In 1922 the Palestine Order in Council was promulgated, which provided, among other things, for administration of the laws of Palestine in conformity with the common law and the doctrines of equity in force in England.

In this situation, the courts of Maryland are specially required to take judicial notice of this foreign law and to apply it to the facts of the particular case, "as would be proper if such foreign law were domestic law." Article 35, Secs. 56-8, Annotated Code of Maryland.

Under this law of Palestine, The Hebrew University Association, by its duly registered and certified rules, was authorized on behalf of the University at Jerusalem: "(c.) to solicit, secure and accept gifts, endowments, bequests, contributions and subscriptions, and to administer and dispose of the same; (d.) to borrow or raise money without security, or secured with mortgage or other charge on all or any of the property and assets of the Association, and to redeem or pay off any such securities." These rules also provide for an executive council which, subject to the control of the Board of Governors, shall have the "management and administration of the revenue and property of the Association, the conduct of its affairs, the custody and use of the common seal, and, in particular, but without derogating from the generality of the foregoing powers, it shall have the following powers, viz: to borrow and raise money, as hereinbefore expressed, and (2) to invest any monies of the Association (including any trust funds vested in, or entrusted to, the Association) in any such manner and from any such securities as the Association may do, and from time to time to realize or vary such investments. . . ."

Without quoting from the various provisions of the Law Covering Associations, as referred to in the testimony of the two witnesses in the case, it is sufficient to say that, based on an examination of this law, as expertly interpreted by them, this court has reached the conclusion, and so holds, that under the law of Palestine this appellee had the legal right to receive and hold for the Hebrew University of Jerusalem the one-half interest in the ground rent in question. It was in keeping with the objects for which the Association was formed, and whether or not this gift or devise received the authorization from the government of Palestine, as required by Article 17 of the law, is beside the point. That provision was invariable alone by the government, and no objection having been raised from that source, the validity of the devise is not affected thereby, so far at least, as the purpose of the pending suit is concerned.

Having thus acquired a valid title the Association has, under that same Article, the power of sale or disposition of this ground rent, so as to convert it into funds of the Association. In addition to this application of the law, it is to be noted that any limitation imposed by it upon the right to hold and dispose of real estate has no extra-territorial force. *Fletcher Encyclopaedia of Corporation Law, Permanent Edition*, Vol. 17, Sec. 3321; *Waters v. Order of Holy Cross*, 155 Md. 145.

As stated in the former authority, and affirmed for Maryland by the latter, "it is a general rule that the statute of wills of a state is no part of the charter of a corporation created by such state and has no extra-territorial

operation, and therefore, where a corporation has the general power under its charter to take and hold real estate, the fact that the statute of wills of the state of its creation prohibits devises to corporations or imposes restrictions upon such devises, does not prevent it from taking by devises in other states in which devises are allowed. . . . And this rule is in accord with the settled doctrine that the right of a corporation to hold land, and the modes by which it may acquire title thereto, must depend altogether upon the law of the state in which the land is situated."

The point is made that his legal authority is not applicable to Maryland because it is limited to cases where a corporation possesses a general power to take and hold real estate, and that no such power exists in the instant case. However, this point is disposed of by the Court's ruling that, under the Palestine law, the Hebrew University Association does possess the power to take and hold real estate. This ruling is further supported by the express language of the expert, Margalith, in his reply to a specific question asked him by counsel for appellants. The pertinent question and answer, as taken from the record are: ("By Mr. Smith) Q. Now is there any law or regulation or emergency decree that you know of that would prevent a corporation such as The Hebrew University from conveying real property in Palestine? A. No, not so far as I know." The witness added that his knowledge "goes very specifically and distinctly up to July, 1941, when I left Palestine, and in a more general way I can say up to the present day."

Having applied the foreign or Palestine law to the facts of this particular case in the same manner "as would be proper if such foreign law were domestic law" (Art. 35, Sec. 58, Md. Code), we find that the court's above stated conclusion is still further strengthened by the application of the Maryland law to these facts.

Appellants' main contention is that an unincorporated association cannot hold or convey property in Maryland. However, it is to be noted, as a matter for first consideration, that whether The Hebrew University Association is called by the name of an association, a society, a company, a corporation, or by any other name, the essential factor in determining the issue is not a matter of nomenclature, but rather it is the real nature of the organization that controls: "Whether a given association is called a corporation, partnership or trust is not the essential factor in determining the powers of a state covering it. The real nature of the organization must be considered. If clothed with the ordinary functions and attributes of a corporation, it is subject to similar treatment." *Hemphill v. Orloff*, 277 U. S. 537, 72 L. Ed. 978.

This applicable doctrine was invoked in Maryland in connection with Section 117 of Article 23 of the Code, which provides: "As used in this Article the phrase 'foreign corporation' shall mean every corporation, association, or joint stock company formed or existing under the statute or common law of any state (other than this State), territory, district, possession

or foreign country, or the United States." It was in construing this statute and declaring it to be constitutional, notwithstanding that unincorporated associations were included in the phrase "foreign corporation," that the Attorney General of Maryland cited the above quoted authority of *Hemphill v. Orloff*, 15 P.A.G. 81 (1933).

The statute was re-enacted by Chapter 504 of the Acts of 1937, thus rendering inapplicable here the Maryland cases principally relied on by appellants to support their principal contention, namely that "the law of Maryland still is to the effect that unincorporated associations cannot hold and convey real property." It is contended, specifically, that The Hebrew University Association, not being a corporation as that term is understood in Maryland cannot convey a valid title to the ground rent in question except through a trustee appointed by the court. The particular case upon which appellants base their argument is that of *Reffor Realty Corporation v. Adams Land & Building Assn.*, 128 Md. 656. There the Court was dealing with the Adams Express Company, an unincorporated joint stock association and the leasehold interest in the property in question was conveyed, in the first instance, to three trustees and their successors. The title was never in the name of the Company but remained in the trustees. The Court held that, inasmuch as the trustees, and not the unincorporated association, held the title to the real estate, the conveyance to the purchaser of the property would have to be made by trustees.

The clear distinction between the case just cited and the case at bar is that in the former the title to the property in question had never been held by the Adams Express Company but always in the name of the trustees; whereas, in the latter, the devise was direct to the present title holder (The Hebrew University of Jerusalem, or, as it is correctly styled, The Hebrew University Association), whose tenure of it has always been exclusive of trusteeship in any form.

Before the *Adams Express Company* case, *supra*, the Court had declared in a case decided in 1911, *Stowden v. Crown Cork and Seal Co.*, 114 Md. 658, that the statutory right of a voluntary association to sue in the group name "pre-supposes the right to acquire and possess in the same capacity the interest which a suit might protect." A gift of stock *inter vivos* to an unincorporated association was upheld, but there was left undecided the question as to whether or not such an association could hold and convey real property without the intervention of a trustee.

In discussing the *Stowden* case, the Court, in the *Adams Express Company* case, commented: "While that language (hereinbefore quoted) is broad, personal property was under consideration and the question still is, how can real estate be held and conveyed by such association? In the absence of some contrary provisions in the statute, the usual way seems to be to hold it by means of trustees." However, as above noted, in the *Express Company* case the Court was simply deciding whether or not a conveyance

without a trustee could be made for an unincorporated association which had never held title in its own name.

We find no precedent in these cases, or in any other, for denying to an organization of persons clothed with the ordinary functions and attributes of a corporation, comprising a legal entity, which is recognized as such in the jurisdiction where it originated and continues to function, the right to hold and convey property, both personal and real, to the same extent as this right is accorded to a group of persons formally incorporated under the laws of Maryland.

It is clearly and expressly shown by the record in this case that The Hebrew University Association is such a legal entity, with a membership certain and definite, and which is functioning under a law (the "Law of Societies") and rules ("Rules of Associations") of such dignity and effectiveness as to completely remove it from all the essential objections which have heretofore been held to apply to unincorporated bodies.

Moreover, it belongs to a class generally known as "charitable corporations" and the devise to it under Miss Cohen's will was in the nature of a charitable trust. It was for the obvious purpose of giving recognition to this class of trusts in Maryland that Chapter 453 of the Acts of 1931 was enacted. (Sec. 259, Art. 16, Code). It is there declared that "as to all trusts hereafter created for charitable purposes, whether by gift, deed, will or other form of settlement, and whether the subject thereof be real or personal property, it shall be no objection to the validity or enforceability of such trusts, or of such gift, deed, bequest, devise, etc., that the beneficiaries of such trusts constitute an indefinite class," . . . , etc.

Prior to the enactment of this statute the common law rule prevailed in Maryland. Under this rule an unincorporated devisee could not receive a testamentary gift "not being an artificial person created by the law, and its membership not being certain and definite, and the courts of this State having no jurisdiction to enforce charitable uses under the statute of 43 Elizabeth, or apart from its provisions." *Snawden v. Crown Cork & Seal Co.*, *supra*, and citing *Dashiell v. Attorney-General*, 5 H. & J. 392; *Same v. Same*, 6 H. & J. 1; *Rizer v. Perry*, 58 Md. 112; *State, use trustees M. E. Church, v. Warren*, 28 Md. 333; *Orrick v. Boehm*, 49 Md. 72; *Trinity M. E. Church v. Baker*, 91 Md. 539.

Since this Act of 1931 the principles of the statute of 43 Elizabeth, Chapter 4, concerning trusts for "charitable purposes," have been expressly recognized as a part of the law of this State, so that a devise of this character to an unincorporated body is no longer void because of uncertainty of indefiniteness of its members, or because of lack of jurisdiction in our courts to enforce such trusts. *Second National Bank v. Bank*, 171 Md. 547. In the case at bar no such indefiniteness of members exists in fact. The members of The Hebrew University Association (who are the governors of the University) are specifically named in the rules of the Association which are

required to be filed in the office of the District Commissioner of Palestine. These members hold office for life, and it is expressly provided that "every change in the personnel of the Board of Governors shall be notified for the purpose of registration to the competent authority in Palestine."

As still further evidence that this Association is clothed with all the attributes of a body corporate and functions as such, the precise and thorough procedure it took to invest the Chairman of its Executive Council, Mr. Schocken, with plenary power to execute the deed and other necessary papers for transferring title to this ground rent to appellants, is unusually impressive. He made the trip from Palestine with papers and certificates specially prepared to accomplish the purpose desired by all parties, and to meet every legal requirement. Under such circumstances, the appointment of a trustee, as prayed by appellants, would be necessary and also contrary to the procedure indicated by the present state of the law in Palestine and in Maryland. Therefore, the decree of the Chancellor dismissing the bill of complaint, with costs to be paid by the Hebrew University Association, will be affirmed.

Decree affirmed, The Hebrew University Association to pay all Court costs.



## BOOK REVIEWS AND NOTES

*Principes Généraux du Droit International Public. Tome I: Introduction; Sources.* By Charles Rousseau. Paris: A. Peçone; 1944. Pp. xxxviii, 975. Index.

In his foreward Professor Rousseau announces that he has completed a three volume treatise on the general principles of Public International Law. The work was for the most part finished during September 1939. That "practical considerations" delayed publication does not surprise us as much as does the fact that any publication at all on this subject was possible in a Paris occupied in defiance of the very principles upon which such a treatise must rest. This first volume is devoted to the Sources of International Law. The second will deal with International Society, and the third and final volume will discuss the Settlement of International Conflicts, War and Neutrality.

M. Rousseau explains that he has departed from the usual plan and devoted the greater part of the volume to treaties, because he has wished to present international relations from a strictly positive viewpoint, such as is expressed in the agreements of the subjects of the law. It seemed to the author worth while to indicate from the start this peculiarity in regard to the formulation of juridical rules of international law in contradistinction with what we find in national law. The method adopted was considered to be justified likewise because of the existing instability of the international situation and the dearth of documentary sources for the study of the juridical organization of international society or of war and neutrality. Although the advent of peace and the organization of the United Nations now makes possible these other avenues of research, the work so ably prepared is not superseded, and can well be fitted unaltered into the more comprehensive study which is to follow.

In addition to the exhaustive treatment of international agreements, the text supplies a brief but extremely valuable discussion of International Custom (Livre II), and what the author designates as Subsidiary Sources (Livre III). Notwithstanding the emphasis which Professor Rousseau places upon treaties as a source, he does not agree with certain writers who only recognize as a source that which has been incorporated in a treaty stipulation. He considers that general principles can of themselves be characterized as sources of international law (p. 895).

It is not possible in a brief review to indicate the many well-reasoned and original discussions to be found in this volume. Of special interest is the concluding study of the elusory topic of the relation of equity and international law (pp. 948-950). This treatise constitutes an important contribution to the science of international law and sustains the well-earned

reputation of French jurists for legal acumen and the lucid exposition of principles. It is a text which no student of international law should neglect.

ELLERY C. STOWELL

*Of the Board of Editors*

*Der Pariser Vertrag vom 9 November 1920.* By Georg Crusen. Danzig: Verlag von Georg Stilke; 1936. Fp. xxiv, 623. Index.

In September, 1945, the reviewer heard of this book at the Interrogation Center at Munich-Freysing while questioning the former president of the Bank of Danzig. Later a copy—now the only one in American hands—was secured from the author, the retired Chief Justice of the Free City and prolific writer on the many legal aspects of this valuable and unprecedented experiment in international organization and adjudication. The book was suppressed by the Nazi authorities immediately upon publication, on the alleged ground that its contents would be valuable to the Polish Government, but, in the author's opinion, actually for the reason that this exhaustive work made the Nazi Chief of the Foreign Section of the Danzig Senate less important as a source of reference and information. At any rate, only ten or twelve copies of the book were circulated among high officials of the Free City and a few "trusted" professors of international law; the rest of the 500 printed copies were impounded and may be presumed lost as Danzig is now one of the destroyed cities of Europe.

The book deals exhaustively with the Treaty of Paris of November 9, 1920, between the Free City and Poland which, together with the Treaty of Versailles, formed the basis of the international legal relations between the two states, supplementing and, in important respects, superseding Articles 100 to 104 of the Peace Treaty. This study provides a complete commentary on the forty articles of this treaty, the pertinent provisions of the Treaty of Versailles, the Decisions of the resident High Commissioners of the League of Nations, the Advisory Opinions of the World Court, and the Constitution and pertinent laws of the Free City. Those parts of the treaty which lent themselves to legal discussion and to Danzig-Polish controversies—such as the conduct of the foreign relations of the Free City, international treaties, the bi-national Harbor Board, the railroads under Polish administration and (largely) ownership, and the utilization of the port by Poland—are stressed, while subjects calling rather for non-legal technical competence, such as the customs union and the postal service, are relegated to a secondary place.

The book is a first-class guide to the enormous number of documents and writings of publicists, in German, French, Italian, and English, that are pertinent to the elucidation of the often complicated international legal relations of the Free City to Poland and the League of Nations. It is, however, intended for the student who is already familiar in some detail with the status of the Free City, and not for the reader who is a stranger to this labyrinth of treaties, agreements, conventions, decisions, advisory opinions, laws,

etc. Americans will find the book valuable if they wish to dig into the record, for instance, of the only arrangement under League auspices providing for the compulsory settlement of all disputes between two given states—a record, incidentally, which is of great credit to the League and its system of resident Commissioners; or into the provisions and working arrangements of the bi-national Harbor Board, or the complicated threefold division of the railroads. Any proposal dealing with the future of Trieste, and similar examples of the “Danzig dilemma”—the conflict between the right of access to the sea of one nation and the right of self-determination of another—can only benefit by consultation with the experience of the Free City of Danzig. While the author’s conclusions tend to make the best case for Danzig, the student of this volume can make up his own mind with the help of this valuable reference work.

The bibliography and the index are exhaustive and valuable.

JOHN BROWN MASON

*Washington, D. C.*

*The Scheldt Question.* By S. T. Bindoff. London: George Allen and Unwin; 1945. Pp. x, 238. Appendix. Maps. Index. 10/6.

The Scheldt question, so called by generations of statesmen and historians, seems to have been not so much a question as a complex of opposed regional and national obsessions. Tangled in that complex have appeared such apparently soluble problems as that of a toll or no toll by the Dutch on Antwerp and Ghent maritime traffic; if a toll, its rate and where to be paid; trans-shipment of cargoes at Dutch ports, and contests among the latter for the tolls; policing against smuggling; Dutch or other pilotage of toll-paying craft; Dutch occupancy of forts astride the river just below Antwerp; buoying and maintenance of channels; interior transit through other Dutch waters between Antwerp and the Rhine; and the status on the Scheldt of craft of non-riparians,—Venetian, Spanish, British, French, Prussian. Mr. Bindoff, an Englishman, has given a clear and scholarly history, supported largely by references to earlier texts, of the Dutch-Belgian struggle (including armed conflicts) over these and related matters during some six centuries ending with 1839, a struggle complicated and intensified,—as the author might have emphasized more clearly—by religious cleavages and the prolonged control of Belgian policy by Spain, Austria, and France.

The Vienna Treaty of 1815 reinforced Belgian claims by including the Scheldt by name in its call for freedom of navigation on international rivers. Later the task of adapting the Vienna generalizations to the Scheldt devolved on Palmerston, then British Foreign Secretary. As the towering leader in the Five-Power Conference of non-riparian nations he accomplished that task in the nine acute years of the Conference’s negotiations with the two contesting nations. Mr. Bindoff, making his real contribution to the subject from letters, drafts, minutes, and memoranda in British archives, vividly pic-

tures Palmerston during those years, warily moving toward his objective, either feeling his way carefully or crashing through boldly—even to the extremity of a joint blockade of Holland,—but guided always by the principles that war must be avoided, that Belgium must be strengthened enough to be independent of France, that Holland must be insured as a second line of defense for England in case of war with France and of violation of Belgian neutrality by France, and that England must hold her large share of Scheldt traffic.

Although Mr. Bindoff's narrative stops at 1839 it illuminates considerably for us the failure of The Netherlands and Belgium nearly a century later to agree on a proposed treaty which would have given Belgium two waterways across Dutch territory between Antwerp and a main Rhine estuary,—the Hollandsch Diep. Will their intervening comradeship in arms now facilitate such an arrangement?

LOUIS B. WEHLE

*New York City*

*Studies in Polish and Comparative Law.* By W. Komarnicki and others. London: Stevens and Sons; 1945. Pp. viii, 374.

This symposium comprises six articles on aspects of Polish law from a comparative law viewpoint, four articles on aspects of international law, one article on Andrew Wolan, a Polish sixteenth-century Calvinist jurist, and one article on phases of modern corporation law without reference to Poland.

In the first category are included some more or less random descriptive remarks on the Polish Criminal Code by S. Glazer, the codification of Polish civil law by Z. Nagórski, Polish marriage law by K. Alexandrowicz which covers some material included in the article on civil law codification, budget law by T. Grodynski, labor and social legislation by J. Bloch, and Polish constitutional law by W. Komarnicki. In this group there is the greatest variety of treatment, ranging all the way from the editorial-like treatment of Polish constitutional law to the very thorough description of appropriate statutes by Mr. Bloch. If such diversity in subject and treatment can have a common theme, it is the continuing difficulty of framing common legal standards for a people of such heterogeneous racial, economic, religious, political, and social backgrounds. No effort has been made to analyze or evaluate the laws treated either in terms of the political forces at work or the results accomplished.

The group of articles on international law are somewhat less descriptive and more analytical. Included here are some remarks on the legal difficulties surrounding war crimes trials by St. Szurlej, the status of consuls in international law by C. Pozzanski, conflict of laws, both international and interprovincial, by R. K. Kuratowski, which includes some further remarks on Polish marriage law, and the legal difficulties surrounding the revision of treaties under the maxim *rebus sic stantibus* by W. Moderow.

The single article by M. Fryde on modern corporations is largely devoted to explanation of the Berle and Means thesis on the control of modern corporations and the supporting findings of the T.N.E.C. The author compares this point of view to that of James Burnham to the latter's disadvantage. Although this is by no means an original approach, supporting conclusions by some French and German writers not always available in translation give this article some value.

The article on Andrew Wolan by C. Jarra is the only one that provides something new for the American or English reader. Wolan was evidently a leading writer and politician in the Calvinist movement in Eastern Europe, although it is not clear what his writings and leadership contributed to modern Poland.

On the whole, this volume suffers from a lack of integration or plan. In addition, no subject touched upon was explored with any high degree of thoroughness. Finally, the prefatory note that "the authors . . . do not necessarily represent the views of the Association," seems somewhat futile since very few distinct points of view are expressed. This latter omission, though regrettable, was perhaps deliberate and is understandable.

FOSTER H. SHERWOOD

*University of California at Los Angeles*

*General Theory of Law and State.* By Hans Kelsen. Translated by Anders Wedberg. Cambridge: Harvard University Press (Twentieth Century Legal Philosophy Series: Vol. I); 1945. Pp. xxxiii, 516. Appendix. Index. \$6.00.

Kelsen's *General Theory of Law and State* (appearing precisely twenty years after his *Allgemeine Staatslehre*) represents a reformulation of the author's well-known Pure Theory of Law—an enriched reformulation that should not fail to revitalize the interest in the basic problems of law and state.

Such a revitalization is urgently needed since, in the words of the "General Introduction" to the "Twentieth Century Legal Philosophy Series" (p. viii), "The current movements in politics and economics have raised innumerable problems which, just as in the formative era of the Republic, require for their solution the sort of knowledge and skills that transcend specialization and technical proficiency." Kelsen's "General Theory" certainly transcends many limitations of traditional juristic specialization, and offers at the same time a unique opportunity for developing a substantially widened legal and political horizon.

The scope of the work is truly universal. It never loses itself in vague generalities or in unconnected fragments of thoughts. On the contrary, precision in the formulation of details and rigorous system are characteristic features of the exposition: only a mind fully concentrated upon that logical structure can possibly follow Kelsen's penetrating analysis. Such a mind

will not shrink from the effort necessary for acquainting itself with "nomostatics" and "nomodynamics"—that is, with the pure theory of law in its more general aspects, and will then pass over to the theory of the state which ends up with a carefully worked out theory of international law. For a mind which proves capable of following through up to this point, a rewarding surprise is waiting at the end of the work: an appendix containing a philosophical contemplation on the "Pure Theory of Law." That appendix characteristically bears the title: "Natural Law Doctrine and Legal Positivism," and enables the reader to look back to the "General Theory" from a standpoint of higher philosophical generalities.

Kelsen's "General Theory" appears then to be a vast scientific edifice comprising strict expositions of fundamental juristic concepts (the concept of law, of the legal person, and of the legal system), methodological considerations (particularly on the relation of legal theory to ethics and to sociology), and the development of a theory of the state based on the fundamental concepts introduced. In order to grasp the meaning and the weight of so grandiosean undertaking it is necessary to realize two things: its intention and its theoretical procedure. About both the "General Theory" expresses itself clearly. It aims at a theory of positive law, of man-made law—not at a theory of justice. It proceeds in that endeavor through a logical analysis of the claim for legal validity made by efficacious political orders. That claim is an undeniable historical fact, and so is its acknowledgment by actual juristic thinking. The problem, however, necessarily arises: "Under what conditions does this claimed legitimacy hold good?" Having formulated this crucial problem and having shown that its solution requires a normative (not an historical, psychological, or sociological) answer is the central methodological achievement of the Pure Theory of Law. This methodological achievement directly leads to the central concept of the whole theory: to the concept of a "basic norm," that is, of a norm which bestows validity upon efficacious political orders, which thus "in a certain sense means the transformation of power into law" (p. 437). The basic norm of law is assumed by Kelsen to be a norm providing for "sanctions" for "delicts" committed. Consequently the science of law becomes a construction of legal systems as normative systems in sanction form. This construction is undoubtedly in two respects theoretically very superior: it does not idealize given legal systems as just orders, and it has to this extent an anti-ideological character. But it also does not press legal systems, as does realistic jurisprudence, into a preconceived naturalistic scheme which is incompatible with its normative contents. The demonstration of that incompatibility and, in general, the analysis of contemporary sociology of law, belong to Kelsen's most brilliant critical achievements.

But the Pure Theory of Law aims at more than critical superiority; it aims at positive results. This positive aim of the theory has in turn two aspects: a technical and a philosophical. It is a highly important technical task to

discuss concrete legal doctrines of Kelsen's theory, for example his detailed doctrine of legal persons, his theory of constitutional law, or his interpretation of war as a sanction of international law. However, such discussions warrant a number of special essays which as expressions of a revitalized interest in legal theory, should soon be forthcoming.

The philosophical aspect of the "General Theory" could likewise be dealt with exhaustively only in the form of a detailed analysis. But it is possible to indicate at least the idea of such an analysis. It was the privilege of this reviewer to follow Kelsen's memorable courses on the theory of law and the state at the University of Vienna, shortly before the appearance of the *Allgemeine Staatslehre*. Since that impressive experience, and after having considered the theory as a whole repeatedly in its philosophical, sociological, and juristic aspects, this impression stands out clearly: the Pure Theory of Law has definitively established the normative character of legal theory (superseding thereby the nineteenth century psycho-sociological doctrines of Jellinek and Austin). This achievement marks its lasting place in the intellectual history of the twentieth century, its contribution to the struggle against naturalistic science.

The theory also has its definite limitations. Neither its ethical relativism nor its delineation of legal theory and sociology (to be distinguished from sociologism) has been established, nor are they tenable. But the systematic development of Kelsen's relativistic norm-monism retains a fundamental importance. It can be shown that this radical standpoint is logically connected with an assumption which the Pure Theory of Law has in common with juristic tradition namely the assumption of the validity of positive law independent from its fulfillment of conditions of justice. This assumption, in consequence of which the will of the lawgiver replaces justice, is equivalent to the acknowledgment of legal authoritarianism (understood in a general sense). Legal authoritarianism once taken over, Kelsen incontrovertibly argues (supported by Neo-Kartian philosophy) that legal institutions are neither bound by principles of justice nor can they be interpreted as a part of social nature. But this consequence holds only as long as legal authoritarianism is maintained. It will be the final triumph of the spirit of science that lives in the Pure Theory of Law when the paradox of legal authoritarianism (the "legal" victims of which became several independent theoreticians of law in different parts of the world during the last twenty years) will be eliminated and will give way to the logic of legal objectivity. Then the lasting elements of Kelsen's formal theory of law will join forces with an analysis of its contents based on a rational theory of justice and on sociological realism. Then and only then will legal science make its full power available to man in his struggle for the mastery of his social life.

JULIUS KRAFT

*Hunter College*

*Papers Relating to the Foreign Relations of the United States. The Paris Peace Conference, 1919. Volume XI.* Published by the Department of State. Washington: Government Printing Office; 1945. Fp. xxix, 736. Index. \$2.00.

We welcome the appearance of the eleventh volume of the series of Foreign Relations relating to the Paris Peace Conference of 1919. Although more than a quarter of a century has passed since the events occurred to which its contents relate, the volume has a paradoxical timeliness. History seems to have completed a circuit of European problems relating to territory, populations, and finance. Thus on June 3, 1919, President Wilson was discussing with the American commissioners and the technical staff the same problem of the occupation of the Rhineland and the Saar which again confronts the makers of peace (pp. 211-222). The President remarked: "The great problem of the moment is the problem of agreement, because the most fatal thing that could happen, I should say, in the world, would be that sharp lines of division should be drawn among the Allied and Associated Powers." Then, as now, a lack of agreement "makes a problem like the problem of occupation look almost insoluble, because the British are at one extreme and the French refusal to move is at the opposite extreme" (p. 219).

The complaints of newspaper correspondents that they were unable to obtain information of the deliberations of the Conference (p. 491) has a familiar ring. So also has the complaint of duly accredited American officials that they were unable to obtain visas from our allies for the conduct of necessary business; but the protests then were addressed to the French instead of to the Russians. Secretary Lansing was quite vigorous in emphasizing that this constituted "an unnecessary hampering of the official business of the American Peace Commission" (p. 37).

The problems of the Tyrol, of Fiume, of Roumania, of Palestine, were all upon the agenda of the proceedings covered by this volume. President Wilson looked hopefully forward to the League of Nations as a solvent. The largest part of the volume consists of minutes of meetings of the American commissioners; also included are the minutes of the steering committee and other papers relating to the composition, organization, and activities of the American Delegation. While many of these papers are important, many others are so trivial and ephemeral as to suggest that a brief notation would have sufficed. What possible interest is subserved by incorporating memoranda as to whether a certain group of attachés should enter by the front or by the side door of the Hotel Crillon (p. 484) or that an increased allowance for expenses has been made or refused to some agent in a foreign capital? On the other hand, the compilers of the volume are to be commended for having included some important documents from sources outside the archive of the mission, such as letters and memoranda from Secretary Lansing's "The Peace Negotiations." Some of the proceedings are not reported. For example, the minutes of the meeting of the Commissioners of February 14, 1919, are missing from the Department's files (p. 38). This is unfortunate,



as it was on that historic day that the plenary session of the Conference was held at which President Wilson presented for the first time the draft of the Covenant of the League of Nations. The minutes of the plenary session of June 28, 1919, held at Versailles, at which the Treaty of Peace with Germany was signed, are also not to be found in this volume, having been reported in Volume III of the series. However, a long memorandum by Secretary Lansing is substituted in which he gives a graphic account of "this great day" (pp. 597-604). The same night President Wilson embarked for his return home.

ARTHUR K. KUHN

*Of the Board of Editors*

*The Second Chance: America and the Peace.* Edited by John B. Whitton. Princeton: Princeton University Press; 1944. Pp vi, 235. \$2.50.

This book is the result of discussions within the Princeton Group for the Study of Post-War International Problems, one of the groups of the Universities Committee organized by Ralph Barton Perry. It is written by certain members of the group under the editorship of Professor Whitton, who contributes an Introduction and one chapter. It appeared after the Dumbarton Oaks Proposals, but before the San Francisco Conference, and reveals a considerable amount of political foresight.

Thus, Gordon A. Craig, who contributes the first chapter on "Foreign Policy Retrospect," notes that the American people favor international collaboration as an abstraction but have yet to view it in terms of actual cost (p. 20). As alternatives to international organization he mentions and discards isolation and Anglo-American combination but, surprisingly, does not mention American regionalism.

Gerhart Niemeyer, whose topic is "World Order and the Great Powers," asserts that responsibility for world order rests squarely upon these Powers. He thinks that conditions are not so favorable to power politics nowadays. Unless we plan a superstate, which we do not, an international organization should not attempt to use force to coerce its members; it should concentrate upon means of lessening international friction, rather than wait till the stage of violence has been reached, when it is too late. Professor Whitton, in the following chapter, "Institutions of World Order," disagrees with this analysis. He quotes Marshal Smuts that "peace not backed by power remains a dream," and argues that forcible sanctions are practicable and do not mean war. He names six basic principles for the new order: joint and several responsibility; executive leadership; power; control of power; limitation of external sovereignty; monopoly of force in the collectivity. In addition to the usual organs he suggests a third chamber, more responsible to world opinion, and a peace center, responsible for public education.

Professor Frank D. Graham, in a chapter entitled "Economics and Peace," concludes that one can not get peace through liberal economic policies, and that peace is necessary in order to have such policies. Among the conditions

necessary to peace are full employment, access to raw materials, and control of monopolies. He discounts protective tariffs, and in general the lack of economic coöperation, as causes of war. Controls over trade lead to aggression, since countries of restricted trade seek sovereignty over areas; certain controls are necessary, however, to prevent aggression. We need to see to it that there is no economic reason for coveting a neighbor's territory.

Professor E. S. Corwin includes a revision of Chapter III of his book on *The Constitution and World Organization*, dealing with "The Senate and the Peace." He shows how the original function of the Senate as an advisory council with regard to treaties was absorbed into its legislative procedures, and holds this, rather than the two-thirds rule, responsible for the bad record of the Senate. He thinks that the problem can be handled without amendment by executive agreements, which are as binding as treaties; or by congressional action evading the two-thirds rule. He thinks that the role of the Senate in the conduct of foreign relations is a diminishing one. An interesting "Note on Sovereignty" is added.

Jerome S. Bruner, whose contribution is entitled "Public Opinion and the Peace," says that public opinion rarely has a direct effect upon foreign policy; that it is effective only to the extent that it is organized; that the interest of the individual citizen is measured chiefly by the anticipated effect upon him personally, and that therefore his interest in foreign affairs is not great; he is not primarily guided by abstract ideologies; his chief aim is the prevention of future war; and belief in sovereignty is no obstacle to advance. These views are supported by reference to public opinion polls.

The final chapter, "American Ideals and Peace," is written by the Professor of Religious Thought. Professor Thomas justly regards as a disturbing sign of the times the tendency of publicists to treat foreign policy in a moral vacuum. American democratic thought, he asserts, has always believed in a moral law; and in a national mission to serve as a beacon light for freedom. Their former belief in progress, based upon scientific solution of all problems as sufficient (he would doubtless have added the atomic bomb by now), has been much weakened; and realization of the depths of evil in human nature has weakened our hopes for democracy. But, says Professor Thomas, we are learning that progress is possible, though at a higher cost than we had realized. We must renounce our national irresponsibility and work through an international organization based upon force and justice to carry out the national mission, to be a beacon light for freedom. National interest and international altruism are not conflicting, but complementary.

Acceptance of the United Nations Charter has not solved the problem which the American people have to face, and this book is still of current value. Its various articles are of a uniformly high level, and constitute a systematic whole.

CLYDE EAGLETON

*Of the Board of Editors*

*Vers une Nouvelle Société des Nations.* By Maurice Bourquin. Neuchâtel, Suisse: Editions de la Baconnière, 1945. Fp. 282. Annexes. Table Analytique. Fr. 7.50.

A strong case could be made out for the proposition that the great tragedy of the Geneva League lay in the fact that, although there was a widespread realization, as early as 1935, or even earlier, among most if not all of the governments supporting that institution, of the weaknesses and defects of the system, action could not be taken, or taken rapidly enough, to save the situation. The present volume comes from the pen of one who, by his position at the head of the action for reform of the League in the years 1936-1939, and by his personal qualifications and intense study of the problem, has been able to appreciate more acutely than any other individual perhaps, the reasons why, apart from partisan politics, it was necessary to turn from the old League toward a new.

The volume justifies the anticipation prompted by its authorship. It is a penetrating and meticulous and at the same time a very wise analysis and appraisal of both the old system and the proposals of Dumbarton Oaks and Charter of San Francisco. It deals skillfully with the question of Great Powers and the smaller powers, Security, Settlement of Disputes, and Economic and Social action, though not quite in that order. It canvasses all aspects of the situation but draws clear and definite conclusions. And it never loses sight of the general social—that is, international—welfare as a standard by which to measure all proposals in this field, a basic but all too frequently betrayed ideal.

If one were to express doubts he would have to descend to a level perilously close to cynicism. Here are acute perception, sound judgment, and a maximum of good will applied to the problems of international politics and world organization. What chances are there that the Great Powers, or the smaller states either, will wish to be guided by such values? One is tempted to object that few governments wish to be clear-sighted, or wise, or socially loyal or are capable of such behavior. As the author himself recognizes, it will be the *climat* of world conditions which will determine how the new institutions work rather than the wisdom of their principles. And the weather is very bad. M. Bourquin has done all that the devoted scholar can do, however, to save the nations from their folly.

PITMAN B. POTTER

*Managing Editor*

*El Pensamiento Internacional de Alberdi.* By Isidoro Ruiz Moreno, Jr. Buenos Aires: Impresa de la Universidad; 1945. Pp. 137.

The work of the great Argentinian thinker Alberdi, apostle of liberty, prosperity, education, and civilization, has been studied from many angles. The book under review sets itself the task of studying Alberdi's ideas on international law and international politics, problems with which he deals in many of his writings.

He is strongly Argentinian and emphatically wishes a strong and prosperous Argentina. The road to this development must be sought by combating ignorance by education, poverty and misery by work, industry, and trade, the emptiness of the country by European immigration: *gobernar es poblar*.

Some of his attitudes toward problems of international law are erroneous. But in many respects he is an early forerunner of modern ideas: his underlining of geopolitical considerations, his wish for a continentalization of the Monroe Doctrine, his strong emphasis on international rights of the individual, his stand in favor of collective intervention for reasons of humanity.

Many of his ideas are typically Argentinian. One such idea was first laid down by Mariano Moreno: insistence on the balance of power in South America. Hence his enmity against Brazil, his counsel to foster a subdivision of Brazil, his ideas of the restoration of the Viceroyalty of la Plata by the incorporation of Paraguay. The creation of an independent Bolivia he considers an error. Hence also his antipathy against the unilateral Monroe Doctrine, "political expression of North American egotism" and against the United States, in which he sees a danger, as in Brazil. Hence finally his insistence on the strongest ties with Europe, through immigration and trade, his admiration for Europe's culture. In the same line lies his opposition to Spanish-Americanism of the Bolívar type, to Pan-American Congresses like that at Panama in 1826.

He stands for sovereignty and non-intervention. He writes in favor of regionalism and is the first to voice the idea of an "American International Law." He is for Spanish-American coöperation. Opposed to Bolívar's ideas of an anti-European alliance, he develops in his writing of 1844 the program of a "practical Pan-Americanism," to foster peace and inter-American coöperation in all non-political fields, a program nearly identical with that of the First International Conference of American States of 1889. Freedom of trade is one of his favorite ideas. Only his idea of liberty ranks higher.

He is—last but not least—a universalist, a pacifist who most strongly condemns war. Even the just war of the natural law doctrine is reduced to the case of defense against an actual military attack from outside. He puts great emphasis on neutrality, for the neutrals "hold the moral sovereignty of the world." He raises the issue of treating those who instigate wars as criminals. He stands for an international court of justice and for general disarmament.

His universalism rests on a Catholic basis; with Suárez he stands for the unity of mankind, divided into nations. Sovereignty of the single state can only be relative; absolute sovereignty is an absurdity. He locates ultimate sovereignty in the international community.

While being opposed to intervention as a negation of a state's independence, he proclaims the right and necessity of collective intervention in Amer-

ica to liberate a country from its own despotic regime. The man who lived in exile while the tyrant Rosas ruled his country writes: "Every internal tyranny legitimates by exception a liberating intervention. As political slavery is only a variety of the confiscation of man's liberty, the day will come in which internal despotism will be, according to international law, a cause of intervention in favor of the people, victim of the tyranny of criminal governments."

JOSEF L. KUNZ

*Of the Board of Editors*

*Soviet Far Eastern Policy, 1931-1945.* By Harriet L. Moore. Princeton: Princeton University Press; 1945. Pp. xv, 235. Appendices. Supplement. Index. \$2.50.

This volume, sponsored by the Institute of Pacific Relations, and written by the Research Director of the American Russian Institute, is a survey of the policy of the U.S.S.R. toward Far Eastern affairs as revealed by official documents and statements. The texts of pertinent international treaties and agreements from the Treaty of Portsmouth to the Sino-Soviet agreements of August, 1945, appear in full in an appendix, along with English translations of a number of editorials from *Pravda* and *Izvestiya*. Additional source material quoted includes statements made at sessions of the League of Nations, diplomatic notes, and appropriate trade statistics. The appendices, in fact, constitute nearly half of the book.

The interpretative text which precedes the compilation of documents is divided into six chapters, one introductory, and the other five covering the Manchurian crisis, the sale of the Chinese Eastern Railway, Soviet-Japanese frontier and fishery disputes and agreements, the period 1937-1939, and World War II. Due recognition is given to the impact of Soviet domestic affairs on Far Eastern policy, as well as to international developments in Europe, and to Soviet-American relations. Stress is laid almost entirely upon Soviet policy as announced by the Soviet Government, and as such the commentary has the customary flavor of such official statements. It may be observed that insufficient attention is devoted to the ideology involved; more material selected from the Communist Party and Communist International press would be enlightening, for Soviet foreign policy is by no means confined to actions of the Government alone.

It is apparent that Miss Moore's work is no more than it claims to be. It is certainly not an analytical and critical approach to the subject, nor does it adduce any factual material hitherto unavailable. It is most timely, however, and would be highly useful as an exposition of the official Soviet view of Far Eastern affairs if it did not suffer so markedly from undue compression. The reader is immediately plunged into the complexities of the Far Eastern situation in 1931, and is then rushed along from

treaty to treaty and crisis to crisis without sufficient orientation. The author seems intent on crowding as many factual and informational references as possible into the allotted space, and the result is not conducive to clarity, nor does it give the impression of full comprehension. Increased background material presented in coherent form, articulate explanation of the material actually included, and some attention to style would doubtless produce a work which would be informative. In its present form it is confusing to the general reader, inadequate for the specialist. Admittedly, expansion of explanatory treatment would afford greater opportunity for the expression of opinion; perhaps the intention has been to avoid this difficulty.

WILLIS C. ARMSTRONG

Washington, D. C.

### NOTES

*Vergleichende Rechtslehre.* By Dr. Adolf F. Schnitzer. Basel: Verlag für Recht und Gesellschaft; 1945. Pp. xii, 497. Index. The author of this book is a Swiss jurist and is known for his *Handbuch des Internationalen Privatrechts* (1937). He acknowledges his obligations to Professor Edouard Lambert of Lyons, to whom the book is dedicated. It is a scholarly analysis of the historical and theoretical bases of the jurisprudence of the western world. The subject matter does not lie directly within the field of international law but many of the chapters are instructive as bearing upon the origins of certain principles of international law which have been developed from Roman concepts and later applied in various European countries after the period of the reception. One example is furnished by the *clausula rebus sic stantibus*, which the author traces to the discussions of the post-glossators. He compares the various principles which have been relied upon to sustain its application within the law of contracts and concludes that it is applicable only if permitted by a reasonable interpretation of the original contract. He wisely emphasizes the danger of undermining the generally binding character of agreements. The work is scholarly and objective throughout.

ARTHUR K. KUHN

Of the Board of Editors

*Director's Report to the Twenty-Seventh Session of the International Labor Conference.* Montreal: International Labor Office; 1945. Pp. 163. The Report made to the twenty-seventh session of the International Labor Conference by the Director of the International Labor Office is a very interesting document. Chapters II and III (pp. 7-108) summarize as succinctly as could be done the economic situation of the world and the current economic and social trends of reconstruction. Ch. IV discusses the current activities and problems of the Office, leaving to Report IV (1) the problem of its relationship to other bodies, such as the UNO. It is noted that the Constitution of the Organization is being amended to eliminate relationships with the League of Nations; this in the hope that it would then be easier to secure the collaboration of the U.S.S.R. Applications for membership are beginning to come in—Iceland, Guatemala, Nicaragua. Relationships between the ILO and the World Trade Union Federation are cordial. Among the new problems of remodeling are those of representation and voting, national tripartite committees and conferences, develop-

ment of the role of Recommendations and Conventions, and regional activities. The Report furnishes further evidence of the unique value and usefulness of the ILO.

CLYDE EAGLETON

*New York University*

*The Central Organization for a Durable Peace (1915-1918)*. By Madeleine Z. Doty. Preface by Hans Wehberg. Ambilly: Imprimerie Franco-Suisse, 1945. Pp. iv, 180. We are here provided with another case study in the evolution of international institutions comparable with Stoner's biography of Levinson.\* And a very detailed and searching study it is, made by a mature and experienced participant in the activity in question and many other reform movements, national and international. It is a valuable contribution to the literature of peace and international organization.

The "Central Organization" was established in 1915 at The Hague and attempted to work out a plan for durable peace after World War I, relying largely on the principles of the Hague Conferences of 1899 and 1907. In actual fact the growing movement for a League of Nations cut across this line of action and preempted all attention and support after 1918.

One does not need to agree with all of the interpretations offered to see that the position of private groups trying to promote peace among the nations was at least as difficult in 1915-1918 as it is today, or more so. Also that partisan political considerations could influence the choice of agencies to be sponsored at Paris as well as at San Francisco (the parallel here is indeed fantastically close). Dr. Doty may be pardoned for her warm presentation of the record of the Central Organization, in view of her intimate share in its work and her deep devotion to peace. All students of these problems will be grateful for her study of the relations among some of the conflicting elements of the peace movement.

PITMAN B. POTTER

*Managing Editor*

*A Review of Allied Military Government and of the Allied Commission in Italy*. United States Army, Public Relations Branch, Allied Commission. Rome; 1945. Pp. 127. Maps. Illustrations. Index. This small booklet provides a handy and somewhat detailed guide to the development of Allied Military Government in Italy over a period of almost two years, from the time of the invasion of Sicily on July 10, 1943, to the establishment, exactly four months later, of the Allied Control Commission (now Allied Commission) and its course of action down to the German surrender in Italy, on May 2, 1945. Functionally, the work of the Allied Commission has been five-fold: 1) to organize direct military government in the wake of the combat troops and to insure the security of their lines of communication; 2) to render all practicable aid to the civilian population in the rear of the fighting armies and to allay disease and unrest; 3) to prepare for the return of the governmental administration and economy to the Italian Government and to effectuate this reversion; 4) to supervise the execution of the terms of the armistice; and 5) to act as the spokesman of the United Nations to the Italian Government. The first three phases were progressive, with "continuity of policy maintained from first to last; the self-same objectives are, as it were, handled by different instrumentalities at successive stages under one

\* Reviewed in this JOURNAL, Vol. 33 (1944), p. 520.

general guidance" (p. 6). The last two roles of the Allied Commission involved its active interest in the formation of a stable Italian Government, as democratic as possible pending free elections, and "advisory liaison" work.

The problems faced by AMG in its various phases ranged from urgent need for food, sanitation, transportation, power, currency, police protection, free newspapers, etc., to the protection of fine arts, monuments and archives, and the preparation and publication of soldiers' guides to Rome and Florence. Both international and domestic political developments added complications, as did, incidentally, the most violent eruption of Vesuvius in forty years ("Even German planes came over to see the sight"). Italian "cobelligerency" added new features and problems, as did a shepherds' vendetta in Sardinia resulting in the wasteful slaughter of 800 sheep, and a score of other events.

The book avoids self-praise and aims at providing an objective narrative statement of the tremendous problems facing AMG. At the same time it avoids any critical appraisal of army methods and measures preceding the invasion (such as the training, or total absence of it, of prospective AMG officers) or during the occupation (for instance, frequent turnover in AMG personnel with a consequent lack of military government staffs which were familiar with local problems and Italian personnel or the appointment of untrained, unsuited or unwilling AMG personnel). An effective appraisal of AMG activities still has to be written. In the meantime, this booklet is valuable because of its rich factual data, including several clarifying maps and a chart. The pictures of AMG activities and problems and the index are helpful.

JOHN BROWN MASON

Washington, D. C.

*The Exploitation of Foreign Labour by Germany.* By J. H. E. Fried. Montreal: International Labor Office; 1945. Pp. vi, 236. Appendixes. \$2.00. The International Labor Office, ever mindful of the problem of exploited labor, here presents in a compact volume a thought-provoking study of the measures adopted by National Socialist Germany to increase its labor supply during World War II. Not only were millions of foreign workers and prisoners of war forced to work within Germany itself, but other millions were compelled to work for the German war effort in their own countries or in other German-occupied territories. Every minute detail of this comprehensive scheme of European-wide labor mobilization "was shrewdly planned and ruthlessly carried out" (p. 244).

This well-written report, in its sixteen chapters, answers many important questions such as that of recruitment and distribution of workers—pointing out, for example, that German officials often had to rely on their own discretion in deciding what methods to use in filling their "quotas" of foreign manpower for transportation to Germany (p. 30). Labor contracts usually contained a clause limiting the length of employment. Actually, however, no foreign worker was allowed to leave Germany or his German place of residence without the written consent of the labor office and the police which enabled the authorities to force a worker to stay on indefinitely (p. 89). Approximately one-third of the study is devoted to a discussion of the living conditions, wages, conditions of work, and provisions for dependents and other social benefits. The concluding chapter deals with the consequences of the system and is followed by a useful series of appendices.



The study is recommended as an important contribution to an intelligent understanding of the systematic use of foreign labor by the German war machine in its attempt to enslave the world. Direct German sources have been used wherever possible and have been supplemented by information supplied to the ILO by the liberated Governments of Belgium, France, and Luxembourg. In publishing this volume the ILO has performed another worth-while service.

WILLIAM LONSDALE TAYLER

Washington, D. C.

*Chang Hsi and the Treaty of Nanking, 1842.* By Ssu-yu Teng. Chicago: University of Chicago Press; 1944. Pp. xii, 191. Appendixes. Index. \$4.00. Important as the Treaty of Nanking undoubtedly was in inaugurating the foreign treaty regime in China which lasted for fully one hundred years, it is a curious fact that in no treatises of Far Eastern history can there be found an adequate discussion of the negotiations which led finally to the signature of the epoch-making agreement. For this reason the work under review is of special interest inasmuch as it gives a vivid account of the diplomatic developments as recorded in the diary of a minor official of the Manchu government whom the vicissitudes of fate brought to the center of the stage to play a prominent role in the hitherto unfamiliar diplomatic game.

The story is a strange one but it must be remembered that the foreign contacts of China prior to the 19th century were restricted to the relationship between the suzerain and the tributary. As diplomacy between sovereign states never received recognition in the juridical system of the Celestial Empire there were few indeed in the mandarinat who had any clear understanding of the fundamental precepts of the law of nations and were capable of meeting the new situation which had developed. Negotiations with foreigners especially with a view to terminating hostilities were looked upon as at best an adventure fraught with unpredictable consequences and, alas, scholars nurtured in the Confucian code of ethics were not taught to crave adventures. It was this psychological barrier between the East and the West which rendered the negotiations of the nineteenth century so haphazard an undertaking.

The author of the diary was a certain Chang Hsi who was a follower or in fact a servant of I-li-pu, the imperial commissioner stationed at Nanking. In spite of his humble origin his talents and sagacity must have impressed his master so much that he was entrusted with the delicate task of serving as an intermediary and spokesman of the Manchu authorities in entering into negotiations with the British. Chang's assignment was by no means an easy one for his opponents included such men as Henry Pottinger and Robert Morrison, the latter of whom did not hesitate to utilize military power as an effective instrument to gain a point. The British, however, respected him for his resolution and courage and he was able to achieve considerable success in the course of the negotiation. He persuaded the invading army to consent to evacuate Tanghai by offering the release of British captives; he succeeded in reducing the indemnity by nine million dollars. On account of intrigue and fratricidal strife in the ranks of the officialdom, however, his participation in the peace discussions was soon brought to an abrupt termination. This is to be regretted as it prevented Chang from recording the development of the conversations regarding such vital issues as opium, a *raison d'être* of the conflict, the cession of Hongkong, and the implications of the scheduled tariff.

The original text of the diary was published in Peiping in 1936 from a manuscript copy the authenticity of which seems to have been established beyond doubt. The reviewer has had an opportunity of comparing the present translation with the Chinese text and can state without qualification that it has been done with meticulous care, precision, and lucidity. The annotations will prove helpful to readers who are not too familiar with the diplomatic history of the Far East. The work is one of great scholarly value and can be highly recommended to anyone who seeks to understand not only the obscure story of the first treaty settlement between China and the West but also the peculiar state of mind of a bureaucracy whose profound ignorance and appalling incompetence contributed much to the formation of the system of unequal treaties. This is a revealing book.

POELIU DAI

Washington, D. C.

*The Pan-American Yearbook, 1945.* Compiled by Pan-American Associates. New York: Pan-American Associates; 1945. Pp. xxxiv, 829. Maps. Indexes. \$5.00. This *Yearbook* is divided into three parts. The first contains brief accounts of the historical development of the American Continent, and of specific topics such as finance, labor, trade, implementation of the Good Neighbor policy, and the development of legal and political techniques in meeting wartime changes. Part two comprises chapters ranging in length from twelve to fifty pages on each country in the Hemisphere. Included therein are sections on Canada and the territories of European nations such as the Guianas and Caribbean islands. Part three devotes three hundred pages to "Who's Who in Inter-American Trade," with some twenty five thousand names and addresses of important business houses listed alphabetically by industry (such as aviation, drugs, textiles) under each country. This data is of particular value to importers, exporters, shipping, and commercial people.

The stated purpose of the *Yearbook* is "to provide for the first time . . . a ready reference volume of useful and reliable current information. . . ." The Associates modestly state—and in this the reviewer heartily agrees—that this first edition of what is to be an annual publication leaves much room for improvement. There are serious inaccuracies in statements of what purports to be factual background, in addition to a sprinkling of errors that arise out of loose proofreading of dates, places, names, and titles. The list of Inter-American organizations needs amplification and revision. Several important groups are omitted while others, such as the Uruguay Information Bureau, are unilateral, rather than Inter-American. One organization listed which induces curiosity is the Bidou Club of the World.

The volume carries a number of advertisements by banking, shipping, aviation, insurance, and trading firms. Some of them appear, strangely, on the backs of the frequent maps. Although the general reader would not be attracted to the *Yearbook*, it is a welcome addition to the reference shelf. For business, school, or library, it is both more recent and more comprehensive than other compendia such as the "Commercial Traveller's Guide to Latin America" published by the United States Bureau of Foreign and Domestic Commerce, or the "New World Guides to Central and South America" issued by Duell, Sloan, and Pearce, under the editorship of E. P. Hanson, in 1943.

WILLARD F. BARBER

Washington, D. C.

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WILEUR S. FINCH

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## CHINA, SOVIET UNION

### TREATY OF FRIENDSHIP AND ALLIANCE\*

Aug. 14, 1945

The President of the National Government of the Republic of China, and the Presidium of the Supreme Soviet of the U.S.S.R.,

Desirous of strengthening the friendly relations that have always existed between China and the U.S.S.R., through an alliance and good neighborly post-war collaboration,

Determined to assist each other in the struggle against aggression on the part of enemies of the United Nations in this world war, and to collaborate in the common war against Japan until her unconditional surrender,

Expressing their unswerving aspiration to cooperate in the cause of maintaining peace and security for the benefit of the peoples of both countries and of all the peace-loving nations,

Acting upon the principles enunciated in the joint declaration of the United Nations of January 1, 1942, in the Four Power Declaration signed in Moscow on October 30, 1943, and in the Charter of the International Organization of the United Nations.

Have decided to conclude the present Treaty to this effect and appointed as their Plenipotentiaries:

The President of the National Government of the Republic of China;

His Excellency Dr. Wang Shih-chieh, Minister for Foreign Affairs of the Republic of China,

\* *Department of State Bulletin*, Vol. XIV, No. 345 (Feb. 10, 1946), p. 201. The following information is added in the *Bulletin*:

The Embassy at Chungking transmitted to the Department of State, with a despatch dated Dec. 17, 1945, the English translation of the accompanying treaty and agreements between the Governments of China and the Union of Soviet Socialist Republics signed at Moscow Aug. 14, 1945.

The following minutes of the meeting of July 11, 1945, in Moscow were received from the American Embassy at Chungking by telegram:

#### MINUTES.

At the fifth meeting held on July 11, 1945 between Generalissimo Stalin and Dr. T. V. Soong the question of the withdrawal of Soviet troops from Chinese territory after the participation by the U.S.S.R. in the war against Japan was discussed.

Generalissimo Stalin would not like to have a clause in the agreement covering the entry of Soviet troops into Manchuria which provides for the withdrawal of Soviet troops within three months after the defeat of Japan. However, he said that after the capitulation of Japan the Soviet troops would commence to withdraw within three weeks.

Dr. Soong asked how long it would take to complete the withdrawal. Generalissimo Stalin said he thought the withdrawal could be completed in not more than two months.

Dr. Soong further asked when [whether?] the withdrawal would be definitely completed within three months. Generalissimo Stalin said three months would be the maximum for the completion of the withdrawal. Moscow, August 14, 1945.



The Presidium of the Supreme Soviet of the U.S.S.R.;

His Excellency Mr. V. M. Molotov, the People's Commissar of Foreign Affairs of the U.S.S.R.,

Who, after exchanging their Full Powers, found in good and due form, have agreed as follows:

#### *Article I*

The High Contracting Parties undertake in association with the other United Nations to wage war against Japan until final victory is won. The High Contracting Parties undertake mutually to render to one another all necessary military and other assistance and support in this war.

#### *Article II*

The High Contracting Parties undertake not to enter into separate negotiations with Japan and not to conclude, without mutual consent, any armistice or peace treaty either with the present Japanese Government or with any other government or authority set up in Japan which do not renounce all aggressive intentions.

#### *Article III*

The High Contracting Parties undertake after the termination of the war against Japan to take jointly all measures in their power to render impossible a repetition of aggression and violation of the peace by Japan.

In the event of one of the High Contracting Parties becoming involved in hostilities with Japan in consequence of an attack by the latter against the said Contracting Party, the other High Contracting Party shall at once give to the Contracting Party so involved in hostilities all the military and other support and assistance with the means in its power.

This article shall remain in force until such time as the organization "The United Nations" may on request of the two High Contracting Parties be charged with the responsibility for preventing further aggression by Japan.

#### *Article IV*

Each High Contracting Party undertakes not to conclude any alliance and not to take any part in any coalition directed against the other High Contracting Party.

#### *Article V*

The High Contracting Parties, having regard to the interests of the security and economic development of each of them, agree to work together in close and friendly collaboration after the coming of peace and to act according to the principles of mutual respect for their sovereignty and territorial integrity and of non-interference in the internal affairs of the other contracting party.

*Article VI*

The High Contracting Parties agree to render each other every possible economic assistance in the post-war period with a view to facilitating and accelerating reconstruction in both countries and to contributing to the cause of world prosperity.

*Article VII*

Nothing in this treaty shall be so construed as may affect the rights or obligations of the High Contracting Parties as members of the organization "The United Nations."

*Article VIII*

The present Treaty shall be ratified in the shortest possible time. The exchange of the instruments of ratification shall take place as soon as possible in Chungking.

The Treaty comes into force immediately upon its ratification and shall remain in force for a term of thirty years.

If neither of the High Contracting Parties has given notice, a year before the expiration of the term, of its desire to terminate the Treaty, it shall remain valid for an unlimited time, each of the High Contracting Parties being able to terminate its operation by giving notice to that effect one year in advance.

In faith whereof the Plenipotentiaries have signed the present Treaty and affixed their seals to it.

Done in Moscow, the Fourteenth of August, 1945, corresponding to the Fourteenth day of the Eighth month of the Thirty-fourth year of the Chinese Republic, in two copies, each one in the Russian and Chinese languages, both texts being equally authoritative.

THE PLENIPOTENTIARY OF THE SUPREME SOVIET OF THE U.S.S.R.

THE PLENIPOTENTIARY OF THE PRESIDENT OF THE NATIONAL GOVERNMENT OF THE REPUBLIC OF CHINA.

## EXCHANGE OF NOTES RELATING TO THE TREATY OF FRIENDSHIP AND ALLIANCE

*August 14, 1945.*

YOUR EXCELLENCY,

With reference to the Treaty of Friendship and Alliance signed today between the Republic of China and the U.S.S.R. I have the honor to put on record the understanding between the High Contracting Parties as follows:

1. In accordance with the spirit of the aforementioned Treaty, and in order to put into effect its aims and purposes, the Government of the U.S.S.R. agrees to render to China moral support and aid in military supplies and other material resources, such support and aid to be entirely given to the National Government as the central government of China.

2. In the course of conversations regarding Dairen and Port Arthur and

regarding the joint operation of the Chinese Changchun Railway, the Government of the U.S.S.R. regarded the Three Eastern Provinces as part of China and reaffirmed its respect for China's full sovereignty over the Three Eastern Provinces and recognize their territorial and administrative integrity.

3. As for the recent developments in Sinkiang the Soviet Government confirms that, as stated in Article V of the Treaty of Friendship and Alliance, it has no intention of interfering in the internal affairs of China.

If Your Excellency will be so good as to confirm that the understanding is correct as set forth in the preceding paragraphs, the present note and Your Excellency's reply thereto will constitute a part of the aforementioned Treaty of Friendship and Alliance.

I take this opportunity to offer Your Excellency the assurances of my highest consideration.

(Signature) V. M. MOLOTOV

*August 14, 1945.*

YOUR EXCELLENCY:

I have the honour to acknowledge receipt of Your Excellency's Note of today's date reading as follows:

[Here follows the text of the above note from V. M. Molotov.]

I have the honour to confirm that the understanding is correct as set forth above.

I avail myself of this opportunity to offer to Your Excellency the assurance of my highest consideration.

(Signature) WANG SHIH-CHIEH

#### EXCHANGE OF NOTES ON OUTER MONGOLIA

*August 14, 1945.*

YOUR EXCELLENCY:

In view of the desire repeatedly expressed by the people of Outer Mongolia for their independence, the Chinese Government declares that after the defeat of Japan should a plebiscite of the Outer Mongolian people confirm this desire, the Chinese Government will recognize the independence of Outer Mongolia with the existing boundary as its boundary.

The above declaration will become binding upon the ratification of the Treaty of Friendship and Alliance between the Republic of China and the U.S.S.R. signed on August 14, 1945.

I avail myself of this opportunity to offer to Your Excellency the assurance of my highest consideration.

(Signature) WANG SHIH-CHIEH

*August 14, 1945.*

YOUR EXCELLENCY:

I have the honour to acknowledge receipt of Your Excellency's Note reading as follows:

[Here follows the text of the above note from Wang Shih-chieh.]

The Soviet Government has duly taken note of the above communication of the Government of the Chinese Republic and hereby expresses its satisfaction therewith, and it further states that the Soviet Government will respect

the political independence and territorial integrity of the People's Republic of Mongolia (Outer Mongolia).

I avail myself of this opportunity to offer to Your Excellency the assurance of my highest consideration.

(Signature) V. M. MOLOTOV

#### AGREEMENT CONCERNING DAIREN

In view of a Treaty of Friendship and Alliance having been concluded between the Republic of China and the U.S.S.R. and of the pledge by the latter that it will respect Chinese sovereignty in the control of all of Manchuria as an integral part of China; and with the object of ensuring that the U.S.S.R.'s interest in Dairen as a port of entry and exit for its goods shall be safeguarded, the Republic of China agrees:

1. To declare Dairen a free port open to the commerce and shipping of all nations.

2. The Chinese Government agrees to apportion in the mentioned port for lease to U.S.S.R. wharves and warehouses on the basis of separate agreement.

3. The Administration in Dairen shall belong to China.

The harbor-master and deputy harbor-master will be appointed by the Chinese Eastern Railway and South Manchurian Railway in agreement with the Mayor. The harbor-master shall be a Russian national, and the deputy harbor-master shall be a Chinese national.

4. In peace time Dairen is not included in the sphere of efficacy of the naval base regulations, determined by the Agreement on Port Arthur of August 14, 1945, and shall be subject to the military supervision or control established in this zone only in case of war against Japan.

5. Goods entering the free port from abroad for through transit to Soviet territory on the Chinese Eastern and South Manchurian Railways and goods coming from Soviet territory on the said railways into the free port for export shall be free from customs duties. Such goods shall be transported in sealed cars.

Goods entering China from the free port shall pay the Chinese import duties, and goods going out of other ports of China into the free port shall pay the Chinese export duties as long as they continue to be collected.

6. The term of this Agreement shall be thirty years and this Agreement shall come into force upon its ratification.

#### PROTOCOL TO THE AGREEMENT ON DAIREN

1. At the request of the U.S.S.R. the Chinese Government leases to the U.S.S.R. free of charge one half of all port installations and equipment. The term of lease shall be thirty years. The remaining half of port installations and equipment shall be reserved for the use of China.

The expansion or re-equipment of the port shall be made by agreement between China and U.S.S.R.

2. It is agreed that the sections of the Chinese Changchun Railway running from Dairen to Mukden that lie within the region of the Port Arthur naval base, shall not be subject to any military supervision or control established in this region.

#### AGREEMENT ON PORT ARTHUR

In conformity with and for the implementation of the Treaty of Friendship and Alliance between the Republic of China and the U.S.S.R., the High Contracting Parties have agreed as follows:

##### *Article I*

With a view to strengthening the security of China and the U.S.S.R. against further aggression by Japan, the Government of the Republic of China agrees to the joint use by the two countries of Port Arthur as a naval base.

##### *Article II*

The precise boundary of the area provided in Article I is described in the Annex and shown in the map (Annex 1).

##### *Article III*

The High Contracting Parties agree that Port Arthur, as an exclusive naval base, will be used only by Chinese and Soviet military and commercial vessels.

There shall be established a Sino-Soviet Military Commission to handle the matters of joint use of the above-mentioned naval base. The Commission shall consist of two Chinese and three Soviet representatives. The Chairman of the Commission shall be appointed by the Soviet side and the Vice Chairman shall be appointed by the Chinese side.

##### *Article IV*

The Chinese Government entrusts to the Soviet Government the defense of the naval base. The Soviet Government may erect at its own expense such installations as are necessary for the defense of the naval base.

##### *Article V*

The Civil Administration of the whole area will be Chinese. The leading posts of the Civil Administration will be appointed by the Chinese Government taking into account Soviet interests in the area.

The leading posts of the civil administration in the city of Port Arthur are appointed and dismissed by the Chinese Government in agreement with the Soviet military command.

The proposals which the Soviet military commander in that area may address to the Chinese civil administration in order to safeguard security and

defense will be fulfilled by the said administration. In cases of disagreement, such cases shall be submitted to the Sino-Soviet military commission for consideration and decision.

#### *Article VI*

The Government of U.S.S.R. have the right to maintain in the region mentioned in Article II, their army, navy and air force and to determine their location.

#### *Article VII*

The Government of the U.S.S.R. also undertakes to establish and keep up lighthouses and other installations and signs necessary for the security of navigation of the area.

#### *Article VIII*

After the termination of this agreement all the installations and public property installed or constructed by the U.S.S.R. in the area shall revert without compensation to the Chinese Government.

#### *Article IX*

The present agreement is concluded for thirty years. It comes into force on the day of its ratification.

In faith whereof the plenipotentiaries of the High Contracting Parties have signed the present agreement and affixed thereto their seals. The present agreement is made in two copies, each in the Russian and Chinese language, both texts being authoritative.

Done in Moscow, August 14, 1945, corresponding to the 14th day of the 8th month of the 34th year of the Chinese Republic.

THE PLENIPOTENTIARY OF THE PRES-  
IDIUM OF THE SUPREME SOVIET  
OF THE U.S.S.R.

THE PLENIPOTENTIARY OF THE PRES-  
IDENT OF THE NATIONAL GOVERN-  
MENT OF THE REPUBLIC OF CHINA.

#### APPENDIX TO "AGREEMENT ON PORT ARTHUR" SIGNED IN MOSCOW ON AUGUST 14, 1945<sup>1</sup>

The territory of the area of the naval base provided for by paragraph II of the Agreement on Port Arthur is situated south of the line which begins on the west coast of Liaotung Peninsula—south of Homsanatanwan—and follows a general easterly direction across Shihe Station and the point of Tsoukiachutse to the east coast of the same peninsula, excluding the town of Dalny (Dairen).

All the islands situated in the waters adjoining the west side of the area on Liaotung Peninsula established by the Agreement, and south of the line passing through the points 39° 00' North latitude, 120° 49' East longitude;

<sup>1</sup> As printed in the Moscow News of Aug. 29, 1945.

39° 20' North latitude, 121° 31' East longitude, and beyond in a general northeasterly direction along the axis of the fairway leading to Port Pulantien to the initial point on land, are included in the area of the naval base.

All the islands situated within the waters adjoining the eastern part of the area on Liaotung Peninsula and south of the line passing from the terminal point on land in an easterly direction towards the point 39° 20' North latitude, 123° 08' East longitude, and farther southeast through the point 39° 00' North latitude, 123° 16' East longitude, are included in the area. (See attached map,<sup>2</sup> scale 1:500,000.)

The boundary line of the district will be demarcated on the spot by a mixed Soviet-Chinese Commission. The Commission shall establish the boundary posts and, when need arises, buoys on the water, compile a detailed description of this line, enter it on a topographical map drawn to the scale of 1:25,000 and the water boundary on a nava. map drawn to the scale of 1:300,000.

The time when the Commission shall start its work is subject to special agreement between the parties.

Descriptions of the boundary line of the area and the maps of this line compiled by the above Commission are subject to approval by both Governments.

W. S.                      V. M.

AGREEMENT REGARDING RELATIONS BETWEEN THE CHINESE ADMINISTRATION  
AND THE COMMANDER-IN-CHIEF OF THE SOVIET FORCES AFTER THE ENTRY  
OF SOVIET TROOPS INTO THE "THREE EASTERN PROVINCES" OF CHINA  
DURING THE PRESENT JOINT MILITARY OPERATIONS AGAINST JAPAN

The President of the National Government of China and the Presidium of the Supreme Council of the Union of Soviet Socialist Republics, desirous that relations between the Chinese Administration and the Commander-in-chief of the Soviet forces after the entry of Soviet troops into the "Three Eastern Provinces" of China during the present joint military operations against Japan should be governed by the spirit of friendship and alliance existing between the two countries, have agreed on the following:

1. After the Soviet troops enter the "Three Eastern Provinces" of China as a result of military operations, the supreme authority and responsibility in all matters relating to the prosecution of the war will be vested, in the zone of operations for the time required for the operations, in the Commander-in-chief of the Soviet forces.

2. A Chinese National Government representative and staff will be appointed for the recovered territory, whose duties will be:

(a) To establish and direct, in accordance with the laws of China, an administration for the territory cleared of the enemy.

<sup>2</sup> Reproduced in *Bulletin*, as cited, on pages 202 and 203.

(b) To establish the coöperation between the Chinese armed forces, both regular and irregular, and the Soviet forces in recovered territory.

(c) To ensure the active coöperation of the Chinese administration with the Commander-in-chief of the Soviet forces and, specifically, to give the local authorities directions to this effect, being guided by the requirements and wishes of the Commander-in-chief of the Soviet forces.

3. To ensure contact between the Commander-in-chief of the Soviet forces and the Chinese National Government representative a Chinese military mission will be appointed to the Commander-in-chief of the Soviet forces.

4. In the zones under the supreme authority of the Commander-in-chief of the Soviet forces, the Chinese National Government administration for the recovered territory will maintain contact with the Commander-in-chief of the Soviet forces through the Chinese National Government representative.

5. As soon as any part of the liberated territory ceases to be a zone of immediate military operations, the Chinese National Government will assume full authority in the direction of public affairs and will render the Commander-in-chief of the Soviet forces every assistance and support through its civil and military bodies.

6. All persons belonging to the Soviet forces on Chinese territory will be under the jurisdiction of the Commander-in-chief of the Soviet forces. All Chinese, whether civilian or military, will be under Chinese jurisdiction. This jurisdiction will also extend to the civilian population on Chinese territory even in the case of offenses against the Soviet armed forces, with the exception of offenses committed in the zone of military operations under the jurisdiction of the Commander-in-chief of the Soviet forces, such cases coming under the jurisdiction of the Commander-in-chief of the Soviet forces. In disputable cases the question will be settled by mutual agreement between the Chinese National Government representative and the Commander-in-chief of the Soviet forces.

7. With regard to currency matters after the entry of Soviet troops into the "Three Eastern Provinces" of China, a separate agreement shall be reached.

8. The present Agreement comes into force immediately upon the ratification of the Treaty of Friendship and Alliance between China and the U.S.S.R. signed this day. The Agreement has been done in two copies, each in the Chinese and Russian languages. Both texts are equally valid.

Date .....

ON THE AUTHORIZATION OF THE NATIONAL GOVERNMENT OF THE REPUBLIC OF CHINA.

ON THE AUTHORIZATION OF THE GOVERNMENT OF THE UNION OF SOVIET SOCIALIST REPUBLICS.

AGREEMENT BETWEEN THE REPUBLIC OF CHINA AND THE U.S.S.R. CONCERNING THE CHINESE CHANGCHUN RAILWAY.

The President of the Republic of China and the Presidium of the Supreme Council of the U.S.S.R., desiring to strengthen the friendly relations and



economic bonds between the two countries on the basis of the full observation of the rights and interests of each other, have agreed as follows:

### *Article I*

After the Japanese armed forces are driven out of the Three Eastern Provinces of China the main trunk line of the Chinese Eastern Railway and the South Manchurian Railway from Manchuli to Suifenho and from Harbin to Dairen and Port Arthur united into one railway under the name "Chinese Changchun Railway" shall be in joint ownership of the U.S.S.R. and the Republic of China and shall be operated by them jointly.

There shall be joint ownership and operation only of those lands acquired and railway auxiliary lines built by the Chinese Eastern Railway during the time of Russian and joint Sino-Soviet administration and by the South Manchurian Railway during the time of Russian administration and which are designed for direct needs of these railways as well as the subsidiary enterprises built during the said periods and directly serving these railways. All the other railways branches, subsidiary enterprises and lands shall be in the complete ownership of the Chinese Government.

The joint operation of the aforementioned railway shall be undertaken by a single management under Chinese sovereignty and as a purely commercial transportation enterprise

### *Article II*

The High Contracting parties agree that their joint ownership of the railway shall be in equal shares and shall not be alienable in whole or in part.

### *Article III*

The High Contracting parties agree that for the joint operation of the said railway the Sino-Soviet Company of the Chinese Changchun Railway shall be formed. The Company shall have a Board of Directors to be composed of ten members of whom five shall be appointed by the Chinese Government and five by the Soviet Government. The Board of Directors shall be in Changchun.

### *Article IV*

The Chinese Government shall appoint one of the Chinese Directors as President of the Board of Directors and one as the Assistant President. The Soviet Government shall appoint one of the Soviet Directors as Vice-President of the Board of Directors, and one as the Assistant Vice-President. Seven persons shall constitute a quorum. When questions are decided by the Board, the vote of the President of the Board of Directors shall be counted as two votes.

Questions on which the Board of Directors cannot reach an agreement shall

be submitted to the Governments of the Contracting Parties for consideration and settlement in an equitable and friendly spirit.

*Article V*

The Company shall establish a Board of Auditors which shall be composed of six members of whom three are appointed by the Chinese Government and three appointed by the Soviet Government. The Chairman of the Board of Auditors shall be elected from among the Soviet Auditors, and Vice-Chairman from among the Chinese auditors. When questions are decided by the Board the vote of the Chairman shall be counted as two votes. Five persons shall constitute a quorum.

*Article VI*

For the administration of current affairs the Board of Directors shall appoint a manager of the Chinese Changchun Railway from among Soviet citizens and one assistant manager from among Chinese citizens.

*Article VII*

The Board of Auditors shall appoint a General-Comptroller from among Chinese citizens, and an assistant General-Comptroller from among Soviet citizens.

*Article VIII*

The Chiefs and Assistant Chiefs of the various departments, Chiefs of sections, station masters at important stations of the railway shall be appointed by the Board of Directors. The Manager of the Railway has right to recommend candidates for the above-mentioned posts. Individual members of the Board of Directors may also recommend such candidates in agreement with the Manager. If the Chief of a department is a national of China, the Assistant Chief shall be a national of the Soviet Union, and vice versa. The appointment of the Chiefs and assistant chiefs of departments and Chiefs of sections and station masters shall be made in accordance with the principle of equal representation between the nationals of China and nationals of the Soviet Union.

*Article IX*

The Chinese Government will bear the responsibility for the protection of the said Railway.

The Chinese Government will also organize and supervise the railway guards who shall protect the railway buildings, installations and other properties and freight from destruction, loss and robbery, and shall maintain the normal order on the railway. As regards the duties of the police in execution of this Article, they will be determined by the Chinese Government in consultation with the Soviet Government.

*Article X*

Only during the time of war against Japan the railway may be used for the transportation of Soviet troops. The Soviet Government has the right to transport by the above-mentioned railway for transit purpose military goods in sealed cars without customs inspection. The guarding of such military goods shall be undertaken by the railroad police and the Soviet Union shall not send any armed escort.

*Article XI*

Goods for through transit and transported by the Chinese Changchun Railway from Manchuli to Sifenho or vice versa and also from Soviet territory to the ports of Dairen and Port Arthur or vice versa shall be free from Chinese Customs duties or any other taxes and dues, but on entering Chinese territory such goods shall be subject to Chinese Customs inspection and verification.

*Article XII*

The Chinese Government shall ensure, on the basis of a separate agreement, that the supply of coal for the operation of the railway will be fully secured.

*Article XIII*

The railway shall pay taxes to the Government of the Republic of China the same as are paid by the Chinese state railways.

*Article XIV*

Both Contracting Parties agree to provide the Board of Directors of the Chinese Changchun Railway with working capital the amount of which will be determined by the Statute of the Railway.

Profits and losses in exploitation of the railway shall be equally divided between the Parties.

*Article XV*

For the working out in Chungking of the Statutes of joint operation of the railway the High Contracting Parties undertake within one month of the signing of the present Agreement, to appoint their representatives—three representatives from each Party. The Statute shall be worked out within two months and reported to the two Governments for their approval.

*Article XVI*

The determination, in accordance with the provisions in Article I, of the properties to be included in the joint ownership and operations of the railway by China and U.S.S.R. shall be made by a Commission to be composed of three representatives each of the two Governments. The Commission shall

be constituted in Chungking within one month after the signing of the present Agreement and shall terminate its work within three months after the joint operation of the railway shall have begun.

The decision of the Commission shall be reported to the two Governments for their approval.

#### *Article XVII*

The term of this present Agreement shall be thirty years. After the expiration of the term of the present Agreement, the Chinese Changchun Railway with all its properties shall be transferred without compensation to the ownership of the Republic of China.

#### *Article XVIII*

The present Agreement shall come into force from the date of its ratification.

Done in Moscow, August 14th, 1945, corresponding to the 14th day of the 8th month of the 34th year of the Chinese Republic, in two copies, each in the Russian and Chinese languages, both texts being equally authoritative.

THE PLENIPOTENTIARY OF THE PRE-  
SIDIUM OF THE SUPREME SOVIET  
OF THE U.S.S.R.

THE PLENIPOTENTIARY OF THE PRES-  
IDENT OF THE NATIONAL GOV-  
ERNMENT OF THE REPUBLIC OF  
CHINA.

### UNITED NATIONS

#### INTERIM AGREEMENT ON INTERNATIONAL CIVIL AVIATION \*

*Effective June 6, 1945*

The undersigned, on behalf of their respective governments, agree to the following:

#### ARTICLE I

##### THE PROVISIONAL ORGANIZATION

##### *Section 1*

The signatory States hereby establish a provisional international organization of a technical and advisory nature of sovereign States for the purpose of collaboration in the field of international civil aviation. The organization shall be known as the Provisional International Civil Aviation Organization.

##### *Section 2*

The Organization shall consist of an Interim Assembly and an Interim Council, and it shall have its seat in Canada.

\* Text from *International Civil Aviation Conference Final Act and Related Documents*, Washington, 1945; on date of effectiveness see *Department of State Bulletin*, Vol. XIII, No. 319 (Aug. 5, 1945), p. 199.

*Section 3*

The Organization is established for an interim period which shall last until a new permanent convention on international civil aviation shall have come into force or another conference on international civil aviation shall have agreed upon other arrangements: provided, however, that the interim period shall in no event exceed three years from the coming into force of the present Agreement.

*Section 4*

The Organization shall enjoy in the territory of each member State such legal capacity as may be necessary for the performance of its functions. Full juridical personality shall be granted wherever compatible with the constitution and laws of the State concerned.

## ARTICLE II

## THE INTERIM ASSEMBLY

*Section 1*

The Assembly shall meet annually and shall be convened by the Council at a suitable time and place. Extraordinary meetings of the Assembly may be held at any time upon call of the Council or at the request of any ten member States of the Organization addressed to the Secretary General.

All member States shall have equal right to be represented at the meetings of the Assembly and each member State shall be entitled to one vote. Delegates representing member States may be assisted by technical advisers who may participate in the meetings but shall have no vote.

A majority of the member States is required to constitute a quorum for the meetings of the Assembly. Unless otherwise provided herein, voting of the Assembly shall be by a simple majority of the member States present.

*Section 2*

The powers and duties of the Assembly shall be to:

1. Elect at each meeting its President and other officers.
2. Elect the member States to be represented on the Council, as provided in Article III, Section 1.
3. Examine, and take appropriate action upon, the reports of the Council and decide upon any matter referred to it by the Council.
4. Determine its own rules of procedure and establish such subsidiary commissions and committees as may be necessary or advisable.
5. Approve an annual budget and determine the financial arrangements of the Organization.
6. At its discretion, refer to the Council any specific matter for its consideration and report.
7. Delegate to the Council all the powers and authority that may be considered necessary or advisable for the discharge of the duties of the Organi-

zation. Such delegations of authority may be revoked or modified at any time by the Assembly.

8. Deal with any matter within the sphere of action of the Organization not specifically assigned to the Council.

### ARTICLE III

#### THE INTERIM COUNCIL

##### *Section 1*

The Council shall be composed of not more than 21 member States elected by the Assembly for a period of two years. In electing the members of the Council, the Assembly shall give adequate representation (1) to those member States of chief importance in air transport, (2) to those member States not otherwise included which make the largest contribution to the provision of facilities for international civil air navigation, and (3) to those member States not otherwise included whose election will insure that all major geographical areas of the world are represented. Any vacancy on the Council shall be filled by the Assembly at its next meeting. Any member State of the Council so elected shall hold office for the remainder of its predecessor's term of office.

##### *Section 2*

No representative of a member State on the Council shall be actively associated with the operation of an international air service or financially interested in such a service.

##### *Section 3*

The Council shall elect, and determine the emoluments of, a President, for a term not to exceed the interim period. The president shall have no vote. The Council shall also elect from among its members one or more Vice Presidents, who shall retain their right to vote when serving as Acting President. The President need not be selected from the members of the Council but if a member is elected, his seat shall be deemed vacant and it shall be filled by the State which he represented. The President shall convene, and preside at, the meetings of the Council; he shall act as the Council's representative; and he shall carry out such functions on behalf of the Council as may be assigned to him.

Decisions by the Council will be deemed valid only when approved by a majority of all the members of the Council.

##### *Section 4*

Any member State not a member of the Council may participate in the deliberations of the Council whenever any decision is to be taken which especially concerns such member State. Such member State, however, shall not have the right to vote; provided that, in any case in which there is a dis-

pute between one or more member States who are not members of the Council and one or more member States who are members of the Council, any State within the second category which is a party to the dispute shall have no right to vote on that dispute.

### *Section 5*

The powers and duties of the Council shall be to:

1. Carry out the directives of the Assembly.
2. Determine its own organization and rules of procedure.
3. Determine the method of appointment, emoluments, and conditions of service of the employees of the Organization.
4. Appoint a Secretary General.
5. Provide for the establishment of any subsidiary working groups which may be considered desirable, among which there shall be the following interim committees:
  - a. A Committee on Air Transport.
  - b. A Committee on Air Navigation, and
  - c. A Committee on International Convention on Civil Aviation.

If a member State so desires, it shall have the right to appoint a representative on any such interim committee or working group.

6. Prepare and submit to the Assembly budget estimates of the Organization, and statements of accounts of all receipts and expenditures and to authorize its own expenditures.

7. Enter into agreements with other international bodies when it deems advisable for the maintenance of common services and for common arrangements concerning personnel and, with the approval of the Assembly, enter into such other arrangements as may facilitate the work of the Organization.

### *Section 6*

In addition to the powers and authority which the Assembly may delegate to it, the functions of the Council shall be to:

1. Maintain liaison with the member States of the Organization, calling upon them for such pertinent data and information as may be required in giving consideration to recommendations made by them.
2. Receive, register, and hold open to inspection by member States all existing contracts and agreements relating to routes, services, landing rights, airport facilities, or other international air matters to which any member State or any airline of a member State is a party.
3. Supervise and coördinate the work of:
  - a. The Committee on Air Transport, whose functions shall be to:
    - (1) Observe, correlate, and continuously report upon the facts concerning the origin and volume of international air traffic and the

relation of such traffic, or the demand therefor, to the facilities actually provided.

- (2) Request, collect, analyze and report on information with respect to subsidies, tariffs, and costs of operation.
- (3) Study any matters affecting the organization and operation of international air services, including the international ownership and operation of international trunk lines.
- (4) Study and report with recommendations to the Assembly as soon as practicable on the matters on which it has not been possible to reach agreement among the nations represented at the International Civil Aviation Conference, convened in Chicago, November 1, 1944, in particular the matters comprehended within the headings of Articles II, X, XI, and XII of Conference Document 422, together with Conference Documents 384, 385, 400, 407, and 429, and all other documentation relating thereto.

b. The Committee on Air Navigation, whose functions shall be to:

- (1) Study, interpret and advise on standards and procedures with respect to communications systems and air navigation aids, including ground marks; rules of the air and air traffic control practices; standards governing the licensing of operating and mechanical personnel; airworthiness of aircraft; registration and identification of aircraft; meteorological protection of international aeronautics; log books and manifests; aeronautical maps and charts; airports; customs, immigration, and quarantine procedure; accident investigation, including search and salvage; and the further unification of numbering and systems of dimensioning and specification of dimensions used in connection with international air navigation.
- (2) Recommend the adoption, and take all possible steps to secure the application, of minimum requirements and standard procedures with respect to the subjects in the preceding paragraph.
- (3) Continue the preparation of technical documents, in accordance with the recommendations of the International Civil Aviation Conference approved at Chicago on December 7, 1944, and with the resulting suggestions of the member States, for attachment to the Convention on International Civil Aviation, signed at Chicago on December 7, 1944.

c. The Committee on International Convention on Civil Aviation, whose functions shall be to continue the study of an international convention on civil aviation.

4. Receive and consider the reports of the committees and working groups.

5. Transmit to each member State the reports of these committees and working groups and the findings of the Council thereon.



6. Make recommendations with respect to technical matters to the member States of the Assembly individually or collectively.

7. Submit an annual report to the Assembly.

8. When expressly requested by all the parties concerned, act as an arbitral body on any differences arising among member States relating to international civil aviation matters which may be submitted to it. The Council may render an advisory report or, if the parties concerned so expressly decide, they may obligate themselves in advance to accept the decision of the Council. The procedure to govern the arbitral proceedings shall be determined in agreement between the Council and all the interested parties.

9. On direction of the Assembly, convene another conference on international civil aviation; or at such time as the Convention is ratified, convene the first Assembly under the Convention.

#### ARTICLE IV

##### THE SECRETARY GENERAL

The Secretary General shall be the chief executive and administrative officer of the Organization. The Secretary General shall be responsible to the Council as a whole and, following established policies of the Council, shall have full power and authority to carry out the duties assigned to him by the Council. The Secretary General shall make periodic reports to the Council covering the progress of the Secretariat's activities. The Secretary General shall appoint the staff of the Secretariat. He shall likewise appoint the secretariat and staff necessary to the functioning of the Assembly, of the Council, and of Committees or such working groups as are mentioned in the present Agreement or may be constituted pursuant thereto.

#### ARTICLE V

##### FINANCES

Each member State shall bear the expenses of its own delegation to the Assembly and the salary, travel and other expenses of its own delegate on the Council and of its representatives on committees or subsidiary working groups.

The expenses of the organization shall be borne by the member States in proportions to be decided by the Assembly. Funds shall be advanced by each member State to cover the initial expenses of the Organization.

The Assembly may suspend the voting power of any member State that fails to discharge, within a reasonable period, its financial obligations to the Organization.

#### ARTICLE VI

##### SPECIAL DUTIES

The Organization shall also carry out the functions placed upon it by the International Air Services Transit Agreement and by the International Air

Transport Agreement drawn up at Chicago on December 7, 1944, in accordance with the terms and conditions therein set forth.

Members of the Assembly and the Council who have not accepted the International Air Services Transit Agreement or the International Air Transport Agreement drawn up at Chicago on December 7, 1944 shall not have the right to vote on any questions referred to the Assembly or Council under the provisions of the relevant Agreements.

## ARTICLE VII

### TRANSFER OF FUNCTIONS, RECORDS, AND PROPERTY

The exercise of any functions which shall have been herein assigned to the Provisional Organization shall cease at any time that those particular functions have been completed or transferred to another international organization. At the time of the coming into force of the Convention on International Civil Aviation signed at Chicago, December 7, 1944, the records and property of the Provisional Organization shall be transferred to the International Civil Aviation Organization established under the above-mentioned Convention.

## ARTICLE VIII

### FLIGHT OVER TERRITORY OF MEMBER STATES

#### *Section 1*

The member States recognize that every State has complete and exclusive sovereignty over the airspace above its territory.

#### *Section 2*

For the purposes of this Agreement the territory of a State shall be deemed to be the land areas and territorial waters adjacent thereto under the sovereignty, suzerainty, protection or mandate of such State.

#### *Section 3*

This Agreement shall be applicable only to civil aircraft, and shall not be applicable to state aircraft. Aircraft used in military, customs and police services shall be deemed to be state aircraft.

#### *Section 4*

Except in a case where, under the terms of an agreement or of a special authorization, aircraft are permitted to cross the territory of a member State without landing, every aircraft which enters the territory of a member State shall, if the regulations of that State so require, land at an airport designated by that State for the purpose of customs and other examination. On departure from the territory of a member State, such aircraft shall depart from a similarly designated customs airport. Particulars of all designated customs airports shall be published by the State and transmitted to the Provisional

International Civil Aviation Organization for communication to all other member States.

#### *Section 5*

Subject to the provisions of this Agreement, the laws and regulations of a member State relating to the admission to or departure from its territory of aircraft engaged in international air navigation, or to the operation and navigation of such aircraft while within its territory, shall be applied to the aircraft of all member States without distinction as to nationality, and shall be complied with by such aircraft upon entering or departing from or while within the territory of that State.

#### *Section 6*

Each member State undertakes to adopt measures to insure that every aircraft flying over or maneuvering within its territory and that every aircraft carrying its nationality mark, wherever it may be, shall comply with the rules and regulations relating to the flight and maneuver of aircraft there in force. Each member State undertakes to insure the prosecution of all persons violating the regulations applicable.

#### *Section 7*

The laws and regulations of a member State as to the admission to or departure from its territory of passengers, crew or cargo of aircraft, such as regulations relating to entry, clearance, immigration, passports, customs, and quarantine shall be complied with by or on behalf of such passengers, crew or cargo upon entrance into or departure from, or while within the territory of that State.

#### *Section 8*

The member States agree to take effective measures to prevent the spread by means of air navigation of cholera, typhus (epidemic), smallpox, yellow fever, and plague, and such other communicable diseases as the member States shall from time to time decide to designate, and to that end member States will keep in close consultation with the agencies concerned with international regulations relating to sanitary measures applicable to aircraft. Such consultation shall be without prejudice to the application of any existing international convention on this subject to which the member States may be parties.

#### *Section 9*

Each member State may, subject to the provisions of this Agreement,

1. Designate the route to be followed within its territory by any international air service and the airports which any such service may use;
2. Impose or permit to be imposed on any such service just and reasonable

charges for the use of such airports and other facilities; these charges shall not be higher than would be paid for the use of such airports and facilities by its national aircraft engaged in similar international services;

provided that, upon representation by an interested member State, the charges imposed for the use of airports and other facilities shall be subject to review by the Council, which shall report and make recommendations thereon for the consideration of the State or States concerned.

#### *Section 10*

The appropriate authorities of each of the member States shall have the right, without unreasonable delay, to search aircraft of the other member States on landing or departure, and to inspect the certificates and other documents prescribed by this Agreement.

### ARTICLE IX

#### MEASURES TO FACILITATE AIR NAVIGATION

##### *Section 1*

Each member State undertakes, so far as it may find practicable, to make available such radio facilities, such meteorological services, and such other air navigation facilities as may from time to time be required for the operation of safe and efficient scheduled international air services under the provisions of this Agreement.

##### *Section 2*

Each member State undertakes to provide such measures of assistance to aircraft in distress in its territory as it may find practicable, and to permit, subject to the control of its own authorities, the owners or authorities of the State in which the aircraft is registered to provide such measures of assistance as may be necessitated by the circumstances.

##### *Section 3*

In the event of an accident to an aircraft of a member State occurring in the territory of another member State, and involving death or serious injury, or indicating serious technical defect, in the aircraft or air navigation facilities, the State in which the accident occurs will institute an inquiry into the circumstances of the accident. The State in which the aircraft is registered shall be given the opportunity to appoint observers to be present at the inquiry and the State holding the inquiry shall communicate the report and findings in the matter to that State.

### ARTICLE X

#### CONDITIONS TO BE FULFILLED WITH RESPECT TO AIRCRAFT

##### *Section 1*

Every aircraft of a member State, engaged in international navigation, shall carry the following documents:

- (a) Its certificate of registration.
- (b) Its certificate of airworthiness.
- (c) The appropriate licenses for each member of the crew.
- (d) Its journey log book.
- (e) If it is equipped with radio apparatus, the aircraft radio station license.
- (f) If it carries passengers, a list of their names and places of embarkation and destination.
- (g) If it carries cargo, a manifest and detailed declarations of the cargo.

#### *Section 2*

(a) Aircraft of each member State may, in or over the territory of other member States, carry radio transmitting apparatus only if a license to install and operate such apparatus has been issued by the appropriate authorities of the State in which the aircraft is registered. The use of radio transmitting apparatus in the territory of the member State whose territory is flown over shall be in accordance with the regulations prescribed by that State.

(b) Radio transmitting apparatus may be used only by members of the flight crew who are provided with a special license for the purpose, issued by the appropriate authorities of the State in which the aircraft is registered.

#### *Section 3*

Every aircraft engaged in international navigation shall be provided with a certificate of airworthiness issued or rendered valid by the State in which it is registered.

#### *Section 4*

(a) The pilot of every aircraft and the other members of the operating crew of every aircraft engaged in international navigation shall be provided with certificates of competency and licenses issued or rendered valid by the State in which the aircraft is registered.

(b) Each member State reserves the right to refuse to recognize, for the purpose of flight above its own territory, certificates of competency and licenses granted to any of its nationals by another member State.

#### *Section 5*

Subject to the provisions of Section 4 (b), certificates of airworthiness and certificates of competency and licenses issued or rendered valid by the member State in which the aircraft is registered, shall be recognized as valid by the other member State.

#### *Section 6*

There shall be maintained in respect of every aircraft engaged in international navigation a journey log book in which shall be entered particulars of the aircraft, its crew and each journey.

*Section 7*

Each member State may prohibit or regulate the use of photographic apparatus in aircraft over its territory.

## ARTICLE XI

## AIRPORTS AND AIR NAVIGATION FACILITIES

Where a member State desires assistance in the provision of airports or air navigation facilities in its territory, the Council may make arrangements for the provision of such assistance so far as may be practicable in accordance with the provisions of Chapter XV of the Convention on International Civil Aviation signed at Chicago, December 7, 1944.

## ARTICLE XII

## JOINT OPERATING ORGANIZATIONS AND ARRANGEMENTS

*Section 1*

Nothing in this Agreement shall prevent two or more member States from constituting joint air transport operating organizations or international operating agencies and from pooling their air services on any routes or in any regions, but such organizations or agencies and such pooled services shall be subject to all the provisions of this Agreement, including those relating to the registration of agreements with the Council.

*Section 2*

The Council may suggest to member States concerned that they form joint organizations to operate air services on any routes or in any regions.

*Section 3*

A State may participate in joint operating organizations or in pooling arrangements, either through its government or through an airline company or companies designated by its government. The companies may, at the sole discretion of the State concerned, be State-owned or partly State-owned or privately owned.

## ARTICLE XIII

## UNDERTAKINGS OF MEMBER STATES

*Section 1*

Each member State undertakes to transmit to the Council copies of all existing and future contracts and agreements relating to routes, services, landing rights, airport facilities, or other international air matters to which any member State or any airline of a member State is a party, as described in Article III, Section 6, Subsection 2.

*Section 2*

Each member State undertakes to require its international airlines to file

with the Council, in accordance with requirements laid down by the Council, traffic reports, cost statistics, and financial statements as described in Article III, Section 6, Subsection 3, a (1) and (2), showing, among other things, all receipts and the sources thereof.

### *Section 3*

The member States undertake, with respect to the matters set forth in Article III, Section 6, Subsection 3, b (1), to apply, as rapidly as possible, in their national civil aviation practices, the general recommendations of the International Civil Aviation Conference, convened in Chicago, November 1, 1944, and such recommendations as will be made through the continuing study of the Council.

## ARTICLE XIV

### WITHDRAWAL

Any member State, a party to the present Agreement, may withdraw therefrom on six months' notice given by it to the Secretary General, who shall at once inform all the member States of the Organization of such notice of withdrawal.

## ARTICLE XV

### DEFINITIONS

For the purpose of this Agreement the expression:

- (a) "Air service" means any scheduled air service performed by aircraft for the public transport of passengers, mail or cargo.
- (b) "International air service" means an air service which passes through the airspace over the territory of more than one State.
- (c) "Airline" means any air transport enterprise offering or operating an international air service.

## ARTICLE XVI

### ELECTION OF FIRST INTERIM COUNCIL

The first Interim Council shall be composed of the States elected for that purpose by the International Civil Aviation Conference convened in Chicago on November 1, 1944, provided that no State thus elected shall become a member of the Council until it has accepted the present Agreement and unless such acceptance has taken place within six months after December 7, 1944. In no case shall the term of office of a State as a member of the first Interim Council begin before or go beyond the period of two years, starting from the coming into force of the present Agreement.

Each State so elected to the Interim Council shall take its seat in the Council upon acceptance by that State of this Agreement or upon the entry into force of this Agreement, whichever is the later date, and it shall hold its seat until the end of the two years following the coming into force of this Agreement: provided, that any State so elected to the Council which does

not accept this Agreement within six months after the above-mentioned election shall not become a member of the Council and the seat shall remain vacant until the next meeting of the Assembly.

## ARTICLE XVII

### SIGNATURES AND ACCEPTANCES OF AGREEMENT

The undersigned delegates to the International Civil Aviation Conference, convened in Chicago on November 1, 1944, have affixed their signatures to the present Interim Agreement with the understanding that the Government of the United States of America shall be informed at the earliest possible date by each of the governments on whose behalf the Agreement has been signed whether signature on its behalf shall constitute an acceptance of the Agreement by that government and an obligation binding upon it.

Any State, a member of the United Nations and any State associated with them, as well as any State which remained neutral during the present world conflict, not a signatory to this Agreement, may accept the present Agreement as an obligation binding upon it by notification of its acceptance to the Government of the United States, and such acceptance shall become effective upon the date of the receipt of such notification by that Government.

The present Interim Agreement shall come into force when it has been accepted by twenty-six States. Thereafter it will become binding as to each other State indicating its acceptance to the Government of the United States on the date of the receipt of the acceptance by that Government.

The Government of the United States shall inform all governments represented at the International Civil Aviation Conference referred to of the date on which the present Interim Agreement comes into force and shall likewise notify them of all acceptances of the Agreement.

IN WITNESS WHEREOF, the undersigned, having been duly authorized sign this Agreement on behalf of their respective governments on the dates appearing opposite their signatures.

DONE at Chicago the seventh day of December 1944, in the English language. A text drawn up in the English, French, and Spanish languages, each of which shall be of equal authenticity, shall be opened for signature at Washington, D. C. Both texts shall be deposited in the archives of the Government of the United States of America, and certified copies shall be transmitted by that Government to the governments of all the States which may sign and accept this Agreement.

[This document was opened for signature at Chicago on December 7 and, by February 28, 1945, had been signed by representatives of the following countries:

Afghanistan  
Australia (subject to  
confirmation by the

Honduras  
Iceland  
India

Poland  
Portugal  
Spain



Australian Govern- ment)	Iran	Sweden
Bolivia	Iraq	Switzerland
Canada	Ireland	Syria
Chile	Lebanon	Turkey
China	Liberia	United Kingdom
Dominican Republic	Mexico	United States
Ecuador	Netherlands	Uruguay
Egypt	New Zealand	Venezuela (ad refer- endum)
France	Nicaragua	The Danish Minister
Greece	Norway	The Thai Minister]
Guatemala	Peru	
Haiti	Philippine Common- wealth	

## UNITED NATIONS

### CONSTITUTION OF THE FOOD AND AGRICULTURE ORGANIZATION \*

*October 16, 1945*

#### PREAMBLE

The Nations accepting this Constitution, being determined to promote the common welfare by furthering separate and collective action on their part for the purposes of

raising levels of nutrition and standards of living of the peoples under their respective jurisdictions,  
securing improvements in the efficiency of the production and distribution of all food and agricultural products,  
bettering the condition of rural populations,  
and thus contributing toward an expanding world economy,

hereby establish the Food and Agriculture Organization of the United Nations, hereinafter referred to as the "Organization," through which the Members will report to one another on the measures taken and the progress achieved in the fields of action set forth above.

#### ARTICLE I. FUNCTIONS OF THE ORGANIZATION.

1. The Organization shall collect, analyze, interpret, and disseminate information relating to nutrition, food and agriculture.

2. The Organization shall promote and, where appropriate, shall recommend national and international action with respect to

(a) scientific, technological, social, and economic research relating to nutrition, food and agriculture;

(b) the improvement of education and administration relating to nutrition, food and agriculture, and the spread of public knowledge of nutritional and agricultural science and practice;

(c) the conservation of natural resources and the adoption of improved methods of agricultural production;

(d) the improvement of the processing, marketing, and distribution of food and agricultural products;

\* Text provided by FAO Secretariat.

- (e) the adoption of policies for the provision of adequate agricultural credit, national and international;
- (f) the adoption of international policies with respect to agricultural commodity arrangements.

3. It shall also be the function of the Organization

- (a) to furnish such technical assistance as governments may request;
- (b) to organize, in coöperation with the governments concerned, such missions as may be needed to assist them to fulfill obligations arising from their acceptance of the recommendations of the United Nations Conference on Food and Agriculture; and
- (c) generally to take all necessary and appropriate action to implement the purposes of the Organization as set forth in the Preamble.

ARTICLE II. MEMBERSHIP.

1. The original Members of the Organization shall be such of the nations specified in Annex I as accept this Constitution in accordance with the provisions of Article XXI.

2. Additional Members may be admitted to the Organization by a vote concurred in by a two-thirds majority of all the members of the Conference and upon acceptance of this Constitution as in force at the time of admission.

ARTICLE III. THE CONFERENCE.

1. There shall be a Conference of the Organization in which each Member nation shall be represented by one member.

2. Each Member nation may appoint an alternate, associates, and advisers to its member of the Conference. The Conference may make rules concerning the participation of alternates, associates, and advisers in its proceedings, but any such participation shall be without the right to vote except in the case of an alternate or associate participating in the place of a member.

3. No member of the Conference may represent more than one Member nation.

4. Each Member nation shall have only one vote

5. The Conference may invite any public international organization which has responsibilities related to those of the Organization to appoint a representative who shall participate in its meetings on the conditions prescribed by the Conference. No such representative shall have the right to vote.

6. The Conference shall meet at least once in every year.

7. The Conference shall elect its own officers, regulate its own procedure, and make rules governing the convocation of sessions and the determination of agenda.

8. Except as otherwise expressly provided in this Constitution or by rules made by the Conference, all matters shall be decided by the Conference by a simple majority of the votes cast.

## ARTICLE IV. FUNCTIONS OF THE CONFERENCE.

1. The Conference shall determine the policy and approve the budget of the Organization and shall exercise the other powers conferred upon it by this Constitution.

2. The Conference may by a two-thirds majority of the votes cast make recommendations concerning questions relating to food and agriculture to be submitted to Member nations for consideration with a view to implementation by national action.

3. The Conference may by a two-thirds majority of the votes cast submit conventions concerning questions relating to food and agriculture to Member nations for consideration with a view to their acceptance by the appropriate constitutional procedure.

4. The Conference shall make rules laying down the procedure to be followed to secure:

(a) proper consultation with governments and adequate technical preparation prior to consideration by the Conference of proposed recommendations and conventions; and

(b) proper consultation with governments in regard to relations between the Organization and national institutions or private persons.

5. The Conference may make recommendations to any public international organization regarding any matter pertaining to the purpose of the Organization.

6. The Conference may by a two-thirds majority of the votes cast agree to discharge any other functions consistent with the purposes of the Organization which may be assigned to it by governments or provided for by any arrangement between the Organization and any other public international organization.

## ARTICLE V. THE EXECUTIVE COMMITTEE.

1. The Conference shall appoint an Executive Committee consisting of not less than nine or more than fifteen members or alternate or associate members of the Conference or their advisers who are qualified by administrative experience or other special qualifications to contribute to the attainment of the purpose of the Organization. There shall be not more than one member from any Member nation. The tenure and other conditions of office of the members of the Executive Committee shall be subject to rules to be made by the Conference.

2. Subject to the provisions of paragraph 1 of this Article, the Conference shall have regard in appointing the Executive Committee to the desirability that its membership should reflect as varied as possible an experience of different types of economy in relation to food and agriculture.

3. The Conference may delegate to the Executive Committee such powers as it may determine, with the exception of the powers set forth in paragraph

2 of Article II, Article IV, paragraph 1 of Article VII, Article XIII, and Article XX of this Constitution.

4. The members of the Executive Committee shall exercise the powers delegated to them by the Conference on behalf of the whole Conference and not as representatives of their respective governments.

5. The Executive Committee shall appoint its own officers and, subject to any decisions of the Conference, shall regulate its own procedure.

#### ARTICLE VI. OTHER COMMITTEES AND CONFERENCES.

1. The Conference may establish technical and regional standing committees and may appoint committees to study and report on any matter pertaining to the purpose of the Organization.

2. The Conference may convene general, technical, regional, or other special conferences and may provide for the representation at such conferences, in such manner as it may determine, of national and international bodies concerned with nutrition, food and agriculture.

#### ARTICLE VII. THE DIRECTOR-GENERAL.

1. There shall be a Director-General of the Organization who shall be appointed by the Conference by such procedure and on such terms as it may determine.

2. Subject to the general supervision of the Conference and its Executive Committee, the Director-General shall have full power and authority to direct the work of the Organization.

3. The Director-General or a representative designated by him shall participate, without the right to vote, in all meetings of the Conference and of its Executive Committee and shall formulate for consideration by the Conference and the Executive Committee proposals for appropriate action in regard to matters coming before them.

#### ARTICLE VIII. STAFF.

1. The staff of the Organization shall be appointed by the Director-General in accordance with such procedure as may be determined by rules made by the Conference.

2. The staff of the Organization shall be responsible to the Director-General. Their responsibilities shall be exclusively international in character and they shall not seek or receive instructions in regard to the discharge thereof from any authority external to the Organization. The Member nations undertake fully to respect the international character of the responsibilities of the staff and not to seek to influence any of their nationals in the discharge of such responsibilities.

3. In appointing the staff the Director-General shall, subject to the paramount importance of securing the highest standards of efficiency and of

technical competence, pay due regard to the importance of selecting personnel recruited on as wide a geographical basis as is possible.

4. Each Member nation undertakes, insofar as it may be possible under its constitutional procedure, to accord to the Director-General and senior staff diplomatic privileges and immunities and to accord to other members of the staff all facilities and immunities accorded to non-diplomatic personnel attached to diplomatic missions, or alternatively to accord to such other members of the staff the immunities and facilities which may hereafter be accorded to equivalent members of the staffs of other public international organizations.

#### ARTICLE IX. SEAT.

The seat of the Organization shall be determined by the Conference.

#### ARTICLE X. REGIONAL AND LIAISON OFFICES.

1. There shall be such regional offices as the Director-General with the approval of the Conference may decide.

2. The Director-General may appoint officials for liaison with particular countries or areas subject to the agreement of the government concerned.

#### ARTICLE XI. REPORTS BY MEMBERS.

1. Each Member nation shall communicate periodically to the Organization reports on the progress made toward achieving the purpose of the Organization set forth in the Preamble and on the action taken on the basis of recommendations made and conventions submitted by the Conference.

2. These reports shall be made at such times and in such form and shall contain such particulars as the Conference may request.

3. The Director-General shall submit these reports, together with analyses thereof, to the Conference and shall publish such reports and analyses as may be approved for publication by the Conference together with any reports relating thereto adopted by the Conference.

4. The Director-General may request any Member nation to submit information relating to the purpose of the Organization.

5. Each Member nation shall, on request, communicate to the Organization, on publication, all laws and regulations and official reports and statistics concerning nutrition, food and agriculture.

#### ARTICLE XII. COÖPERATION WITH OTHER ORGANIZATIONS.

1. In order to provide for close coöperation between the Organization and other public international organizations with related responsibilities, the Conference may, subject to the provisions of Article XIII, enter into agreements with the competent authorities of such organizations defining the distribution of responsibilities and methods of coöperation.

2. The Director-General may, subject to any decisions of the Conference, enter into agreements with other public international organizations for the maintenance of common services, for common arrangements in regard to recruitment, training, conditions of service, and other related matters, and for interchanges of staff.

#### ARTICLE XIII. RELATION TO ANY GENERAL WORLD ORGANIZATION.

1. The Organization shall, in accordance with the procedure provided for in the following paragraph, constitute a part of any general international organization to which may be entrusted the coördination of the activities of international organizations with specialized responsibilities.

2. Arrangements for defining the relations between the Organization and any such general organization shall be subject to the approval of the Conference. Notwithstanding the provisions of Article XX, such arrangements may, if approved by the Conference by a two-thirds majority of the votes cast, involve modification of the provisions of this Constitution: Provided that no such arrangements shall modify the purposes and limitations of the Organization as set forth in this Constitution.

#### ARTICLE XIV. SUPERVISION OF OTHER ORGANIZATIONS.

The Conference may approve arrangements placing other public international organizations dealing with questions relating to food and agriculture under the general authority of the Organization on such terms as may be agreed with the competent authorities of the organization concerned.

#### ARTICLE XV. LEGAL STATUS.

1. The Organization shall have the capacity of a legal person to perform any legal act appropriate to its purpose which is not beyond the powers granted to it by this Constitution.

2. Each Member nation undertakes, insofar as it may be possible under its constitutional procedure, to accord to the Organization all the immunities and facilities which it accords to diplomatic missions including inviolability of premises and archives, immunity from suit, and exemptions from taxation.

3. The Conference shall make provision for the determination by an administrative tribunal of disputes relating to the conditions and terms of appointment of members of the staff.

#### ARTICLE XVI. FISH AND FOREST PRODUCTS.

In this Constitution the term "agriculture" and its derivatives include fisheries, marine products, forestry, and primary forestry products.

#### ARTICLE XVII. INTERPRETATION OF CONSTITUTION.

Any question or dispute concerning the interpretation of this Constitution or any international convention adopted thereunder shall be referred for

determination to an appropriate international court or arbitral tribunal in the manner prescribed by rules to be adopted by the Conference.

#### ARTICLE XVIII. EXPENSES.

1. Subject to the provisions of Article XXV, the Director-General shall submit to the Conference an annual budget covering the anticipated expenses of the Organization. Upon approval of a budget the total amount approved shall be allocated among the Member nations in proportions determined, from time to time, by the Conference. Each Member nation undertakes, subject to the requirements of its constitutional procedure, to contribute to the Organization promptly its share of the expenses so determined.

2. Each Member nation shall, upon its acceptance of this Constitution, pay as its first contribution its proportion of the annual budget for the current financial year.

3. The financial year of the Organization shall be July 1 to June 30 unless the Conference should otherwise determine.

#### ARTICLE XIX. WITHDRAWAL.

Any Member nation may give notice of withdrawal from the Organization at any time after the expiration of four years from the date of its acceptance of this Constitution. Such notice shall take effect one year after the date of its communication to the Director-General of the Organization subject to the Member nation's having at that time paid its annual contribution for each year of its membership including the financial year following the date of such notice.

#### ARTICLE XX. AMENDMENT OF CONSTITUTION.

1. Amendments to this Constitution involving new obligations for Member nations shall require the approval of the Conference by a vote concurred in by a two-thirds majority of all the members of the Conference and shall take effect on acceptance by two-thirds of the Member nations for each Member nation accepting the amendment and thereafter for each remaining Member nation on acceptance by it.

2. Other amendments shall take effect on adoption by the Conference by a vote concurred in by a two-thirds majority of all the members of the Conference.

#### ARTICLE XXI. ENTRY INTO FORCE OF CONSTITUTION.

1. This Constitution shall be open to acceptance by the nations specified in Annex I.

2. The instruments of acceptance shall be transmitted by each government to the United Nations Interim Commission on Food and Agriculture, which shall notify their receipt to the governments of the nations specified in Annex I. Acceptance may be notified to the Interim Commission

through a diplomatic representative, in which case the instrument of acceptance must be transmitted to the Commission as soon as possible thereafter.

3. Upon the receipt by the Interim Commission of twenty notifications of acceptance the Interim Commission shall arrange for this Constitution to be signed in a single copy by the diplomatic representatives, duly authorized thereto, of the nations who shall have notified their acceptance, and upon being so signed on behalf of not less than twenty of the nations specified in Annex I this Constitution shall come into force immediately.

4. Acceptances the notification of which is received after the entry into force of this Constitution shall become effective upon receipt by the Interim Commission or the Organization.

#### ARTICLE XXII. FIRST SESSION OF THE CONFERENCE.

The United Nations Interim Commission on Food and Agriculture shall convene the first session of the Conference to meet at a suitable date after the entry into force of this Constitution.

#### ARTICLE XXIII. LANGUAGES.

Pending the adoption by the Conference of any rules regarding languages, the business of the Conference shall be transacted in English.

#### ARTICLE XXIV. TEMPORARY SEAT.

The temporary seat of the Organization shall be at Washington unless the Conference should otherwise determine.

#### ARTICLE XXV. FIRST FINANCIAL YEAR.

The following exceptional arrangements shall apply in respect of the financial year in which this Constitution comes into force.

(a) the budget shall be the provisional budget set forth in Annex II to this Constitution; and

(b) the amounts to be contributed by the Member nations shall be in the proportions set forth in Annex II to this Constitution: Provided that each Member nation may deduct therefrom the amount already contributed by it toward the expenses of the Interim Commission.

#### ARTICLE XXVI. DISSOLUTION OF THE INTERIM COMMISSION.

On the opening of the first session of the Conference, the United Nations Interim Commission on Food and Agriculture shall be deemed to be dissolved and its records and other property shall become the property of the Organization.



## ANNEX I

## NATIONS ELIGIBLE FOR ORIGINAL MEMBERSHIP.

AUSTRALIA	INDIA
BELGIUM	IRAN
BOLIVIA	IRAQ
BRAZIL	LIBERIA
CANADA	LUXEMBOURG
CHILE	MEXICO
CHINA	NETHERLANDS
COLOMBIA	NEW ZEALAND
COSTA RICA	NICARAGUA
CUBA	NORWAY
CZECHOSLOVAKIA	PANAMA
DENMARK	PARAGUAY
DOMINICAN REPUBLIC	PERT
ECUADOR	PHILIPPINE COMMONWEALTH
EGYPT	POLAND
EL SALVADOR	UNION OF SOUTH AFRICA
ETHIOPIA	UNION OF SOVIET SOCIALIST RE-
FRANCE	PUBLICS
GREECE	UNITED KINGDOM
GUATEMALA	UNITED STATES OF AMERICA
HAITI	URUGUAY
HONDURAS	VENEZUELA
ICELAND	YUGOSLAVIA

## ANNEX II

## BUDGET FOR THE FIRST FINANCIAL YEAR.

The provisional budget for the first financial year shall be a sum of 2,500,000 U.S. dollars, the unspent balance of which shall constitute the nucleus of a capital fund.

This sum shall be contributed by the Member nations in the following proportions:

	<i>Per cent</i>		<i>Per cent</i>
Australia.....	3.33	Costa Rica.....	.05
Belgium.....	1.28	Cuba.....	.71
Bolivia.....	.29	Czechoslovakia.....	1.40
Brazil.....	3.46	Denmark.....	.62
Canada.....	5.06	Dominican Republic.....	.05
Chile.....	1.15	Ecuador.....	.05
China.....	6.50	Egypt.....	1.73
Colombia.....	.71	El Salvador...	.05

	<i>Per cent</i>		<i>Per cent</i>
Ethiopia.....	.29	Norway . . . . .	.62
France.....	5.69	Panama.....	.05
Greece.....	.38	Paraguay.....	.05
Guatemala.....	.05	Peru.....	.71
Haiti.....	.05	Philippines. . . . .	.25
Honduras.....	.05	Poland.....	1.19
Iceland.....	.05	Union of South Africa.....	2.31
India.....	4.25	U.S.S.R.....	8.00
Iran.....	.71	United Kingdom.....	15.00
Iraq.....	.44	U.S.A.....	25.00
Liberia.....	.05	Uruguay.....	.58
Luxembourg.....	.05	Venezuela.....	.58
Mexico.....	1.87	Yugoslavia. . . . .	.71
Netherlands.....	1.38	Provision for New Members	2.00
New Zealand.....	1.15		
Nicaragua.....	.05	Total.....	100.00

## UNITED STATES

### STATUTE EXTENDING PRIVILEGES, EXEMPTIONS, AND IMMUNITIES TO INTERNATIONAL ORGANIZATIONS AND TO THE OFFICERS AND EMPLOYEES THEREOF

*Public Law 291, 79th Congress; December 29, 1945*

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

## TITLE I

SECTION 1. For the purposes of this title, the term "international organization" means a public international organization in which the United States participates pursuant to any treaty or under the authority of any Act of Congress authorizing such participation or making an appropriation for such participation, and which shall have been designated by the President through appropriate Executive order as being entitled to enjoy the privileges, exemptions, and immunities herein provided. The President shall be authorized, in the light of the functions performed by any such international organization, by appropriate Executive order to withhold or withdraw from any such organization or its officers or employees any of the privileges, exemptions, and immunities provided for in this title (including the amendments made by this title) or to condition or limit the enjoyment by any such organization or its officers or employees of any such privilege, exemption, or immunity. The President shall be authorized, if in his judgment such action should be justified by reason of the abuse by an international organization or its officers and employees of the privileges, exemptions, and immunities herein provided

or for any other reason, at any time to revoke the designation of any international organization under this section, whereupon the international organization in question shall cease to be classed as an international organization for the purposes of this title.

SEC. 2. International organizations shall enjoy the status, immunities, exemptions, and privileges set forth in this section, as follows:

(a) International organizations shall, to the extent consistent with the instrument creating them, possess the capacity—

- (i) to contract;
- (ii) to acquire and dispose of real and personal property;
- (iii) to institute legal proceedings.

(b) International organizations, their property and their assets, wherever located, and by whomsoever held, shall enjoy the same immunity from suit and every form of judicial process as is enjoyed by foreign governments, except to the extent that such organizations may expressly waive their immunity for the purpose of any proceedings or by the terms of any contract.

(c) Property and assets of international organizations, wherever located and by whomsoever held, shall be immune from search, unless such immunity be expressly waived, and from confiscation. The archives of international organizations shall be inviolable.

(d) Insofar as concerns customs duties and internal-revenue taxes imposed upon or by reason of importation, and the procedures in connection therewith; the registration of foreign agents; and the treatment of official communications, the privileges, exemptions, and immunities to which international organizations shall be entitled shall be those accorded under similar circumstances to foreign governments.

SEC. 3. Pursuant to regulations prescribed by the Commissioner of Customs with the approval of the Secretary of the Treasury, the baggage and effects of alien officers and employees of international organizations, or of aliens designated by foreign governments to serve as their representatives in or to such organizations, or of the families, suites, and servants of such officers, employees, or representatives shall be admitted (when imported in connection with the arrival of the owner) free of customs duties and free of internal-revenue taxes imposed upon or by reason of importation.

SEC. 4. The Internal Revenue Code is hereby amended as follows:

(a) Effective with respect to taxable years beginning after December 31, 1943, section 116 (c), relating to the exclusion from gross income of income of foreign governments, is amended to read as follows:

“(c) INCOME OF FOREIGN GOVERNMENTS AND OF INTERNATIONAL ORGANIZATIONS.—The income of foreign governments or international organizations received from investments in the United States in stocks, bonds, or other domestic securities, owned by such foreign governments or by international organizations, or from interest on deposits in banks in the United

States of moneys belonging to such foreign governments or international organizations, or from any other source within the United States."

(b) Effective with respect to taxable years beginning after December 31, 1943, section 116 (h) (1), relating to the exclusion from gross income of amounts paid employees of foreign governments, is amended to read as follows:

"(1) RULE FOR EXCLUSION.—Wages, fees, or salary of any employee of a foreign government or of an international organization or of the Commonwealth of the Philippines (including a consular or other officer, or a nondiplomatic representative), received as compensation for official services to such government, international organization, or such Commonwealth—

"(A) If such employee is not a citizen of the United States, or is a citizen of the Commonwealth of the Philippines (whether or not a citizen of the United States); and

"(B) If, in the case of an employee of a foreign government or of the Commonwealth of the Philippines, the services are of a character similar to those performed by employees of the Government of the United States in foreign countries or in the Commonwealth of the Philippines, as the case may be; and

"(C) If, in the case of an employee of a foreign government or the Commonwealth of the Philippines, the foreign government or the Commonwealth grants an equivalent exemption to employees of the Government of the United States performing similar services in such foreign country or such Commonwealth, as the case may be."

(c) Effective January 1, 1946, section 1426 (b), defining the term "employment" for the purposes of the Federal Insurance Contributions Act, is amended (1) by striking out the word "or" at the end of paragraph (14), (2) by striking out the period at the end of paragraph (15) and inserting in lieu thereof a semicolon and the word "or," and (3) by inserting at the end of the subsection the following new paragraph:

"(16) Service performed in the employ of an international organization."

(d) Effective January 1, 1946, section 1607 (c), defining the term "employment" for the purposes of the Federal Unemployment Tax Act, is amended (1) by striking out the word "or" at the end of paragraph (14), (2) by striking out the period at the end of paragraph (15) and inserting in lieu thereof a semicolon and the word "or," and (3) by inserting at the end of the subsection the following new paragraph:

"(16) Service performed in the employ of an international organization."

(e) Section 1621 (e) (5), relating to the definition of "wages" for the purpose of collection of income tax at the source, is amended by inserting after the words "foreign government" the words "or an international organization."

(f) Section 3466 (a), relating to exemption from communications taxes is amended by inserting immediately after the words "the District of Columbia" a comma and the words "or an international organization."

(g) Section 3469 (f) (1), relating to exemption from the tax on transportation of persons, is amended by inserting immediately after the words "the District of Columbia" a comma and the words "or an international organization."

(h) Section 3475 (b) (1), relating to exemption from the tax on transportation of property, is amended by inserting immediately after the words "the District of Columbia" a comma and the words "or an international organization."

(i) Section 3797 (a), relating to definitions, is amended by adding at the end thereof a new paragraph as follows:

"(18) INTERNATIONAL ORGANIZATION.—The term 'international organization' means a public international organization entitled to enjoy privileges, exemptions, and immunities as an international organization under the International Organizations Immunities Act."

SEC. 5. (a) Effective January 1, 1946, section 209 (b) of the Social Security Act, defining the term "employment" for the purposes of title II of the Act, is amended (1) by striking out the word "or" at the end paragraph (14), (2) by striking out the period at the end of paragraph (15) and inserting in lieu thereof a semicolon and the word "or" and (3) by inserting at the end of the subsection the following new paragraph:

"(16) Service performed in the employ of an international organization entitled to enjoy privileges, exemptions, and immunities as an international organization under the International Organizations Immunities Act."

(b) No tax shall be collected under title VIII or IX of the Social Security Act or under the Federal Insurance Contributions Act or the Federal Unemployment Tax Act, with respect to services rendered prior to January 1, 1946, which are described in paragraph (16) of sections 1426 (t) and 1607 (c) of the Internal Revenue Code, as amended, and any such tax heretofore collected (including penalty and interest with respect thereto, if any) shall be refunded in accordance with the provisions of law applicable in the case of erroneous or illegal collection of the tax. No interest shall be allowed or paid on the amount of any such refund. No payment shall be made under title II of the Social Security Act with respect to services rendered prior to January 1, 1946, which are described in paragraph (16) of section 209 (b) of such Act, as amended.

SEC. 6. International organizations shall be exempt from all property taxes imposed by, or under the authority of, any Act of Congress, including such Acts as are applicable solely to the District of Columbia or the Territories.

SEC. 7. (a) Persons designated by foreign governments to serve as their representatives in or to international organizations and the officers and employees of such organizations, and members of the immediate families of such representatives, officers, and employees residing with them, other than nationals of the United States, shall, insofar as concerns laws regulating entry into and departure from the United States, alien registration and fingerprinting, and the registration of foreign agents, be entitled to the same privileges, exemptions, and immunities as are accorded under similar circumstances to officers and employees, respectively, of foreign governments, and members of their families.

(b) Representatives of foreign governments in or to international organizations and officers and employees of such organizations shall be immune from suit and legal process relating to acts performed by them in their official capacity and falling within their functions as such representatives, officers, or employees except insofar as such immunity may be waived by the foreign government or international organization concerned.

(c) Section 3 of the Immigration Act approved May 26, 1924, as amended (U. S. C., title 8, sec. 203), is hereby amended by striking out the period at the end thereof and inserting in lieu thereof a comma and the following: "and (7) a representative of a foreign government in or to an international organization entitled to enjoy privileges, exemptions, and immunities as an international organization under the International Organizations Immunities Act or an alien officer or employee of such an international organization, and the family, attendants, servants, and employees of such a representative, officer, or employee."

(d) Section 15 of the Immigration Act approved May 26, 1924, as amended (U. S. C., title 8, sec. 215), is hereby amended to read as follows:

"SEC. 15. The admission to the United States of an alien excepted from the class of immigrants by clause (1), (2), (3), (4), (5), (6), or (7) of section 3, or declared to be a nonquota immigrant by subdivision (e) of section 4, shall be for such time and under such conditions as may be by regulations prescribed (including, when deemed necessary for the classes mentioned in clause (2), (3), (4), or (6) of section 3 and subdivision (e) of section 4, the giving of bond with sufficient surety, in such sum and containing such conditions as may be by regulations prescribed) to insure that, at the expiration of such time or upon failure to maintain the status under which admitted, he will depart from the United States: *Provided, That* no alien who has been, or who may hereafter be, admitted into the United States under clause (1) or (7) of section 3, as an official of a foreign government, or as a member of the family of such official, or as a representative of a foreign government in or to an international organization or an officer or employee of an international organization, or as a member of the family of such representative, officer, or employee, shall be required to depart from the United States without the approval of the Secretary of State."

SEC. 8. (a) No person shall be entitled to the benefits of this title unless he (1) shall have been duly notified to and accepted by the Secretary of State as a representative, officer, or employee; or (2) shall have been designated by the Secretary of State, prior to formal notification and acceptance, as a prospective representative, officer, or employee; or (3) is a member of the family or suite, or servant, of one of the foregoing accepted or designated representatives, officers, or employees.

(b) Should the Secretary of State determine that the continued presence in the United States of any person entitled to the benefits of this title is not desirable, he shall so inform the foreign government or international organization concerned, as the case may be, and after such person shall have had a reasonable length of time, to be determined by the Secretary of State, to depart from the United States, he shall cease to be entitled to such benefits.

(c) No person shall, by reason of the provisions of this title, be considered as receiving diplomatic status or as receiving any of the privileges incident thereto other than such as are specifically set forth herein.

SEC. 9. The privileges, exemptions, and immunities of international organizations and of their officers and employees, and members of their families, suites, and servants, provided for in this title, shall be granted notwithstanding the fact that the similar privileges, exemptions, and immunities granted to a foreign government, its officers, or employees, may be conditioned upon the existence of reciprocity by that foreign government: *Provided*, That nothing contained in this title shall be construed as precluding the Secretary of State from withdrawing the privileges, exemptions, and immunities herein provided from persons who are nationals of any foreign country on the ground that such country is failing to accord corresponding privileges, exemptions, and immunities to citizens of the United States.

SEC. 10. This title may be cited as the "International Organizations Immunities Act."

## TITLE II

### SEC. 201. EXTENSION OF TIME FOR CLAIMING CREDIT OR REFUND WITH RESPECT TO WAR LOSSES

If a claim for credit or refund under the internal revenue laws relates to an overpayment on account of the deductibility by the taxpayer of a loss in respect of property considered destroyed or seized under section 127 (a) of the Internal Revenue Code (relating to war losses) for a taxable year beginning in 1941 or 1942, the three-year period of limitation prescribed in section 322 (b) (1) of the Internal Revenue Code shall in no event expire prior to December 31, 1946. In the case of such a claim filed on or before December 31, 1946, the amount of the credit or refund may exceed the portion of the tax paid within the period provided in section 322 (b) (2) or (3) of such code, whichever is applicable, to the extent of the amount of the overpayment attributable to the deductibility of the loss described in this section.

## SEC. 202. CONTRIBUTIONS TO PENSION TRUSTS

(a) DEDUCTIONS FOR THE TAXABLE YEAR 1942 UNDER PRIOR INCOME TAX ACTS.—Section 23 (p) (2) of the Internal Revenue Code is amended by striking out the words "January 1, 1943" and inserting in lieu thereof "January 1, 1942," and by striking out the words "December 31, 1942" and inserting in lieu thereof "December 31, 1941."

(b) EFFECTIVE DATE.—The amendment made by this section shall be applicable as if it had been made as a part of section 162 (b) of the Revenue Act of 1942.

## SEC. 203. PETITION TO THE TAX COURT OF THE UNITED STATES

(a) TIME FOR FILING PETITION.—The second sentences of sections 272 (a) (1), 732 (a), 871 (a) (1), and 1012 (a) (1), respectively, of the Internal Revenue Code are amended by striking out the parenthetical expression appearing therein and inserting in lieu thereof the following: "(not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the ninetieth day)."

(b) EFFECTIVE DATE.—The amendments made by this section shall take effect as of September 8, 1945.

Approved December 29, 1945.



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VOL. 40

July, 1946

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## THE JURISDICTION OF THE SECURITY COUNCIL OVER DISPUTES

By CLYDE EAGLETON

*Of the Board of Editors*

Chapter VI of the Charter of the United Nations has generally been regarded as one of its most poorly drafted parts;<sup>1</sup> and the experience of the Security Council in dealing with cases recently coming before it has both evidenced the uncertainties of the text and added to the confusion as to its meaning. The difficulties of the Council were increased by the tendency of members to disregard the text of the Charter and by the lack of Rules of Procedure. As a result important issues have been raised, especially in the Soviet-Iran case, and more particularly as to the decision that a dispute exists concerning which the Council may make recommendations.

To evaluate and interpret the procedure for the pacific settlement of disputes under the Charter of the United Nations certain general characteristics of that system must be borne in mind. The United Nations was planned as a security system, and the Security Council was made primarily responsible for the security function therein. This function was regarded as including the entire range of adjustment of differences between nations and it was sought to leave to the Security Council a large degree of flexibility in handling such differences. The Security Council was, consequently, not restricted to legal principles, solutions, or procedures. Security was set above justice, and the establishment of order was to precede the reign of law.<sup>2</sup> The jurisdiction of the Council was to include not merely formal disputes but also situations which might give rise to friction or disputes; in other words, the Security Council was to be able to reach back to the causes of war.

While the field of action of the Security Council was thus broad and largely exclusive, its actual authority was stringently limited, and the freedom of action of sovereign states was carefully protected. Five of the six articles of Chapter VI are devoted to settlement by the states parties to the dispute themselves, through means of their own choice; and it was only through the insertion at San Francisco of four words in what is now Article 37 that

<sup>1</sup> "There are those who feel that the provisions of the Dumbarton Oaks Proposals on pacific settlement were among the least satisfactory provisions of that document. At the Conference, considerable well-founded criticisms of these provisions were voiced. The view was expressed that they were not carefully thought out, that they were illogical in arrangement, and that they were repetitious in their phraseology." L. M. Goodrich, "The Pacific Settlement of Disputes," *American Political Science Review*, Vol. 39 (1945), p. 968. See also UNCIO, Doc. 992, III/2/27, p. 1.

<sup>2</sup> See G. A. Finch, "International Law in the United Nations Organization," *Proceedings of the American Society of International Law*, 1945, pp. 28-40; C. Eagleton, "International Law and the Charter of the United Nations," this JOURNAL, Vol. 39 (1945), pp. 751-754.

the Council was given any jurisdiction of its own over terms of settlement. This jurisdiction was limited to recommendation, and there is no legal obligation upon the parties to accept such recommendations, nor any legal right on the part of the United Nations to enforce them—unless indirectly under Chapter VII.<sup>3</sup> The procedure of pacific settlement is based upon the theory that the states have a right, as well as a duty, to settle their differences by agreement among themselves. The Security Council cannot settle a dispute; it can only exert or recommend. The fact that all of Chapter VI, with the exception of four words ("such terms of settlement") is devoted to procedures through which the parties may choose their own means and their own terms of settlement manifests the emphasis of the Charter upon the right of sovereign states to settle their disputes in their own fashion. This emphasis must dominate in any interpretation of the Charter provisions for pacific settlement.

There are three stages in the procedure of pacific settlement—four, if one may be added from Chapter VII. In the first stage the Security Council does not appear at all; in the second stage the Council may recommend procedures, which the parties may or may not accept; in the third stage the Council may recommend terms of settlement to the parties, which again they may accept or not, as they choose. Finally under Article 39—which is no longer in the domain of pacific settlement—the Council may declare that a threat to the peace exists, perhaps as a result of failure to accept its recommendations, and call into play theoretically vast powers of enforcement. The matters to be considered in this essay fall within the first, or at most the first two, of the stages mentioned. In no case yet has procedure advanced beyond these two stages.

## I

Article 33, which had been third in the series of the Dumbarton Oaks Proposals, became the first item in Chapter VI of the Charter because, as the Rapporteur of the drafting subcommittee reported to Committee III/2:

The most important idea of the text was the principle that members of the Organization should undertake to settle their dispute by pacific means, and this provision accordingly had been placed at the beginning of the Chapter.<sup>4</sup>

Though the explanation was sound the result was to confuse the chronological order somewhat. This chronological order would ordinarily be expected to be as follows: (1) appeal by a Member, or party; (2) decision by the Security Council that the case presented was of the type which put into effect the obligation to seek a peaceful settlement; (3) recommendation by the Council, either general or specific, that the parties seek to achieve a

<sup>3</sup> See the statements by Senator Connally and Dr. Pasvolsky before the Senate Committee on Foreign Relations, *Hearings*, 79 Congress, First Session, pp. 271-273, 275-278.

<sup>4</sup> UNCIO, Doc. 992, III/2/27, p. 1.

settlement by means of their own choice; (4) reference to the Council, when such means have failed, for recommendation by the Council of terms of settlement.<sup>5</sup>

Some confusion might have been avoided had the Charter provisions begun with the intervention of the Council, but it was understood that the effort or the obligation of the parties to arrive at a settlement by agreement between themselves need not wait upon a decision by the Council. The great emphasis placed upon the right of the parties to settle their dispute in their own way thus introduces a stage anterior to any action by the Council, and in which the Council has no share. This first stage is decision by the parties, on their own initiative, to seek a settlement. The decision may refer to a dispute of the type which they are obligated to settle, or it may refer to any sort of a dispute; this is made superfluously clear by Article 38.<sup>6</sup> They can choose whatever means of settlement they wish, including reference to the Security Council itself; but it is quite clear that in this first, or preliminary, stage the Security Council has no jurisdiction of its own.<sup>7</sup> The action taken is entirely voluntary, and covers either a situation in which no obligation exists to settle, or one in which an obligation exists and is being discharged by the action taken.

The Security Council may at any time, upon its own initiative, or that of a Member, or of the Secretary-General, investigate to ascertain whether the dispute is one "the continuance of which is likely to endanger the maintenance of international peace and security." It could do so if it felt that the measures being taken by the parties were inadequate, or that they were unduly dominated by one of the parties, or for other reasons. The parties, however, have a preliminary opportunity to make their own decision, before the Security Council does so;<sup>8</sup> and it would be superfluous for the Council to

<sup>5</sup> "The normal sequence of events contemplated in the Dumbarton Oaks Proposals would be as follows:—(1) The Security Council, either on its own initiative or at the instance of individual States, would investigate a dispute, or a situation likely to give rise to a dispute, in order to determine whether its continuance would be likely to endanger the maintenance of peace; (2) if the parties failed to seek by peaceful means of their own choice a solution of any such dispute, the Security Council would be under a duty to call upon them to do so; (3) if the parties failed to reach a solution by peaceful means, and the Security Council was of opinion that the continuance of the dispute would endanger the maintenance of peace, it would recommend to the parties appropriate procedures or methods of adjustment . . .": *Report by the Australian Delegates*, United Nations Conference on International Organization (Canberra, 1945), No. 118.

<sup>6</sup> This was a Four Power amendment introduced originally as the first sentence of what became Chapter VI. UNCIO, Doc. 288, G/38, p. 34.

<sup>7</sup> "If the dispute has no such character, the Council shall remain passive. It is also clear that ordinarily the Council will make such a decision after having investigated the dispute under Article 39": L. M. Goodrich and E. Hambro, *Charter of the United Nations, Commentary and Documents*, 1946, p. 144.

<sup>8</sup> The delegate of Mexico (Mr. Padilla Nervo), in the course of the debate over the Lebanese-Syrian affair, said: "This Council has not to decide whether it is a question of a dispute, and that it has no importance; that is a question that has to be decided and is within the

intervene if the parties were already adequately seeking a settlement. This is borne out by the dominating theory that settlement must be by the parties themselves; by the fact that the Security Council, even if it intervened with such a decision, could only recommend a procedure to the parties, to which they would not be bound; and by paragraph 2 of Article 36, under which the Council should take into consideration any procedures already adopted by the parties.

If, however, the parties are not adequately seeking a settlement, or if they are not agreed that their dispute is one which they are obligated under Article 33 to settle the Security Council can make the decision establishing the obligation and, as will be argued later, must make that decision. A party may claim that the dispute is not one of the type described in Article 33, and consequently that no obligation rests upon him and that the Security Council has no right to make recommendations concerning it. Reserving for a moment the position of the Security Council in such a case, it is to be observed that this claim was made by the Soviet Government in the first Iranian case.

The Iranian appeal was made in such confused terms that it is not possible to ascertain upon what procedural basis it was offered;<sup>9</sup> but it necessarily raised a question as to what the Security Council should do about it. The Soviet delegate (Vyshinsky) argued that the issue was one which could and should be settled through bilateral negotiation, and that such negotiation was in process in a manner satisfying to both parties; consequently "the conditions envisaged by Articles 34 and 35 of the Charter" were not present.<sup>10</sup> He presumably meant by this that the matter was not one "the continuance of which is likely to endanger the maintenance of international peace and security." He was instructed, he said, to prove to the Security Council that the matter was one which should not be discussed by it at all.<sup>11</sup>

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jurisdiction and criterion of the party that is bringing the matter to the Council. All the articles of the Charter express that clearly. The only thing that the Council has to decide is whether that dispute or that situation or the prolongation of that situation or that dispute is likely to endanger the peace. On that, the Council has to give a decision . . .": *Journal of the Security Council* (hereinafter cited as *Journal*), p. 270 (No. 15).

<sup>9</sup> The Iranian note of January 19 claimed that interference of the Soviet Union in Iran had produced a "situation" which might lead to international friction. It then asserted that negotiations had failed—which would apparently lead into Article 37. However, the appeal was based upon Article 35 (-), "so that the Council may investigate the situation" (which could only be for the limited purpose of deciding the type of dispute) "and recommend appropriate terms of settlement" (which could only be done under Article 37). *Journal*, p. 14 (No. 2). In his note of January 26, the Iranian delegate referred to aggression, though he did not appeal to Article 39; maintained that the conditions of Article 25 (probably a typographical error) were present; and asked for the investigation of "this dispute": Same, pp. 32-37 (No. 4).

<sup>10</sup> In his note of January 24: Same, pp. 17-19 (No. 3).

<sup>11</sup> Same, p. 22. When the President announced that the matter had been placed on the agenda, Mr. Vyshinsky asked: "Would it mean a discussion of this matter in substance or on whether it should be discussed by the Council at all?"

At the third meeting, Mr. Vyshinsky stated that he would agree to discussion provided it were limited to the "procedural aspect" of the question.<sup>12</sup> In his reply to the Iranian presentation, which went into substance, he said that he would deal only with procedure, and reiterated that the Iranian claims "cannot be discussed by the Security Council since they do not meet the conditions specified in the Charter." He claimed that the Iranian Government had been satisfied with the negotiations, and said that if the new Government were not satisfied, the Soviet Union was ready to continue negotiations with it. He argued that Article 34 "is absolutely inapplicable to the question under consideration, since it relates to a dispute or situation of quite a different order," and concluded by suggesting that the Soviet Union and Iran should be given the opportunity to settle the matter.<sup>13</sup> At the end of this debate, the President observed that "if the Council should accept the view that there is a dispute," the Soviet Union would not be able to vote.<sup>14</sup>

In the Indonesian affair, the delegate of the Netherlands (van Kleffens) asserted:

Now, looking at this matter from the viewpoint of the Charter . . . I observe, first of all, that there is no dispute. I observe in the second place, that there is no situation threatening to endanger international peace and security . . . in the third place, there is no international friction which may lead to infringement of the peace. In the fourth place, I deny that there is an infringement of Article 1. . . . Fifthly, and this is my conclusion, there is, therefore, no case for the Security Council to deal with.<sup>15</sup>

Similarly, in the Lebanese-Syrian affair, the delegate of France (Bidault) said:

. . . one of two things—either there is a dispute or there is not a dispute. If there is a dispute, then it must be settled under Article 33 which recommends that disputes shall be settled in the first place by means of negotiations, and it does not set any limit to the scope of these investigations. If, on the other hand, Article 33 does not apply then there is no dispute involved, but then I wonder what we have been doing here?<sup>16</sup>

In each of the above cases the decision of the Security Council was to refer the matter back to negotiations between the parties and in no case was a formal decision taken that the dispute was one "the continuance of which is likely to endanger the maintenance of international peace and security." The actual result was to concede the argument in each case that

<sup>12</sup> *Journal*, p. 48 (No. 5).

<sup>13</sup> Same, pp. 53-57.

<sup>14</sup> Same, p. 58.

<sup>15</sup> Same, p. 189 (No. 10). The Australian delegate had no objection to setting up a committee of enquiry, but said "If I am asked to vote on the specific question as to whether the military actions of the British troops in Indonesia threaten the maintenance of international peace and security, thus providing a basis for action by this Council under Article 34 of the Charter I feel bound to answer 'No'" (italics provided): Same, p. 232 (No. 13).

<sup>16</sup> Same, p. 322; see also p. 339 (No. 16).

since no dispute of the type mentioned in Article 33 existed, the settlement of the affair should be left to the parties themselves. In each case, however, matters were introduced, both into the debate and into the resolution proposed or adopted, which left uncertain what was the true intent of the Council.

## II

The only type of dispute which the parties are obligated to settle, and the only one with regard to which the Security Council is permitted to make recommendations either of procedure or of terms of settlement, is one "the continuance of which is likely to endanger the maintenance of international peace and security."<sup>17</sup> The Security Council may also deal with "any situation which might lead to international friction or give rise to a dispute"; no obligation is stated for the parties, if any, to a "situation." In either case decision as to whether the dispute or the situation is of the type stipulated is made by the Security Council under Article 34, and must, it is believed, be made by the Security Council before it is enabled to make any recommendations concerning either procedures or terms of settlement.

It has been maintained that a Member, or party, may, by Article 35 (1) put a matter upon the agenda of the Security Council, and that the Council is thereby obligated to treat it as a dispute or situation.<sup>18</sup> Assuming that the phrase "bring to the attention of the Security Council" has the effect of "putting the item upon the agenda" (whatever that may mean), it does not follow from either phrase that the Council is thereby bound to regard the matter as a dispute, or as a situation, upon the mere allegation of the party making it. To assert this would be to deny to the Council the right of decision which is actually given it by Article 34. A state may make the claim before the Council that a dispute or situation exists, but if this allegation were interpreted to bind the Council, Article 34 would be useless. If this claim were admitted, or if the Council in a particular case should fail to make a decision, various difficulties would appear. Should the parties agree and meet their obligations under Article 33 (the first stage, as described above) action by the Security Council would be unnecessary and undesirable. If the parties did not agree conflicting possibilities would arise: (1)

<sup>17</sup> Goodrich and Hambro, p. 141.

<sup>18</sup> This claim is sometimes made by persons who wish to strengthen the Security Council, or the procedure of pacific settlement. Thus Mr. Bevin, who gave little consideration to procedural limitations, said: "If any accuser State says there is a dispute, then there is a dispute, and if a State makes a charge against another State, and then the State against which it is made repudiates it or contests it, then there is a dispute, and the Council can make its recommendations." Mr. van Kleffens, with whom he thought he was in agreement, took exactly the opposite viewpoint: *Journal*, pp. 237, 262, 270. Professor Quincy Wright, in remarks made at the recent meeting of the American Society of International Law (which will appear in the forthcoming *Proceedings*) takes a position similar to that of Mr. Bevin.



a party could insist that the dispute was one of the proper type and therefore that the obligations imposed by Chapter VI, both upon the other party and upon the Security Council, were binding;<sup>19</sup> (2) a party could, on the contrary, insist that the matter was not of the proper type and thus exclude not only any obligation for itself under Article 33 but any right of the Security Council to make recommendations. The situation thus produced would be impossible, and if possible would be undesirable, since the parties are not disinterested. The Security Council manifestly does have the power to make the decision that a dispute or situation is of the designated type, and cannot be bound by the mere allegation of a state or party.

The Dumbarton Oaks Proposals may be adduced in further support of the above conclusion. In the order of articles there laid down the authority of the Security Council to investigate and decide came first, and what is now paragraph 2 of Article 33 therefore followed<sup>20</sup> as did everything else, upon this decision by the Council; it would not be reasonable for the Council to call upon the parties to settle their dispute until it was first established that the dispute was one for which an obligation to settle could be asserted. While the published records of the UNCTO are too summary for this purpose, the verbatim record of discussions would disclose many statements made by delegates indicating their acceptance of this logical sequence.<sup>21</sup> Dr. Pasvolsky, explaining Article 34 to the Senate Committee on Foreign Relations, said:

The Security Council is empowered to make investigations here for a definite purpose—for the purpose of determining whether or not the continuance of a dispute or situation is likely to endanger the maintenance of international peace and security, because the Security Council, as is indicated later on, *takes action on it* when it determines that a particular dispute is of such a nature that its continuance is likely to endanger the maintenance of international peace and security.<sup>22</sup>

<sup>19</sup> "If we have to establish commissions of inquiry simply because a Member of the United Nations thinks fit to bring a charge against another State or Government, this organization might well soon become an obnoxious tool of international ill-feeling. All sorts of accusations of one sort or another would then be presented to the detriment of peaceful relations, and that would seem highly undesirable." Van Kleffens at the 37th meeting of the Council.

<sup>20</sup> The transfer of this paragraph with the Article to which it was attached (see note 4, p. 514, above) was illogical and produces confusion. The paragraph is in any case unnecessary, since this right of the Council to exhort the parties is three times repeated in Chapter VI.

<sup>21</sup> I make this statement upon the basis of my own detailed notes of discussions in Committee III/2 and its drafting subcommittee III/2/B. See also note 5, p. 515, above.

<sup>22</sup> *Hearings before the Committee on Foreign Relations, U. S. Senate, 79 Cong., 1st Session, p. 271.* A colloquy between Senator Burton and Dr. Pasvolsky may also be quoted (pp. 284-285):

Mr. Pasvolsky: Senator, the question of the definition of danger to international peace and security or threat to international peace and security necessarily has to be left to the determination of the Council.

Senator Burton: I want to be clear that it is not sufficient to meet the requirements here that there is an international dispute and danger of breaking international peace between the two of them.

Mr. Pasvolsky: You see, the purpose of this 'if' clause [Article 37] is that the Security

The necessity for such a *décision préalable* by the Security Council is further demonstrated by the voting procedure in subsequent action.<sup>23</sup> If the rule is to be applied that disputants are not permitted to vote, there must be authoritative determination that there is a dispute; who are the parties to the dispute; and, alternatively, whether it is a "situation," the consequences of which as regards voting are not yet known. Without such determinations it would be impossible to say who was entitled to vote in each case.

The above discussion may now be illustrated from cases which have been considered by the Security Council but it should be observed that no serious consideration was given to such questions of procedure and that both the debates and the decisions taken were confused and of uncertain value as precedents.

The USSR, in a note of January 21, 1946, asked the Security Council to discuss the situation in Greece, and to take measures provided by the Charter to remove the situation.<sup>24</sup> Mr. Vyshinsky, presenting the oral argument, passed by all the procedural questions which he had raised in the earlier Iranian case, leapt at once into substance, and demanded the "quick unconditional withdrawal of British troops from Greece."<sup>25</sup> Mr. Bevin, indignant at the charge and eager to refute it, also argued on the basis of substance, and demanded from the Council an answer to the question whether British action in Greece was endangering the peace of the world.<sup>26</sup> Mr. Stettinius thought that the Council would not be justified in regarding the situation as one likely to endanger peace, and added:

*Without such a finding the Council has no authority to recommend appropriate procedures or methods of adjustment. I do not believe, therefore, that it would be wise for the Council to take formal action in this case.*<sup>27</sup>

Mr. Bevin rejected the proposal of Mr. Vyshinsky to say that in view of the declaration by the representative of the United Kingdom that the British troops will be withdrawn as soon as possible the Council is of the opinion that the question has been exhausted

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Council has to determine that a particular dispute in fact is of such nature that its continuance would be likely to endanger the maintenance of international peace and security. . . . The Security Council, however, has to be the judge as to whether the dispute is of such a nature that it should intervene and take action.

<sup>23</sup> "But since the answer to the question whether that matter is a dispute or a situation has consequences; consequences, namely, with regard to the voting procedure, I do not think that, in the final analysis, it can be left to the parties to decide whether a matter is a dispute or a situation, and that is a question that should be decided by the Council having heard the development of the parties' statements": Mr. van Kleffens, *Journal*, p. 270 (No. 15).

<sup>24</sup> Same, p. 14 (No. 2).      <sup>25</sup> Same, pp. 87-92 (No. 7).      <sup>26</sup> Same, pp. 92-100 (No. 7).

<sup>27</sup> Same, p. 120 (No. 8) (italics supplied). The President, speaking as the delegate of Australia, said: "If we look at the terms of the Charter itself, we find that action by the Security Council is called for *only if there is a dispute*, the continuance of which is likely to endanger the maintenance of international peace and security." He suggested that the Council should decide this question, and observed that his answer would be "No."

and demanded a "straight answer" to the question whether his Government was endangering world peace. If it were not, he said, "Then the function of the Security Council is finished."<sup>28</sup> Mr. van Kleffens asked if the parties to the dispute could vote. To this the President replied:

The Council has not declared the matter to be a dispute, and at such time as the Council declares any situation to be a question of dispute, in that way it brings into operation Article 27 of the Charter.<sup>29</sup>

Mr. Bevin's question was never answered; indeed, the Security Council as such took no decision. It permitted a statement to be issued by the President of the Council, which merely took note of statements made, expressed neither condemnation nor approval of the action of British forces in Greece, and declared the matter closed.<sup>30</sup> It was definitely not a formal decision under Article 34, and it may be interpreted as a refusal to consider the matter as a dispute or situation of the type which would enable the Council to make recommendations of its own.

Another note on January 21, this time from the Ukrainian delegate, brought to the attention of the Security Council the situation in Indonesia, which it regarded as covered by Article 34, and asked the Council to "carry out the necessary investigations and to take the measures provided for by the Charter in order to put an end to the present situation."<sup>31</sup> Mr. Manuisky asked specifically for the appointment of a commission to investigate on the spot.<sup>32</sup> Mr. Bevin claimed that no charge was made that the situation endangered peace, and Mr. van Kleffens emphatically asserted that there was no dispute and therefore nothing for the Council to do.<sup>33</sup> Mr. Manuisky suggested that the commission might decide that the Netherlands Government had taken a wrong action or a right action; and he made a proposal under which the commission would "establish peace in Indonesia."<sup>34</sup> No such authority is given to the Council, of course; it can investigate only to decide whether a dispute of the stipulated type exists, and if such a dispute did exist, the Council could do no more than recommend procedures to the parties. The Ukrainian proposal was lost, the President declaring that the vote was taken under Article 27, paragraph 3. Other

<sup>28</sup> *Journal*, pp. 126-128.

<sup>29</sup> Same, p. 131. The President asked if it was desired "to take a vote on the question as to whether this should be regarded as a dispute, thus bringing into operation Article 27?" Later (p. 134), Mr. Vysinsky claimed that Article 27, paragraph 3, should apply to voting on the proposal, and thereby threw proceedings into confusion.

<sup>30</sup> Same, p. 177 (No. 10).

<sup>31</sup> Same, p. 15 (No. 2).

<sup>32</sup> Same, p. 182 (No. 10). In the debate it appeared that delegates regarded the appointment of such a commission in general as desirable, as an instrument for obtaining the necessary facts and for satisfying public opinion that the Council was working efficiently; but the delegates thought that it was unnecessary in the present case.

<sup>33</sup> Same, pp. 183, 189. Mr. van Kleffens' words are quoted in note 15, p. 517, above.

<sup>34</sup> Same, p. 244 (No. 13). The Egyptian delegate's proposal stated terms of settlement to be executed by the United Kingdom! Same, p. 245.

proposals likewise failed, and the President declared the matter closed.<sup>35</sup> Again it seems clear that the Security Council did not regard the situation as one of the type designated and therefore took no jurisdiction and made no recommendations.

On February 4 a communication from the heads of the Lebanese and Syrian delegations brought to the attention of the Security Council under Article 34 a "dispute."<sup>36</sup> When the President suggested that, rather than pass upon the question whether a dispute existed, the two delegates be seated without reference to that question, Mr. van Kleffens replied that he had no objection to seating the delegates, but that

This should not be taken to mean that if any Member State says that there is a dispute, the Council is bound to accept as a fact that there is a dispute in the technical sense of the term.<sup>37</sup>

The delegate of Brazil hoped

That in the future the Council will establish the fact that no simple letters, unsubstantiated, can be accepted by the Council. It is not enough for a Member to say there is a situation or a dispute in a single letter, without giving the reasons for it. The next time we have such a letter or request I think the Council will be able to decide, before asking the member or members interested to come to the table, whether it is a dispute or a situation, but we cannot do that now.<sup>38</sup>

Mr. Bevin, in a somewhat confused statement, seemed to believe that the mere presentation of an accusation established the fact that there was a dispute, a position which was immediately challenged by the Egyptian delegate:

I say it is for the Council to decide on any occasion whether a dispute or situation exists.<sup>39</sup>

The delegate of Mexico made a more precise distinction, to the effect that a party can call it a dispute, but the Security Council must decide whether it is a dispute, the continuance of which is likely to endanger the maintenance of international peace and security.<sup>40</sup> Mr. Vyshinsky also agreed

that it is not enough to say that because a party announces that a conflict exists, the Council must agree that a conflict does exist. It is for the Council in every case itself to determine whether or not a conflict does exist. I agree with Mr. van Kleffens when he insists that the Council had the right to decide *and the duty to decide* this question.<sup>41</sup>

The delegate of Lebanon demanded the immediate withdrawal of British and French troops and various proposals attempted directly or indirectly to

<sup>35</sup> *Journal*, pp. 252-256 (No. 14).

<sup>36</sup> *Same*, p. 139 (No. 5).

<sup>37</sup> *Same*, p. 267 (No. 15).

<sup>38</sup> *Same*, p. 268.

<sup>39</sup> *Same*, p. 269.

<sup>40</sup> *Same*, p. 269 (No. 15).

<sup>41</sup> *Same*, p. 271 (italics supplied). It is, however, difficult to find consistency between this clear statement and the positions taken by Mr. Vyshinsky at pp. 298, 309, 342, in which he asserts at one time that there is a dispute and at another time that "it is the business of the Council to decide" whether there is a dispute. *Ad hoc* argumentation has not been uncommon in the Security Council discussions.

include this demand without having decided that a dispute existed. The delegate of France noted that an appeal was being made to the Council without proper efforts on the part of the parties themselves under Article 33 to adjust the situation; and Mr. Stettinius remarked that the possibilities of Article 33 had not yet been exhausted.<sup>42</sup> Others argued that negotiations should be continued and various proposals were offered to this end, most of which sought also to include directly or indirectly the Lebanese demand. The Soviet delegate pressed for a more definite statement of the purposes and content of the negotiations.<sup>43</sup> The Security Council had not yet put itself into a position in which it was qualified even to recommend procedures, much less so definite a term of settlement as withdrawal of troops on a specified date; and Mr. Bidault in reply stated quite accurately the situation under the Charter:

If there is a dispute, then it must be settled under Article 33 which recommends that disputes shall be settled in the first place by means of negotiations, and it does not set any limit to the scope of those negotiations. If, on the other hand, Article 33 does not apply, then there is no dispute involved. . . .<sup>44</sup>

Solution of the problem was facilitated, though procedure was left uncertain, by the willingness of the United Kingdom and France to agree to the withdrawal of their troops. Both announced that they would abstain from voting, without prejudice to future procedure. The proposal of Mr. Stettinius at last received seven votes, only to meet with an objection from the Soviet delegate that his vote was against it and that it had not, therefore, been adopted, under Article 27, paragraph 3. Mr. Bevin and Mr. Bidault agreed to this interpretation of the voting procedure, but asserted that they would nevertheless carry out the expressed desires of the Council members.<sup>45</sup> While it is difficult to draw conclusions from this handling of the Lebanese-Syrian affair, it was strongly emphasized by individual speakers, as has been shown, that the Council must decide that a dispute exists, and that, even after such a decision, the Council must leave it to the parties to settle by means of their own choice.

Finally we have to consider the second Iranian case, in which the problem above raised was brought to a head by a memorandum from the Secretary-General. It should be recalled that the Soviet delegate had steadily maintained, during the first consideration of the Iranian complaint, that the matter was not a dispute of the type calling for intervention by the Security Council, and that the action taken by the Council supported this view by suggesting that negotiations be continued.

The Iranian note of March 18, 1946, called attention, under Article 35 (1), to a "dispute" which had arisen by reason of new developments, and asked for "immediate and just solution of this dispute by the Security

<sup>42</sup> *Journal*, p. 291 (No. 16).

<sup>43</sup> Same, p. 322; see also p. 339.

<sup>44</sup> Same, p. 322.

<sup>45</sup> Same, pp. 346-347.

Council."<sup>46</sup> The Soviet delegate (Gromyko) again argued that negotiations had been in progress and had indeed "resulted in a positive solution agreed to by both the governments concerned."<sup>47</sup> Mr. Byrnes, supported by the delegate of the United Kingdom and others, insisted that such a unilateral statement was not sufficient. Mr. Gromyko then charged Mr. Byrnes with taking the following position, which he said was contrary to the Charter:

The fact that the Security Council receives a communication from a Member of the United Nations is sufficient to make it necessary for the Security Council to examine that communication as to its substance.<sup>48</sup>

Mr. Byrnes, at the following meeting (26th), replied that he had not discussed the merits of the Iranian proposal, and called for a vote on the motion of the Soviet delegate that the item should be deleted from the agenda.<sup>49</sup> This motion having been defeated, Mr. Gromyko called attention to his note of March 19, asking for delay until April 10.<sup>50</sup> After much debate the Soviet request was denied whereupon he withdrew, announcing that he would not attend discussion of the Iranian question until April 10.<sup>51</sup> When the Iranian representative had been admitted to the Council table Mr. Byrnes interrupted his presentation to insist that he confine himself to the question of postponement and not enter into the facts of the case.<sup>52</sup> At the 28th meeting the Council agreed to Mr. Byrnes' proposal that both parties be asked to report by April 2 upon the existing status of negotiations and particularly "whether or not the reported withdrawal of troops is conditioned upon the conclusion of agreements between the two Governments on other subjects."<sup>53</sup> At the 29th meeting a letter was read from the Iranian representative denying that negotiations had achieved an understanding between the parties; but immediately thereafter, in reply to a question from Mr. Byrnes, he expressed willingness to withdraw his complaint if the Soviet Government would give unconditional assurance that its troops would be withdrawn by May 6 and provided that the matter should remain upon the agenda of the Security Council.<sup>54</sup>

Mr. Byrnes thereupon, at the 30th meeting, offered a resolution which took note of assurances that Soviet troops would be withdrawn in five or six weeks and that current negotiations were not connected with this withdrawal; expressed solicitude that Soviet troops would not be used to influence negotiations; and resolved to defer further proceedings until May 6, at which time both parties would report and the Council should consider

<sup>46</sup> *Journal*, p. 352 (No. 17).

<sup>47</sup> Same, pp. 366-369, 378 (No. 19). He asked that it should therefore be deleted from the agenda, apparently meaning by this that the Security Council should give up its claims to jurisdiction over the matter. See also pp. 375-376.

<sup>48</sup> Same, p. 375.

<sup>49</sup> Same, pp. 381-382 (No. 20).

<sup>50</sup> Same, pp. 413, 420 (No. 21).

<sup>51</sup> Same, p. 438 (No. 22).

<sup>52</sup> Same, p. 353 (No. 17).

<sup>53</sup> Same, pp. 428-9.

<sup>54</sup> Same, pp. 450-454 (No. 23).

what further proceedings were required.<sup>55</sup> This resolution was agreed to, the Australian representative abstaining partly because

before any of the measures in Chapter VI can be considered by the Council, or a postponement granted, in fact before any decision at all is taken, we have to ascertain the facts, once the case has been admitted to the agenda. . . . We went straight from a procedural question of postponement to a final resolution without even having decided to investigate the case.<sup>56</sup>

The Soviet delegate immediately filed a demand that the Iranian question be removed from the agenda, on the ground that the resolution was "incorrect and illegal, being in conflict with the Charter of the United Nations." He noted that:

Such a resolution of the Security Council might have been well-founded, if the position in Iran had threatened international peace and security, as provided in Article 34 of the Charter of the United Nations.

Under the Charter, the Security Council may investigate any dispute or any situation which might endanger the maintenance of international peace and security. It is, however, quite obvious that such a position did not and does not now exist in Iran, so that the Security Council had no reason to give further consideration to the Iranian question of 6 May.<sup>57</sup>

When the Security Council assembled on April 16, it was confronted, apparently to its annoyance,<sup>58</sup> with a memorandum from the Secretary-General. The Iranian Government had, on the preceding day, withdrawn its complaint, thereby strengthening the Soviet argument that the matter should be removed from the agenda, and the Council had debated the request inconclusively. It now had to face the following argument advanced by the Secretary-General:

The Council was originally seized of the dispute under Article 35, Paragraph 1. Now that Iran has withdrawn its complaint the Council can take no action under Article 33, Article 36, Article 37, or Article 38, since the necessary conditions for applying these articles, namely a dispute between two or more parties, do not exist. The only article

<sup>55</sup> *Journal*, p. 458 (No. 22). This should be compared with the statement of Mr. Stettinius, quoted at note 27, page 523, above; with the charge made by Mr. Gromyko that Mr. Byrnes wished to deal with substance, at note 48, p. 524, above; and with Part III, below.

<sup>56</sup> Same, pp. 463-464 (No. 24). Colonel Hodgson's meaning was, however, rendered uncertain by his remarks made at the following meeting (32nd).

<sup>57</sup> Same, pp. 489-490 (No. 25).

<sup>58</sup> The annoyance was probably due mostly to surprise at the sudden and unexpected character of the move. It is believed that the Secretariat should be encouraged and not spurned in such matters. Its officials represent the international community and should be able to offer disinterested, impartial, and expert advice. It is their function to uphold the Charter as against national interests, and encouragement of their efforts in this function will serve to build up respect for the United Nations. The Security Council has now, according to the newspapers of June 8, affirmed the right of the Secretary-General to intervene in such matters.

under which it can act at all is Article 34. But that article, as has already been said, can only be invoked by a vote to investigate, which has not been taken or even suggested in this case. It is therefore arguable that, following withdrawal by the Iranian representative, the question is automatically removed from the agenda unless (a) the Security Council votes investigation under Article 34 or (b) a member brings it up as a situation or dispute under Article 35, or (c) the Council proceeds under Article 36, Paragraph 1, which would appear to require a preliminary finding that a dispute exists under Article 33, or that there is "a situation of like nature."

The memorandum went on to consider the argument that once a matter is brought to the attention of the Security Council, it no longer belongs to the party but to the Council and observed that, granted this argument, the only way in which the Council could exercise its right would be under Article 34, and it had not done this.<sup>59</sup>

The viewpoint expressed by the Secretary-General was, however, rejected by the Security Council at its 36th meeting. This decision was based upon a report from the Committee of Experts, in which a majority held that

even after an agreement has been reached between the parties, circumstances may continue to exist (for example, the conditions under which the agreement has been negotiated) which allow fears regarding peace to subsist and which justify the maintenance of the question in the list of matters with which it is concerned.

The majority group further criticised the Secretary-General's memorandum as too narrow in that it dealt only with a "dispute" and treated the dispute merely as a lawsuit and in that it misunderstood the functions of the Security Council (which is not a court of justice) and its competence, which includes situations. It found a broader base for the authority of the Security Council:

The Charter has in fact invested the Security Council, especially under Article 24, with certain political functions of primordial importance by conferring on it the primary responsibility for the maintenance of international peace and security.<sup>60</sup>

It may be said of the two documents that they proceed in parallel lines, in opposite directions, without touching each other. The argument presented by the Secretary-General was a strictly technical interpretation of the Charter; the position of the Security Council seemed to be that its authority to maintain peace was of such primordial importance as to be superior to any limitations found in Chapter VI. There can be no doubt of the right of the Council to put a matter upon its agenda, and to keep it there as long as it wishes; but it had never put this matter upon the agenda, in terms of Article 34. The Council could "consider and discuss" almost any question, and could decide whether or how to act upon it; but it could recommend procedures to the parties only if it were established that the

<sup>59</sup> *Journal*, pp. 522-524 (No. 27).

<sup>60</sup> S/42 (April 18, 1947), p. 2.



matter was a dispute or situation of the type referred to in Article 34; and it could recommend terms of settlement only if it were established that the conditions of Article 37 had been met. An item, that is, may be upon the agenda for one of several reasons or purposes; the question is not so much whether it should be upon the agenda at all as whether it is there for a purpose which implies an authority on the part of the Security Council to deal with it in that particular way.

It seems clear that Mr. Gromyko objected to retention of the Iranian question upon the agenda because he felt that the purpose for which it had been left on the agenda indicated an assumption of jurisdiction by the Security Council which the Soviet Government regarded as illegal under the Charter. This position (as has been seen above) the Soviet delegates had consistently maintained; they had not objected to inclusion upon the agenda for the purpose of procedural discussion; they had maintained that it was not a dispute of the type over which the Security Council could take jurisdiction; and the Council had never taken a decision that it was such a dispute. Mr. Gromyko apparently regarded the decision taken at the 30th meeting as a recommendation not only of a specific procedure which could not be done until the conditions of Article 34 had been established but also of terms of settlement which could not be done until the conditions of Article 37 were established. The Soviet request to remove the matter from the agenda was thus more than mere resentment; it was a protest against what Mr. Gromyko and his Government asserted to be an illegal course of action. There being no appeal from the Security Council he rejected the decision unilaterally; and on the day set for the report (May 6), no Soviet representative appeared.

### III

Thus an issue of some importance in the constitutional interpretation of the Charter has been raised. On the one hand, the willingness of states to accept the Charter depended largely upon the extent to which their sovereign rights would be limited by it, in this case, upon the extent of the authority which was to be given to the Security Council with regard to the settlement of disputes among them. Limitations were put into the Charter in order to protect the sovereignty of the states Members, and for none more than for the United States;<sup>61</sup> they serve in the capacity of protection of the constitutional rights of the accused, a matter in which the American people have always been much interested. The Soviet Government claims, in

<sup>61</sup> Mr. Stettinius said "We believe that the argument in the Secretary-General's memorandum discloses a concept of the functions of the Security Council which is rather limited and which, if accepted, would have serious consequences for the future of this body." *Journal*, p. 588 (No. 50). With regard to this position it should be recalled that it was the United States which, at Dumbarton Oaks and San Francisco, insisted upon this limited concept; and it was upon the assurance that such limitations were actually in the Charter that the Senate gave its advice and consent to ratification.

effect, that such constitutional rights were denied to them in the Iranian case.

On the other hand it is beyond doubt that the Charter is weak and inadequate in its provision for the peaceful settlement of disputes among states. It is most desirable that it should be strengthened and much could be done in this direction through liberal interpretation of the Charter. A constitutional system may be, and often is, modified by the acceptance of usages; and where constitutional provisions lead to deadlocks efforts will always be made to find a way around them.

Such a solution seems to have been what Mr. Byrnes was aiming at, as a result of the lack of rules of procedure for the Security Council and of uncertainties as to procedure and voting under the Charter. If a decision under Article 34 were attempted—as was clearly prerequisite before the Security Council could proceed to formal recommendation, either of procedures or terms of settlement—it was to be feared that the Soviet Government might claim a right of veto in the taking of the decision.<sup>62</sup> It was doubtless fear of the *impasse* which might result from this situation which deterred the Security Council from undertaking, in any of the cases brought before it, to decide whether or not it was a dispute (or situation) in the sense of Article 34. A way was needed to avoid this *contretemps*, and it must again be recalled that, without such a decision, the Security Council would have no jurisdiction to recommend either procedures or terms of settlement.

In the light of the preceding paragraph another interpretation may be offered for the resolution proposed by Mr. Byrnes and adopted by the Security Council. The Council, it may be said, made no recommendation of any kind, and took no jurisdiction for this purpose over this case (or over any case before it); it did no more than to "consider and discuss," which it has an unlimited right to do under the voting formula.<sup>63</sup> Mr. Byrnes' resolution, it may be argued, merely took note of various statements made by both parties, and proposed to defer action until further information had been received from both of them. It also observed—what is obviously true whether said or not—that any Member or party could bring the dispute to the attention of the Security Council at any time that it might wish to do so. Thus, it could be said, the action of the Security Council was entirely procedural, and within the first stage of action described above—that is, of action by the parties themselves. Since an appeal had been made to the Council under Article 35 (1), the Council was forced to consider what should

<sup>62</sup> It was reported in the newspapers (but not in an official UN document) that the Soviet delegate had proposed to the Committee of Experts incorporation into the Rules of Procedure of a right of veto in connection with decisions taken under Article 34. It is to be recalled that the statement on voting procedure issued at San Francisco asserted that the "preliminary question as to whether or not such a matter is procedural must be taken by a vote of seven members of the Security Council, including the concurring votes of the permanent members." UNCIO, Doc. E52, III/1/37 (1); see Goodrich and Hambro, p. 180.

<sup>63</sup> See the citations in the preceding note.

be done; and it had, after consideration, decided to defer the serious decision that a dispute or situation menacing to the peace actually existed. Mr. Byrnes had in fact said, and he repeated it following the proposal of his resolution, that with this procedure "there might be no need to go into the substantive issue"<sup>64</sup>

Such an interpretation is, of course, much at variance with that made by the Soviet Government; and much debate could be had as to whether the resolution adopted actually means, or was intended to impose upon Russia either procedures or terms of settlement. The Soviet Government has given to it this interpretation, has therefore rejected it as illegal, and has undertaken a sitdown strike against it. Public opinion, sympathetic with Iran and unconcerned with technical interpretation of the Charter, approves the Council action in the belief that it does make demands of Russia. Yet the Security Council has an unlimited right of "consideration and discussion," which no individual member thereof can alone prevent.<sup>65</sup> There is nothing to forbid the Security Council from issuing a statement summing up the results of its consideration at a given moment; indeed such a statement would be expected. There are no rules of procedure, and no forms of action have yet been devised; but it is reasonable to assume that, if the Council had really intended to regard the matter as a dispute and to make recommendations thereon, it would have employed those words. The resolution, however, does not mention a "dispute" or a "situation," and it does not "recommend."

A mere statement as to a situation at a given moment, such as this resolution may be interpreted to be, can be very impressive and almost as effective as a formal decision that a dispute exists and formal recommendations concerning it. Neither procedure establishes any legal obligation upon the parties to submit to the implications or to the recommendations. The words of the Security Council are weighty words, speaking as they do for the organized community of nations; and they have their effect upon the parties and upon world opinion in whatsoever form they appear, not because they create legal obligations, but because of their own weight. It is probably true, also, that this method of action—if not carried to the point of abuse—harmonizes with the original concept of the Security Council, which was intended to operate with as much flexibility as possible for the maintenance of peace and security.

There are thus two interpretations as to the action taken by the Security Council, with consequent friction and deadlock. The situation thus presented results from earlier insistence upon a weak Charter and upon protection of national sovereignty, and especially from inclusion in it of the nonsensical veto system, autophagous in its relation to the settlement of

<sup>64</sup> *Journal*, p. 459 (No. 24).

<sup>65</sup> See the citations in footnote 62 above, and the *Commentary on the Charter of the United Nations*, British Command Paper Miscellaneous No. 9 (1945) Nos. 30, 86.

disputes.<sup>66</sup> Assuming that it is now desired to overcome the effect of these earlier errors, is the method followed by the Security Council the best for the purpose? It may be said for it that it purports to be nothing but discussion, and thus keeps matters within the earlier stages of settlement; that it thus avoids the exacerbation of feelings which might flow from more formal decisions; that it avoids the veto; and that it is about as effective as more formal recommendations, since both depend upon the weight of Council opinion and the pressure of public opinion, rather than upon the legal consequences of the action taken.

While the employment of this procedure in the confusion of present uncertainties is understandable, it is believed that it offers no satisfactory solution of the problem, and that it will breed new difficulties for the United Nations. It seeks to accomplish by indirection what the Security Council apparently fears could not be accomplished directly;<sup>67</sup> it has the effect by implication of making demands which the Security Council has no legal authority to make; it bypasses the intended meaning of the Charter provisions for the peaceful settlement of disputes. The unavoidable consequence is to arouse suspicion as to the fairness of the Council, and fear as to the extent to which it might carry this procedure. The precedents thus created might be used later against those who now create them.

The technical procedures of law are often annoying, but they are indispensable in any system whose function it is to deal out justice. A court must pass upon its own jurisdiction when challenged; it must weigh evidence and state its conclusions without prejudice; it must establish the degree of illegality involved and its rightful means of action for each degree. The Security Council was of course not planned as a court of law and it was left an exceptional freedom of action; nevertheless it is a high tribunal upon which the hopes of nations depend, and it is obligated to act "in conformity with the principles of justice and international law." There was at San Francisco much apprehension that the Security Council was being given a too arbitrary power, and disregard by it of the procedural limitations set upon it by the Charter will increase fears of this nature. These limitations were put into the Charter to give some degree of protection to Members against arbitrary invasion of their rights; they are in the nature of constitutional guarantees for the accused; disregard of the rights thereby established is sure to engender suspicions and to weaken confidence in it. It is particularly unfortunate that it happened to be the Soviet Union against which this method of action was conceived and first used.

The reasons advanced by the Security Council for its rejection of the Secretary-General's memorandum are not convincing and they add to the

<sup>66</sup> The veto is brought to the *reductio ad absurdum* at the point where it is used to prevent decision that there is a dispute in which the veto may or may not be used.

<sup>67</sup> The method, and the consequent difficulties, may be compared with the methods which, it is complained, are being used by the Soviet Union against Iran.

suspicion that the Council sought to stretch its means of action for *ad hoc* purposes. The Council asserted, in effect, that it is a political, rather than a judicial, body—which is true enough, and bad enough without exaggerating it further. The Council also based an argument upon Article 24 which, if accepted as stated, would eliminate need for any other provisions in the Charter with regard to peace and security.<sup>68</sup> This disingenuous argument can not be upheld, for the Council must act within the limits of authority given it by the Charter and Article 24 itself, in paragraph two, limits the Council not only to Purposes and Principles, but to "the specific powers granted . . . in Chapters VI, VII, VIII and XII." And if, as was suggested in the Council debates, settlement is to be brought about in conformity with the principles of justice and international law, this should surely include respect for the Charter itself. The position taken by states in the Committee of Experts and in the Council on this question was the same as that taken in the voting on the Iranian appeal, a fact which lends further weight to the charge that political factors prevailed, rather than respect for the provisions of the Charter.<sup>69</sup>

In attempting to meet the difficulty in this fashion, the members of the Security Council were doubtless actuated by a laudable desire to prove that it could act effectively, and to show that small states could confidently look to it for protection. Commentators have excitedly proclaimed that upon this test of the ability of the Security Council to control Russia hinges the future of the United Nations. In evaluating such emotions and such charges, there should be borne in mind, first that respect for the Charter is essential to the success of a system founded upon it and, second that it may be, politically or otherwise, as important to be fair to a large state as to be fair to a small one. If errors were committed in the making of the Charter, they are not best remedied by further errors, and especially if these are such as to give cause for suspicion as to their motives.

Assuming, for the purposes of this discussion, that it was desirable to protect Iran as against the Soviet Union, it is believed that it would have been better to follow the procedures of the Charter, either (1) by referring the matter back to the parties without the use of words which implied judgment without trial on the part of the Security Council—on the assumption that nothing could be done because of the veto, and that since this was true nothing was to be gained by increasing friction between members; or (2) by proceeding to a decision that the matter was a dispute (or situation) under Article 34, and then, with proper jurisdiction, rendering

<sup>68</sup> The quotation from the Committee of Experts with regard to this point is given at note 60, above.

<sup>69</sup> Said Mr. Gromyko: "The members of the Committee, as is evident, have conscientiously carried out the instructions of their chiefs, the members of the Security Council. The difference of opinion in the Committee followed the same line as in the Security Council." *Journal*, p. 586 (No. 30).

such verdict or making such recommendations as the Council might be able under the Charter. The latter is believed to be the preferable procedure.

With regard to the latter procedure, however, the issue of the veto was almost certain to arise. It is an issue which will inevitably have to be faced at some time; and Soviet psychology would perhaps respect the United Nations more if it should make a fair fight on this issue than if it should seek to condemn the Soviet Union in the eyes of the world without proper consideration of evidence and by phrases carrying hidden meaning. With regard to the veto, it can logically be argued that since "no individual member of the Council can alone prevent consideration and discussion by the Council of a dispute or situation brought to its attention" no one member could prevent determination that a dispute exists—otherwise, how could there be a dispute, to be considered and discussed? The "chain of events" mentioned in the next paragraph of the voting formula "begins when the Council decides to make an investigation . . .," and uncertain phraseology which does not make clear whether the chain of events begins with the decision, or after it; but the last proviso, "for abstention from voting by parties to a dispute," would seem to indicate a prior decision that a dispute exists—otherwise, the parties to the dispute would not be known.

Whatever the logic of this confused situation may be, the issue of the veto in decisions under Article 34 must ultimately be faced and the sooner this is done the better it will be for the reputation of the United Nations. If it is the Soviet Government and its attitude or its rights under the Charter which are feared its opposition could be as effective in the one situation as in the other;<sup>70</sup> and if there is to be a showdown it should be upon the more important issue. An open fight, on an understandable issue, should leave her less suspicious, even if defeated, than she would be if she felt that the Charter had been misused to her disadvantage.<sup>71</sup> If the Charter, or procedures under the Charter, need to be strengthened, they should be strengthened openly.

Nevertheless progress will not be stayed, and should no solution be found in this direction, and should the present deadlock and uncertainty continue, there is little doubt that some means, perhaps the current procedure of the Security Council, will be found to escape them. There can be no proper settlement of disputes so long as a disputant can block settlement. The veto was a mistake from the beginning. If it can not be adjusted to allow

<sup>70</sup> The absention of the Soviet delegate from meetings of the Council, and the consequent grave questions as to the effect of such absence upon the voting procedure, is an example of the way in which this opposition could be shown.

<sup>71</sup> It is important that the Soviet Union remain in the UN, and it is more probable that she would withdraw because of illegal use of the Charter against her, confirming further her suspicion that the UN is being organized against her, than upon a decision against her upon a formal interpretation of the voting procedure. If the community of nations opposed her with regard to the veto, it is not believed that she would withdraw; her position is too disadvantageous for that.

more effective settlement of disputes efforts to circumvent it must be approved.<sup>72</sup>

<sup>72</sup> "The matter stands at present in so confused a condition that if the present text of the voting procedure stands without amendment steps should be taken to secure the opinion of the International Court of Justice on the question of interpretation involved.

"But the simple, and preferable, course is to make sure by amendment that the veto is clearly inapplicable to any decision of the Security Council under the section dealing with the peaceful adjustment of disputes." Report by the Australian Delegates, Annex O (Mr. Evatt), p. 89.

## QUESTIONS OF GUERRILLA WARFARE IN THE LAW OF WAR †

By I. P. TRAININ\*

### *The Law of War*

The history of war knows no such brigandage, fanaticism, or such craftiness as the German fascist usurpers practiced from the moment of their attack upon the peoples of other states. The rules and customs relating to the conduct of war, recognized by all civilized peoples, were rejected and trampled under foot by these usurpers. These rules and customs relating to the conduct of war, put together in the course of many centuries, have received the title "the law of war" and constitute an inseparable part of international law.

As early as the dawn of capitalism, together with the development of manufacturing and trade, and together with the growth of international economic relations, there began to be heard with increasing strength a voice calling for making war less barbarous and cruel, less destructive and ruinous. In consequence, especially during the nineteenth century, jurists stated that in society, to protect which the so-called "government of laws" exists, everyone is equal, and the power of the state belongs "neither to the rich nor to the poor" but to "all the citizens." - In view of this fact, they explained, in the international arena force must be exercised in the interest not of individual states but of all states, which are declared to be formally "equal before the law." But since states are independent and do not have over them a superior master who could adjudicate between them in the event of conflict, they decide their conflicts themselves with their own weapons. The function of war is often identified with the function of a court, before which each state appears independently with the right to bring suit. "The parties" are not peoples but states or, to be more accurate, governments. It is clear that such a purely legalistic interpretation of the law of war is absurd. It discards even those motives which were established as early as Grotius as the basis for considering war justified. Because of the fact that in the last analysis the strongest party is found to be "right" as a result of "trial by arms" and not the party which defends the just cause, war cannot be compared to a trial in court.

The development of economic relations and communication between individual countries led to the broadening of international agreements. These

Dr. John N. Hazard from original published in *Izvestiya Akademii Nauk, nomiki i prava*, No. 4 (1945). Re-published by permission.  
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"A people's war" is understood by them to be one in which is manifested the personal initiative of citizens who carry on a struggle at their own risk, apart from the state. Such personal initiative of the people—expressed under conditions in which the government is increasingly set off against the people—is thought by some authors to be harmful, bringing anarchy into the affair of war. Thus one of the best known of the lawyers of Tsarist Russia and its representative at the international conferences in Brussels (1874) and the Hague (1899), F. Martens, wrote: "It is not hard to stir the people up to oppose the enemy, but it is not easy to direct its aroused forces and to oblige it to subordinate itself to the orders of the government. In the majority of cases people's wars lead to complete anarchy, which is equally undesirable for the state which is attacked and the attacker."

Writers on international law have generally understood (armed forces to be the regular army—whether professional or developed on the principle of a militia—authorized by the state to carry on war. These armies are composed of combatants and enjoy the protection of the laws of war.)

Non-combatants are of two categories: the first category comprises the individuals who do not take direct part in the battles, even though they accompany the army. These are the representatives of the supply services, the disciplinary services, and the administrative services. In accordance with the declaration of the Hague Conventions of July 29, 1899, and October 18, 1907, they have the rights of prisoners of war if they are taken prisoner. Likewise the correspondents of newspapers, contractors, etc., if they are captured by the enemy and the latter finds it necessary to detain them, have the rights of prisoners of war if they have credentials from the staff of the army which they are accompanying. The medical-sanitary personnel is placed in a special category, which, according to the Geneva Conventions of August 22, 1864, and July 6, 1906, must have special privileges.

A second category of non-combatants is the category about which we are speaking in this instance—persons from the civilian population, of the people.

Various writers, in discussing the laws of war, have emphasized the fact that a state fights only against a state and those of its organical parts which

<sup>3</sup> F. Martens, *Contemporary International Law*, 1893, p. 553. Another well-known Russian lawyer, N. Zinkunov, wrote against this standpoint of Martens, as follows: "Mr. Martens bases his thought upon two arguments: as to the nature of war and the uselessness of acting by the people. He argues that war is a relationship between States, the legal organs of representation of the state is the government and only the government. Therefore, only the government's troops can be enemies under the law. Professor Martens overlooks the fact that war takes on the character of a people's war only in the case of troops acting under the law. The lack of power in a government is not always the same thing as the lack of power in a state, and it would be dangerous to contend that a population might be enough to overthrow its independence but not right to do so, and, on the other hand, a population overpowered requires help from itself. Can the only sanction for such resistance be the lack of carried out at all times by the law?" (*International Law*, 1907, p. 111).

are officially recognized. Every person who voluntarily picks up arms, even for patriotic motives, is a private person, and, consequently, does not come under the customs and rules of warfare. Just as not everyone can assume within a state the role of a government organ, but only those authorized by the state, so also in foreign relations only a person named for the purpose by the state may be recognized as a combatant.)

This formal-legalistic point of view of many writers in international law has discarded the democratic principle of the people's initiative, and looks upon the state as a sort of self-sufficient entity, even in such an important question for the people as the defense of the fatherland. The commander of the army of the enemy in the event of capturing noncombatants may refuse to recognize that the rights of prisoners of war apply to them.

A noncombatant in an occupied territory is guaranteed personal inviolability and inviolability of his property. This does not take into account that in moral relationships a noncombatant finds his patriotic feeling insulted, subjected to the very mockery of the enemy trampling upon his native soil. From time to time a voice is heard to say, for example, that there may be a general levy, but only on condition that it is subordinate to the staff of the regular army. In this event they have in mind only a general levy in territory unoccupied by the enemy. Even the draft of the American jurist, Lieber, developed in 1863, at the request of President Lincoln during the Civil War in the United States, was not free of these formal-legalistic prejudices. One must take into consideration that the leaders of the North thought at the beginning that the decision in the conflict might be reached by peaceful Constitutional means. They thought that all measures should be taken to return to the bosom of the Union the troops which, because of the machinations of the Secretary of War, Floyd, had been thrown against the South even before the conflict. (The right of guerrilla warfare in the "Instructions of 1863 for the government of the armies of the United States in the field," drafted by Lieber was recognized only for members of the regular army.)

Article 81 of these instructions reads:

"Partisans are soldiers armed and wearing the uniforms of their army, but belonging to a corps which acts detached from the main body for the purpose of making incursions into the territory occupied by the enemy. If captured, they are entitled to all the privileges of prisoners of war."

The North thought, however, that guerrillas from the civilian population, fighting for the interests of the South, might turn out to be the most deeply hated slave owners and plantation owners, and inspired the struggle of the army against the North. Therefore in Lieber's code upon the severe punishment was provided for them. Article 82 of Lieber's code stated that the rights of prisoners of war did not extend to persons who were not part of the regular army or navy. After 1863 limited instructions of individual states and of the United States were subject to the same rules as captives.

tured. Article 85 did not recognize the rights of prisoners of war as extending to persons rebelling against the occupiers (they bore in mind that the North would be the occupier), even if the government itself called on them to revolt.

All of these articles became dead letters since guerrilla bands of negroes and poor whites were formed after the Emancipation Proclamation and fought against the Southern slaveowners and planters and not against the North. It is natural that these guerrilla bands in the heart of the South were supported by the North. They were really guerrilla troops of the North.

The question of guerrilla warfare was decided in these circumstances not by Lieber's code but by the course of events.

It must be emphasized that the Southern plantation owners were not in a position to bring together any very important guerrilla bands for action against the Northerners because of the nature of their aims, which were directed against the masses of the people. This was one of the reasons for the defeat of the South. Engels, foreseeing this defeat, remarked in a letter to Marx on May 23, 1862, that the Southerners might have supported themselves longer by means of guerrilla warfare but that the population of the South was opposed to the war.

And in such a soil (asked Engels) is it reasonable to expect guerrilla warfare? I, of course, foresee the possibility that after the decisive defeat of the Southern armies their White trash will try to build up something of the kind but I am too thoroughly convinced of the bourgeois character of the planters to imagine even for a moment that this will turn them into violent supporters of the Union. As soon as their brigandage begins, the planters will prepare to meet the Yankees with outstretched arms.

It is also thought that the question of who is to be included in the category of combatants is an internal affair of each state. They may be conscripted under a general military conscription law of the state, or they may be volunteers. They may be mercenaries or even foreigners. But only members of the regular army, in the opinion of many writers on international law, may enjoy the rights set forth in the laws and customs of war.

It is true that states have not always endorsed these customs and rules. Germany has especially distinguished herself in this connection. As early as the war of 1870-1871 Germany applied cruel measures, forbidden by the laws and customs of war. The Germans even then avenged themselves in a barbarous way on the local population who were suspected of taking part in the struggle as guerrillas or their accomplices.

Engels wrote:

Everything was done systematically and in accordance with orders. They would surround a doomed village, lead out the inhabitants, confiscate the provisions and burn down the houses; and real or suspected culprits would be taken before a court martial where a half dozen bullets awaited them, without delay and without question.

(Marx and Engels, Collected Works (Russian Edition), Vol. 23, p. 75.)

Today, in 1870, there are hardly enough statements that this is a lawful way of conducting war and that interference of the civilian population or of persons not recognized officially as soldiers may be put down with fire and the sword just as if it were banditry. This might all have been done in the time of Louis XIV or Frederick II, when war was conducted solely between armies, but, beginning with the American war of independence and coming right up to the Civil War in America, the participation of the population in war became the rule and not the exception both in Europe and in America.

Everywhere that a people permitted its subjugation only because its army was not able to provide opposition it has been treated with general scorn, as a nation of people in lincloths; and everywhere that the people carried on guerrilla warfare energetically the enemy very quickly was convinced that it was impossible to be governed by the ancient code of blood and fire.<sup>6</sup>

In the war of 1870-1871 the Germans applied cruel measures even to foreign volunteers, who were found in the regular French army, especially the members of the Garibaldi corps.

Garibaldi in his memoirs wrote that after conclusion of the peace it was necessary to open negotiations with the Prussians in view of the Bordeaux Government's armistice order, establishing a demarcation line, and other features. "General Barden, my chief of staff, several times went to the camp of the enemy for this purpose. But we were not granted an armistice because we were not considered to be regular troops."<sup>7</sup>

When Bismarck made his announcement of the taking prisoner of the Garibaldi corps, numbering 13,000 persons, he said: "13,000 riflemen—which are not even Frenchmen—have been taken prisoner. Why have they not already been shot?" Bismarck expressed vexation at their having asked his opinion.<sup>8</sup>

The experiences of the Franco-Prussian War of 1870-1871 raised the question of the fate of volunteers from the peaceful population who had taken up defense of the fatherland. This question flared up at the Brussels Conference, called on the initiative of the Russian Government.

On April 17, 1874, constituting an invitation to the Conference, it was said:

At the present time a solidarity destined to unite the members of the general and their military organization has the character of a struggle between armed forces to define more precisely than has hitherto the rights and customs consistent with the state of belligerents and its distress reduced to a minimum.

It is necessary by means of concerted action

to establish rules which must be obligatory for the governments themselves as well as for the armies; on the basis of the most complete mutuality.

From the very beginning of the Brussels Conference it was recognized that the population of a state is divided into three categories by virtue of its position in time of war: (1) the regular army, (2) irregular military units or armed forces, which on the invasion of the enemy had not yet had time to organize themselves into a regular army, and (3) peaceful civil society.

The most extensive conflict was raised by the question of extending the laws of war to the irregular units and to members of the civil population taking part in military activities. The question of the right of a population to self-defense in occupied territories was raised with particular sharpness. A difference of opinion arose on this question between representatives of states with a militia or semi-militia system (such as Switzerland, Belgium, etc.) and representatives of great military powers such as Germany.

What were the arguments of those who opposed recognition of the rights of peoples to self-defense against an aggressor? Some argued that recognition of the right to self-defense in a population would be retrogression to barbarism, to that period when war was conducted "by all against all." Another argument which was a formal legalistic one was that legal right is always linked with some state authority or other. As soon as the former state authority no longer exists in the occupied territories, then the legal right which is linked with it loses force.

Legal right is thus deprived of its real substance. The people are considered as non-participating spectators, who can be deprived of their nationality, fatherland, and so on.

Some representatives of democratic states with militia systems argued against these abstract principles. Yielding to them, the Brussels Declaration of 1874 stated in Article 9:

The laws, rights and duties of war are applicable not only to the army, but likewise to militia and corps of volunteers complying with the following conditions: (1) That they have at their head a person responsible for his subordinates; (2) That they wear some settled distinctive badge recognizable at a distance; (3) That they carry arms openly; and (4) That in their operation they conform to the laws and customs of war. In those countries where the militia form the whole or part of the army they shall be included under the denomination of "army."

It is evident from this statement that not only members of the regular army but also general levies and detachments of volunteers, and militia

<sup>1</sup> The Brussels Conference lasted from July 16 to August 15, 1874. It was a conference solely of European governments (15). There were 12 delegates, officers 13 were civilians, 10 diplomats and 4 military. Austria was represented by Major General Leo, and Professor of Law Marquis. Germany was represented by Major General von Kretsch, Major General Lehmann, Major Baron von Bismarck, Baron von Bismarck, and Professor of Law Marquis.

<sup>2</sup> See Marquis, *op. cit.* p. 7.

guerrillas are usually included, are in the group of persons having the right of defense under the laws of war. Since volunteers may be found in the regular army and in general levies, they did not think it necessary to create special rules for them. This declaration specially stipulates in relation to them that in countries with the militia system general levies have the same rights as armies.

Furthermore Article 10 of the Brussels Declaration also yielding in some measure to states with the militia system, said:

The population of a nonoccupied territory, when on the approach of the enemy, of their own accord take up arms to resist the invading troops without having had time to organize themselves in conformity with Article I, shall be considered as belligerents, if they respect the laws and customs of war.

It is characteristic that in Article 10 the categorical requirement of open bearing of arms, which the German militarists demanded, is not advanced. On the other hand the same Article 10 has the indispensable requirement that the laws and customs of war be observed.

Moreover, there was introduced at the Brussels Conference a draft of an article (46) in the following form: "Persons from the local population of an area in which the authority of the enemy is already established, who rebel against it with arms in hand may be brought before a court and are not considered as prisoners of war." This was directed against guerrillas and was the subject of a sharp protest from the representatives of Belgium, Switzerland, and Holland. The representative of Belgium, M. Lambemont, said:

If citizens are to be punished for the sole reason that, in risking their life, they wished to defend their country, on the spot where they are to be shot they should find the article of the treaty, signed by their government, condemning them to death in advance.

As a result of the opposition of the representatives of the small powers the draft of the article was withdrawn without ceremony. This was explained in law by the fact that occupation does not yet give the right to possession of the occupied territory. The Manual of the Institute of International Law, approved on September 9, 1880, drafted on the basis of the declaration of the Brussels Conference on the laws and customs of war, said:

No invaded territory is regarded as conquered until the end of the war; until that time the occupant exercises in such territory only *de facto* power, essentially provisionally in character. If the population of the occupied territory rises in insurrection the occupant may take measures of repression, but it must not refuse the rights of prisoners to the insurgents.

In the declaration of the Brussels Conference nothing is said about preventing insurrection in the region occupied by the aggressor. This only emphasizes the fact that the Brussels Conference did not think that the right of self-defense of a people against an aggressor had to be considered a crime, subject to punishment from the point of view of international law.

The Brussels Conference says nothing (not even by way of a reminder) about the necessity for general levies (and one must think of obtaining the government's approval of their taking part in what the Germans demanded in 1870-1871. The Brussels Conference did not forbid guerrilla warfare. Moreover (and this can relate to guerrillas) the Brussels Conference stated: "The population and those who are fighting remain under the protection and influence of international law, so long as they adhere to the customs, laws of mankind, and demands of social conscience established among civilized peoples.")

The Brussels Conference, although not going into detail, insisted upon the preservation of the "customs and laws of mankind and the demands of social conscience," among which love of and supreme devotion to the fatherland and readiness to defend it with all permissible means, have throughout history been considered the highest form of social conscience, persons performing this duty to their fatherland having been celebrated in song as heroes in the literature of all centuries.<sup>10</sup>

The Brussels Conference proceeded not only along the line of strengthening the laws concerning combatants but also along the line of attempting to reduce the cruelty of war. In consequence, in the concluding part of the Protocol, executed on August 27, 1874, the participants stated that in the rules which had been worked out

war, being thus regulated, would involve less suffering, would be less liable to those aggravations produced by uncertainty, unforeseen events, and the passions excited by the struggle; it would tend more surely to that which should be its final object, viz., the reestablishment of good relations, and a more solid and lasting peace between the belligerent states.<sup>11</sup>

The Brussels Conference did not, thus, establish concrete rules relating to the question of the forces taking part in war, but concentrated attention on the task of bringing a war to its speediest conclusion. It was supposed that every state would discuss further the Brussels Declaration and would ratify it.

But, as has already been noted, the Declaration met an unsympathetic reaction from countries with a militia system. Among these were the complications arising in the Balkans beginning in 1875 (the insurrection in Bosnia and Herzegovina in 1875; the Serbo-Turkish war of 1876; the Russo-Turkish war of 1877-1878) which occupied the attention of the great European States.

<sup>10</sup> L. N. Tolstoi in *War and Peace*, in connection with the popular resistance of 1812 writes, "It is thanks to this people, who were unlike the French in 1813 who had saluted in accordance with all the rules of art and had tendered the sword by its hilt, graciously and politely handing it to the magnanimous conqueror, and it is thanks to this people which at the minute of trial, without asking how others in such circumstances acted correctly, with simplicity and ease raised the first club which came to hand and struck with it until in its soul the feeling of outrage and revenge had been replaced by contempt and compassion."

<sup>11</sup> Cited in Martens, above, note 7, supplement, p. 35.

Declaration of the Brussels Conference, which was the first serious attempt to define laws compulsory for all.<sup>12</sup> (was not ratified. It must be noted, however, that Russia not only took notice of the decisions of the Conference, but also made them the basis of the rules applied during the Russo-Turkish War.<sup>13</sup> The Order of the Governing Senate stated in this connection on May 12, 1877:

XII. In view of the mitigation of the events of the war, and in order to bring these into accord as much as possible and on the basis of mutual-ity with the demands of the love of mankind, the military command will not fail to conform in their orders to the general spirit of the bases set forth in the Brussels Conference of 1874, to the extent to which they are applied by Turkey and in accordance with the general aim of the present war.

The question of the right of a people to self-defense against an aggressor was raised again twenty-five years after the Brussels Conference at the first Hague Peace Conference of 1899.<sup>14</sup>)

This Conference, in the conception of those who initiated it, largely Russia, was to discuss the question of suspending the growth of armaments, the question of arbitration, and the codification of the laws and customs of war. (It must be noted that even the idea of a conference was received in an unfriendly manner by reactionary circles in Germany, but under the weight of public opinion Germany itself could not refuse to take part in the conference, although much was done to hinder the adoption of many important progressive decisions.

In particular, in connection with the suspension of the growth of armaments, which were weighing heavily on the budgets of all countries, the Russian draft of the agreement proposed:

(1) A mutual undertaking to the effect that during a five year period the size of the army in the mother country would not be increased.

<sup>12</sup> Some international agreements on specific questions began to be reached at the end of the 18th century. Thus in 1780 there was published the "Act of Armed Neutrality" which established freedom of navigation for neutral vessels, except for contraband, conditions of legality of a blockade. In 1800 there were added to this Act the rules relating to search of vessels suspected of transporting contraband. In 1856 the Paris Declaration on the law of the sea not only affirmed the Acts of 1780 and 1800 but added a declaration on the abolition of letters of marque. In 1864 there was concluded the "Geneva Convention concerning soldiers wounded on the field of battle." In 1868 the Petersburg declaration was published "On the abolition of the use of explosive and incendiary bullets."

<sup>13</sup> The Brussels Declaration is set forth in its essential parts in the French *Manuel de droit international à l'usage des officiers de l'armée de terre*.

<sup>14</sup> In addition to the European powers there were invited the U.S.A., Mexico, Brazil, China, Japan, Persia, and Slam. Brazil refused to partake in the conference, on the grounds that she had already anticipated the objective of the conference, having reduced the quantity of her armaments and having included in her constitution an article concerning compulsory arbitration. Other American Republics, except for those named, were not invited.



(2) In the event of acceptance of this mutual undertaking there would be established for each country a definite number of troops, not including colonial troops.

(3) During a five year period the current level of the military budgets would not be exceeded.

The major opponent of the Russian proposal, which would have lessened the tax burden on the peoples of all states, was Germany. Her representative Gross-von-Schwartzhoff descended upon the Russian proposals as follows:

I do not believe that among my honorable colleagues there is even one who would permit his state, his government, to act in the interests of the inevitable and certain ruin of his fatherland. I do not have authority to speak in the name of my honorable colleagues. Yet, as to what concerns Germany I must encourage her friends and dispel all doubt. The German people is not weighted down by the burden of taxation, it is not going toward a precipice, it is not threatened with exhaustion and ruin. On the contrary, the public and private wealth of Germany is constantly increasing, the well-being and standard of life of her population grows from year to year. That which is linked to these questions—the question of compulsory military service—Germany looks upon not as an unbearable burden but as a sacred patriotic duty, on which rests her existence, her flowering, and her future.<sup>15</sup>

The German colonel simply lied when he said that taxes did not oppress the German people. It is enough to note that the increase of taxes in Germany proceeded in the following manner:

	<i>Year</i>	<i>Taxes per head of population (in marks)</i>	<i>For each mark of direct taxes there were indirect taxes (in marks)</i>
(Prussia)	1879 *	9.99	1.36
	1878	17.24	1.63
	1906	34.21	2.94

The choleric reactionary representative of Germany perverted in this manner the Russian proposals, which related not to the abolition of compulsory military service but to maintaining a definite level of the army and expenditures for it during a period of five years. But the German militarist, who considered the "flowering and future" of Germany dependent upon the increase in her armed forces, was already conceiving new military depredations. Therefore he tried to kill (and did kill<sup>16</sup>) not only these Russian proposals but also other proposals relating to compulsory arbitration.

In the commission discussing the question of arbitration the German representatives—Professor of Law Zorn and Count Muenster—stated that in accordance with the instructions of the Minister of Foreign Affairs, Von

<sup>15</sup> *Conférence Internationale de Paix*, Netherlands Ministry of Foreign Affairs.

\* *Sic-Tr.*

<sup>16</sup> The Conference declared that the Russian draft required further study.

Bülow, of June 16, 1899, Germany was in general opposed to the creation of an agency of arbitration. The preliminary reasoning showed that in the first place Germany was not convinced of the possibility of obtaining an objective decision from the proposed court. In the second place the norms which could serve as the basis for a decision of the court were not worked out. This reasoning produced such an unfavorable impression and so disclosed the secret ideas of the German militarists that Professor Zorn hastened to Berlin to ask Von Bülow to agree, if only for appearance's sake, to some form of arbitration. Von Bülow in his note to the Kaiser of June 21, 1899, under the pressure of world public opinion, was forced to ask consent to adherence to the decision on arbitration. But, having given formal consent, Germany inserted the condition which made arbitration optional.

Under the influence of Germany, of Austria-Hungary, which was supported by her, and of some other countries, arbitration was recognized as not being compulsory but only an optional institution.<sup>7</sup>

The reactionary tendencies which Germany showed in connection with the questions of international law were evident to an even sharper degree in the discussion of the question of the laws and customs of war, in particular in connection with the question of guerrilla troops.

With regard to the subject discussed in this article, the major interest is to be found in the debates which appeared at the Congress around the question of the right of insurrection against an aggressor on the part of the population of occupied regions. The debates on this question in the subcommittee were opened by the representative of Belgium, Beernaert.

It is true that Belgium enjoyed formally guaranteed neutrality.

But what (asked Beernaert) would happen if one of the guaranteeing powers in spite of everything intruded upon the country? A small country, which Belgium is, may be occupied in two days and her army may render itself helpless, locked in Antwerp. In such a serious situation, how could the Belgians be relieved of their obligation to their country, how could one drive from their minds the idea, which is equivalent to a counsel, that it would be better not to take part in opposition to the enemy?

What was said of Belgium was pertinent to all small countries, whose representatives feelingly referred to the speech of Beernaert. The speech of the representative of Great Britain, Ardagh, was also important. He said

<sup>17</sup> The eminent German military writer, General von Bernhard, wrote in 1912: "Arbitration treaties are especially disastrous for a people which is developing and has not yet achieved the peak of its political and national development, which has to give attention to the expansion of its power in order to perform its cultural tasks."

"Every arbitration tribunal inevitably bases its work on a given political situation, which contemporary law recognizes, and any change, even the most necessary, on which all contracting parties do not agree is looked upon as a violation of law. By means of this impediment to every progressive change a legal position is created which could easily conflict with the development of relations which already exist in fact and block the expansion of the power of a virile state in the interests of a culturally weak state doomed to decadence."

with relation to the article concerning the right of a population to insurrection, "Nothing in this article must be understood as an attempt to reduce or destroy the right belonging to the population of countries subjected to invasion to do their duty—to show the interventionists the most energetic patriotic opposition with all permissible means."

Thus, under the influence of public opinion there appeared not only representatives of the masses but eminent government and military officials such as Beernaert, a former Minister of Belgium, and Ardagh, a Major General of the English army.

The representative of Russia—Martens—also appeared with a declaration. He had taken an active part in the work of the Brussels Conference of 1874. Martens stated:

Heroic nations, just as individual heroes, stand on the side of law and rights in general. One cannot accuse the conference of wanting to create legal limits to patriotism. The question is one of working out rules of international law for those who wish to take part in the struggle on a legal basis.

It must be remarked that Martens did not bring clarity to this question, dividing defenders of the fatherland into those who take part in the struggle "on a legal basis" and those heroes who "stand on the side of law and rights in general."

The representative of Switzerland, Kunzle, followed Martens. He said that the draft article stating what must fall under the protection of the laws of war strengthens the position that has arisen from the experience of previous wars. A step forward must be taken. Those who come forward to defend their fatherland because of love of it must not be punished. This is especially important for Switzerland. That is why he supported the proposal of the representative of Great Britain. "Repression must not be applied to the population of occupied territory for open armed resistance to the interventionists." 15. 1. 35.

In his subsequent speech Martens emphasized that neither the Brussels nor the Hague drafts had in view imposing a prohibition on the display of patriotism and heroism which springs from it. Martens said: "The task is simpler—saving the life and property of weak and defenseless people, but by no means to hamper the struggle of heroes and patriots."

We have intentionally dwelt upon the speeches set forth above to show how they differed from the speeches of the representative of Germany, Gross-von-Schwartzhoff, who, taking a sharply opposed position, stated that patriots, desirous of fighting for their fatherland, could enlist in the regular army. He demanded that every proposal should be denied which was directed to giving to the population of occupied regions the right of opposing the aggressor. He also cynically supported his "conclusions" with "humanitarian considerations." He said,

If they talk so much here about humanity, I must remind you that soldiers are also people and have the right to a human approach them-

\* selves. If soldiers, after unusual strain, after long marches and battles, stop at a village to rest, they must be assured that the peaceful population will not suddenly turn out to be their violent enemies.

The heirs of this "apostle of humanity," considerate of the "rest" of the soldiers, in this last war killed children when they cried and interfered with their sleep.

In this way two conflicting positions were denoted. Since the proposal of the representatives of Great Britain and Switzerland met with the sympathy of the representatives of the small states, a delicate situation was created. The question was raised as to whether along with the draft articles they should vote separately on the proposal of Great Britain, since Martens said that it did not differ from the draft articles. The representative of France tried to reconcile the parties. Finally they agreed to the draft articles as interpreted by Martens. It was ordered that this interpretation of Martens be included not only in the Protocol but also be reflected in the introductory part of the resolution on the laws and customs of war.

\* Thus, the Hague Convention in the main confirmed what had been worked out in the Brussels Conference.<sup>18</sup> It passed over in silence the question of the right of populations in the occupied regions to insurrection. But the commentary of most participants confirmed that it did not forbid the showing of patriotism and heroism in occupied regions.

The Hague Convention was signed by the representatives of all powers except Switzerland and China. It was ratified by all powers (26), except Turkey, Sweden and Norway. Germany signed the Protocol of ratification on September 4, 1900. But the signature of Germany bore a doubly formal character. In this matter the German militarists did not reckon with the resolutions of international conferences, but violated them ruthlessly. Individual influential representatives of the militarists even emphatically manifested their disregard for the international obligations of Germany. Right after the Brussels Conference, in December, 1880, General Field Marshal Count Moltke wrote in a letter to the jurist Bluntschli:

I cannot agree in any way with the St. Petersburg declaration that in war one must conduct oneself in accordance with the principle of "weakening the power of the enemy". Not one of the memorized paragraphs will convince a soldier that he must look upon a disorganized population, with which he is not certain either day or night of keeping his life, as an equal enemy.<sup>19</sup>

<sup>18</sup> The Declaration in its basic points comes to the following: "Article 1. The laws, rights and duties of war apply not only to armies, but also to militia and volunteer corps fulfilling the following conditions: (1) To be commanded by a person responsible for his subordinates; (2) To have a fixed distinctive emblem recognizable at a distance; (3) To carry arms openly; and (4) To conduct their operations in accordance with the laws and customs of war. In countries where militia or volunteer corps constitute the army, or form part of it, they are included under the denomination 'army.'"

"Article 2. The population of a territory which has not been occupied who, on the enemy's approach, spontaneously take up arms to resist the invading troops without having had time

It followed from this approach that bloody repression had to be carried out by the Germans under the leadership of this very Moltke in 1870-1871 against troops springing to arms to defend their fatherland. The German militarists then put forward their "theory" of "military expediency," "Kriegsraison," which was inconsistent with international declarations.

The American instructions on the laws and customs of war in 1863 also treated of "military necessity." Lieber, in Article 14 of his code noted that "military necessity, as understood by modern civilized nations, consists in the necessity of those measures which are indispensable for securing the ends of the war, and lawful according to the modern law and usages of war." As if it were not the whole sense of compiling laws and rules of war to harmonize military convenience and necessity as much as possible with humanitarian principles.

The German militarists approached this question in a different way. It must be noted that the top of the German military clique—der Grosse Generalstab (Great General Staff)—could not be controlled by the Reichstag. This was a military clique, based upon Junker and wealthy bourgeois circles, which exercised influence on the course of both internal and external policy. At the request of this military clique the Kaiser on December 28, 1899, i.e., five months after the first Hague Conference, published an order charging the German militarists to avenge themselves on foreigners resisting German arms. According to Article 18 of the order guerrilla troops could be shot simply on the order of commanders. A simplified field court could act only as a dramatization of "legality."

Mocking the laws and customs of war adopted by the Hague Conference the German General Staff in its manual published in 1902, entitled "Military Customs of Land Warfare," criticized sharply the so-called sentimentality of the 18th and 19th centuries as contrary to the nature of war and positively dangerous for contemporary officers.

In past centuries (said the leaders of the German General Staff) intellect was under the strong influence of humanitarian points of view, often reflected in sentimentality or in delicate and sensitive dreaming. Therefore there was no shortage of efforts to influence the development of military customs in a spirit directly contrary to the very nature of war and its final objective. There will likely be similar attempts, and even no shortage of them, the more so since such efforts have achieved moral recognition in some declarations of the Geneva Convention and the Brussels and Hague Conferences . . . War, when conducted energetically cannot be directed solely against combatants of the enemy state

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to organize themselves in accordance with Article 1, shall be regarded as belligerent if they carry arms openly and if they respect the laws and customs of war.

"Article 3. The armed forces of the belligerent parties may consist of combatants and non-combatants. In case of capture by the enemy both have a right to be treated as prisoners of war."

<sup>10</sup> Bluntschli, *Gesammelte kleine Schriften*, Bd. II, p. 273.

and its fortified points. On the contrary, it will and must attempt also to destroy all spiritual and material sources of the enemy for carrying on war.

International conferences start from the principle that military activities commence after a warning has been given. Germany committed herself to this rule, but her military leaders base their actions on other premises. She has demonstrated that anything is permitted which accords with the objective of law and that the Hague Convention and other international agreements on the law of war are applied only "so long as they do not conflict with military necessity."

Hitler did not have to go far for examples. German reactionary cliques always supported the barbarian theories of "exceptional law" (Notrecht), "military necessity" (Kriegsraison), that "necessity knows no law," and so on. Double dealing and treachery have commonly been the method of the German imperialists and their General Staff

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The Second Hague Conference of 1907 again met with the opposition of Germany, holding a reactionary and anti-popular position, especially with respect to the question of disarmament and the question of the laws and rules of war. Even before the Conference Germany categorically came out against discussion of disarmament. She was supported by Austria-Hungary and Japan. Chancellor Von Bülow on April 30, 1907, stated from the tribune of the Reichstag, "A decision on the question of disarmament, even if it were not dangerous, is not now necessary. If the Powers expecting positive results from the discussion of the question nevertheless insist upon it they will discuss the question alone," (that is, without Germany).

The representatives of Germany spoke against compulsory arbitration at the Second Hague Conference. In view of this opposition the Second Hague Conference adopted nothing new, and with relationship to the question of guerrilla troops, in the main, merely repeated the former declarations of the Brussels and First Hague Conferences. Article I of the Hague Convention of 1907 said:

The High Contracting Parties shall issue instructions to their armed land forces, which shall be in conformity with the Regulations respecting the Laws and Customs of War on Land, annexed to the present Convention.

The German militarists systematically violated this proposition, often on the ground that all details could not be anticipated by the Convention, even though this question had been examined by the Hague Conference.<sup>20</sup>

<sup>20</sup> In the introduction to the Hague Convention it is said, "It has not, however, been found possible at present to concert regulations covering all the circumstances which occur in practice. On the other hand, it could not be intended by the High Contracting Parties that the unforeseen cases should, in the absence of a written undertaking, be left to the arbitrary judgment of military Commanders. Until a more complete code of the laws of war has been

These violations assumed a particularly barbarous character from the beginning of the war of 1914-1918. The Germans won hatred in the occupied countries. Every protest of the population against cruel oppression was considered by them to be guerrilla warfare. Guerrilla troops seemed to them to be everywhere like a mirage. They burned the ancient Belgian city of Louvain solely as vengeance for mythical 'guerrilla attacks.' When German cruelty aroused protests even in neutral countries, William II sent, on September 8, 1914, a hypocritical telegram to the President of the United States in which it was said:

My heart bleeds with the thought of the measures I must take. But in the presence of the brutal acts of the Belgian population I see myself forced to turn to the strictest measures to punish the guilty and sow terror among the blood-thirsty population, in order to put a stop to continued killing and horrors.

In summarizing all the discussions and declarations in the question of extending to non-combatants the norm of the laws of war, the following may be said:

1. The Brussels Conference, as well as the two subsequent Hague Conferences, put the observance of the laws and customs of war in first place. This became a compulsory condition. No one could justify himself with any arguments, if he violated these most important conditions.

2. There appeared against the representatives of the democratic states, speaking for the right of a people to oppose an aggressor, in large measure at that time representatives of the Kaiser's Germany and of the ragged Austro-Hungarian monarchy.

3. A people's insurrection against an aggressor was not forbidden by any categorical declaration. Even Christian Meurer, a Professor fawning before the Kaiser in his book, "The Law of War of the Hague Conference," recognized in connection with a people's insurrection in occupied territories only that in Brussels and at The Hague it had not received its final answer. "Some states," he wrote, "will refer to the Hague speeches . . . others to the text of the Convention."<sup>21</sup>

Meurer's "lack of clarity" springs from the fact that, having examined much material, he, as a protagonist of the interests of German imperialism, could not, however, openly recognize the right of peoples to defense against an aggressor.

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*Indirect* The Soviet state from the moment of its appearance has striven to establish by means of treaties peaceful businesslike relations with other states. The

issued, the High Contracting Parties deem it expedient to declare that in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of international law, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience."

<sup>21</sup> Christian Meurer, *Das Kriege recht der Haagen konferenz*, 1907, p. 111.

Soviet state has rejected attempts to make her adhere to coerced treaties. At the same time Lenin emphasized that, "all points in which are included good neighborly conditions and economic agreements we accept with joy, we cannot resist them."<sup>22</sup>

Every state tries to introduce into international law those principles which it supports within the country. The foreign policy of the Soviet state has been an extension of its internal policy. The Soviet state from the time of its first steps renounced annexation and indemnity, special privileges in other countries (Iran, China). It has come out against imperialist coercion, against aggression, for disarmament, for democratic principles of equality, independence and sovereignty of a state—principles incorporated in the Soviet Constitution.<sup>23</sup> And, naturally, the Soviet Union recognizes the right of every people to defend its freedom, honor, and independence by all methods.

Of course the mutual desire and interest of both countries are necessary for coöperative relations to exist. The basis for collaboration of two economic systems in the international arena has been (1) non-interference of one government in the internal affairs of another government, (2) the existence of mutual interests in the business of economic and political collaboration. In all international action in which representatives of the Soviet Union take part, they try to defend all that is in the interests of the people, in an analogous way to that in which the bolsheviks in their time under conditions of capitalism tried to defend internal reforms, which was good from the point of view of the interests of the working men, even though it was not basic and decisive in the conduct of the struggle.

Aiming at such an agreement, the USSR has gone forth to meet every proposal which could hold back war. For that very reason the USSR joined the League of Nations (September 18, 1934) which then seemed to be a "hillock" which one could catch hold of in preventing war. It is also natural that the USSR recognized all laws and customs of war, since they were directed toward the humanization of war and has insisted on their observance. The USSR has thought that from the point of view of international law belligerent states have no right to use any and every form and method of war, but only those which are not forbidden by international agreements (conventions). The USSR has adhered to all proposals which could mitigate the consequences of destructive wars, the main weight of which falls on the mass of the people.

It is impossible not to recognize that some conventions are already out

<sup>22</sup> Lenin, *Collected Works*, 1932 (Russian edition), Vol. 22, p. 18.

<sup>23</sup> The USSR once offered for discussion by the powers a draft of a proposal for complete disarmament. After its rejection, the USSR offered a draft of a proposal for partial limitation of armaments (1927-1932), it signed the Kellogg Pact for the outlawry of war (1928), put it into effect with certain western neighbors ahead of its general effective date and concluded non-aggression pacts with several states.



of date, that they do not conform to new armaments and new forms and methods of war. When the conventions were concluded aviation and tanks were not as developed as they are now and they had never known of parachute descents or magnetic mines. They did not use in the current manner a "fifth column" and did not utilize so widely propaganda as a means of conducting war. At that time even economic warfare was not applied as extensively as now. There was also no such economic exploitation of occupied regions with infringement of the rights of private property. But all progressive mankind even now holds to the basic humanitarian principles of international law, believing that all the new superstructure of law must not infringe upon it.

What is meant by the observance of the rules and laws of war? This is the humanitarian relationship to prisoners of war; inviolability of the rights of the peaceful population, non-application of crafty methods (not to be confused with military ruses), forbidding of pillaging, etc.

The Hague Convention has already established a large number of prohibitions: for example, it says that it is forbidden to use poison or poisoned weapons, commit a crafty murder of the enemy, kill the wounded or the disarmed, announce that mercy will not be shown the enemy, use arms and methods which cause unnecessary suffering, use uniforms of other countries, rob a peaceful population, deprive a peaceful population of rights which they formerly enjoyed, violate the rights and honor of the family, use citizens and prisoners of war for the struggle against their own fatherland, destroy undefended cities and historical monuments, and so on.

All of this was rejected by the fascists as the notes of V. M. Molotov and the reports of the Extraordinary State Commission have demonstrated. The Hitlerites in their own country destroyed the remnants of democratic rights which the people still had. In place of law the Hitlerites brought to Germany the unlimited arbitrary administration of the "leader." The methods of crafty administration which were applied within the country were transferred into the field of international relations by the Hitlerites. The foreign policy of German fascism was the policy of treachery and bloody aggression in relations with other peoples.

The Hitlerites appeared in the historical arena in an epoch when it was impossible to proceed without a supporting point among the masses. In order to create at least the appearance of this, the fascists played on the lowest instincts of the dregs of society and on the retarded strata of the population. In doing this, of course, they tried in all ways to mask their rapacious objectives by fraud and demagoguery. For the very purpose of defrauding the masses the fascists put into circulation the illiterate "theory" that the historical fate of peoples was clearly defined by race, that there could not be equality of races, and that there were "superior" and "inferior" races.

The teaching of Marxism-Leninism about war demands that the approach

to every war be historical, that is, that one take into consideration the historical period in which the war broke out, its economic background, in whose interests and for the sake of what it was fought. Only such an approach provides the opportunity to determine whether a given war is justified,—corresponding to the interests of the masses of the people,—or whether it is a war of aggrandizement, conducted in the interests of a clique of enslavers and oppressors. History knows of not a few examples when broad masses of the people were implicated in the war by means of fraud or compulsion, but such a war was not a people's war because of its objectives.

A truly people's war is one for the basic interests of the people, for its rights, honor, freedom, and independence. Such a war is a justifiable war, in contradistinction to an unjustifiable war, that is, a war directed to the seizure of foreign territories, to the enslavement and subjugation of peoples, to the destruction of their independence as a state. In such a war the people try to defend themselves and their interests, especially when the fate of their native land and the question of its independence and freedom is at stake. The people's war against Hitlerism was the most sacred of wars in which the people have tried to defend themselves from attempts to annihilate them.

Conditions of mutuality are generally recognized in international law. Since there has been no supreme agency to pass upon questions concerning the correctness of the application of law, each state has responded to violations of law by adopting measures of reprisal. Failure on the part of one belligerent to carry out the rules of warfare gives the other belligerent the right in turn to refuse to observe these rules and to seek means of defense appropriate to the newly created situation. The democratic countries responded to the fascist bombing of cities by bombing German industrial centers. If the Hitlerites had used gas the democratic powers would have had no other course but to answer with the same measures. The democratic countries, however, would never have murdered children and used other heinous fascist methods of conducting war as the Hitlerites did.

The crafty and treacherous enemy, using methods of prevarication, forgery, and demagoguery, sometimes clung to international law in order to mask his objectives of brigandage. The Hitlerites attempted to deal with guerrilla troops in this manner. In Hitler's order of August 17, 1938, relating to guerrilla activities, it was stated that on the basis of the "rules of international law" every person could be condemned to death if he did not belong to the armed forces of the enemy and did not have visible distinguishing marks recognized by international law; who carried on warfare with weapons or other means or possessed such weapons with the intention of using them against the German or allied (Hitlerite) armed forces, or who killed members of these forces; or who carried on activities which, under the laws of war, could be carried on only by armed forces, dressed in the appropriate uniform.

To think of the Hitlerites as "interpreters" of international law!

In accordance with the very substance of international law respect for the laws and customs of war must lie at the base of activity of every army. When this basic condition was not adhered to, when the Hitlerites fell upon each state with treacherous violation of international law on the commencement of military operations, when the Hitlerites from the very first steps of aggression resorted to robbery and murder, forbidden by international law, then what importance could be given to the attempt of the Hitlerites to cling to any rule of international law, while at the same time perverting it, and wildly and scoffingly violating the very substance of international law?

During the war arguing with Hitlerites about law was equivalent to exhorting hyenas. Now Hitlerism has been thrown in the dust. But in some countries there are still adherents of the "doctrine" of the Prusso-Hitlerite militarists, seeking to make allowances for the Hitlerite brutality. Hitlerite agitation was counted on to supply "arguments" to the pro-Hitlerites in other countries. Thanks to this the Hitlerites in the field of international law and especially with relation to the law of war attempted to screen their bloody arbitrary action with "legal" argument, on which we shall stop a moment.

First of all as to the military uniform.<sup>24</sup>

This was the beloved "argument" of the Prussian militarists, which was also used by the Hitlerites. A mania for uniforms was always a distinctive feature of Prussian militarism. Frederick II ("the Great"), who was glorified by the Hitlerites, advanced uniforms in his time to the most extreme limits, dressing his soldiers in buckles, braids, and such sort of theatrical flashiness. Such a uniform was intended to create an even greater barrier between soldiers and the people. The Prusso-Frederick "spirit," having become embedded in the army, cultivated scorn for civilians and their clothes. The soldier's uniform actually hid the internal emptiness of the soldier.

The Hitlerites, in their turn, began with the proposition that they might lure the unemployed into the Storm Troops by the free distribution of brown

<sup>24</sup> Lieber, who demanded in his code that uniforms be worn in order to obtain recognition of belligerents by combatants had to admit that the absence of a uniform in the event of a general uprising was not an excuse to exact punishment: "There are actually cases when the absence of a uniform can be taken as serious *prima facie* evidence against the captured enemy, but one must remember that uniform clothing is impossible in a general uprising and that there are cases when regular soldiers are left without uniforms at least for an appreciable period. I have seen prisoners, captured at Fort Donaldson. They had no uniforms. It is true that they were dressed in almost similar clothes but these were similar to the clothes of the local village inhabitants. We, however, conducted ourselves with respect to them as with prisoners of war and even very indulgently." (Lieber, *On guerrillas and guerrilla parties*, 1882, p. 15.)

At the Brussels Conference of 1874 the Belgian delegate, Lambremont, found it impossible to demand that a population, rising at a moment of danger to defend the fatherland, should think of supplying itself with distinctive markings.

uniforms. In educating the ten-year-olds with race vanity they began to dress these children in the uniform of the "Hitler Youth." It goes without saying that every active Hitlerite in Germany would have been unthinkable without his brown uniform. If such a person had been in a position of responsible authority, then every anti-fascist would have been dressed in an ignominious uniform, as was evidenced by the distinguishing marks for Poles, Jews, and others in occupied regions. If such a person had been in a position of responsible authority, all people would have gone around with numbers on collars, as was done in many temporarily occupied regions.

Even the Hitlerites had to recognize that militia and volunteer troops did not always have the opportunity to acquire uniforms. It is true that they recognized this only for unoccupied regions. But logic indicates how much more difficult it was to obtain uniforms in occupied regions. The Hitlerites feared the people mortally. They therefore wanted to have against themselves a regular army, and, according to their explanation, the people had to stand silently on the side. The cynicism of this request is clear if one takes into account that the "total war" conducted by the Hitlerites was directed not only against the armies of the enemy but also against the peaceful population, its life and property.

It is relevant to remark at this point that in their time, when the Germans were defending their independence in the struggle with the French, the Prussian King, Frederick William III, born in Engels' opinion "to be a corporal to see whether each soldier's buttons were in order"<sup>25</sup> emphasized in his order of April 21, 1813, issued at the insistence of the German patriots of that period, that the struggle of the general levies (landsturm)<sup>26</sup> is the legal defense of the people, that the most decisive struggle is the best since it serves a sacred and just cause (Article 7). The order appealed for the development of guerrilla warfare and its methods of struggle. He stated that the landsturm had neither military uniform nor distinctive marks. Moreover, the order warned that the landsturmiers would be recognized by the enemy because of their clothes, and the enemy could apply punishment to them (Article 13). The order advised against the use of any distinguishing marks, to aid the position of German guerrilla troops in the enemy's rear. It is true that this was an unimportant fleeting moment in the history of Germany at the beginning of the 19th century, since the government quickly decided to reject the "enthusiasm of the people" and to stand on the soil of the "spirit of Frederick" in scorning the people.

Engels wrote

To permit the people itself to carry on the struggle apart from orders of the King would have been completely at odds with the Prussian spirit. Therefore the formation of the Landsturm was postponed until the

<sup>25</sup> Marx and Engels, Vol. 5, p. 12.

<sup>26</sup> Hitler tried to dramatize the "Volkssturm."

moment when the King should demand it, but the King never issued such a demand.<sup>27</sup>

It would, of course, be entirely incorrect to belittle the importance of the uniform in the structure of war. Discipline and both military and sanitary conditions require it. Simplicity, modesty, and lightness are principles of the Soviet military uniform. For the Prussian militarists and the Hitlerites the military uniform has been not only an organizational requirement, but one of the means to embed in the soldier a heroic feeling in place of that of the civilian. Schedrin in his time ridiculed the efforts of the Prussian militarists to conceal their character as brigands by their external appearance. In speaking of the Prussian officer, which in his external appearance seems to say to every one, "I am a hero," Schedrin wrote,

It seems to me that if he said in place of this, "I am a robber and now I shall begin to beat you," it would be easier for me . . . It is true that the wisest thing would be if they put such heroes under lock and key because this would unbind the arms of plain people and at the same time give the country a chance to use these arms fruitfully.<sup>28</sup>

The substance of international law is in this very thing, keeping such "heroes" under lock and key.

It is appropriate to remark, however, that in the declarations of both the Brussels and the Hague Conferences, identifying marks visible from afar were spoken of in connection with other conditions of which something will be said below. In the second place, the declarations of these Conferences by no means had in view making defense of the fatherland conditional upon the presence of distinguishing marks. The position of countries with militia systems at international conferences speaks clearly enough on this subject. At the first Hague Conference even the representative of Germany, Von Schwartzhof, recognized that a distinguishing mark need be only in a special armband. In the third place, all former international declarations on the uniform were drawn up at a time when war was reflected largely in direct military skirmishes, when the uniform was very gay, striking the eye, since this gave the opportunity to distinguish it more easily from others. Today with the development of artillery, shooting from a great distance, with the development of aviation and other contemporary weapons of war, all states try to make their armies less noticeable, and dress them in protective colors. The whole gist, for example, of the grey-green German soldier's uniform lies in this, to make the soldier less noticeable, to mask him. Even in the war of 1870-1871 the Germans demanded that the uniform of the "franc-tireur" be distinguished from that of a sharp shooter at a distance of a rifle shot, or at a distance of not less than a kilometer. The Germans themselves in the last war tried by means of the color of the uniform and the

<sup>27</sup> F. Engels, *Remarks on War*, 1941, (Russian edition), p. 178.

<sup>28</sup> Saltikov-Schedrin. *Collected Works* (Russian edition). Vol. 14. p. 105.

maximum camouflage to make their soldiers indistinguishable at a distance of from three hundred to five hundred paces.

The unconditional requirement of a uniform for guerrilla troops is not supported even by simple military logic. The conditions of guerrilla warfare are unusual. Guerrilla troops attack suddenly, by surprise. Could a uniform or distinguishing marks prevent surprise, which is the principal method of guerrilla warfare? What importance does a uniform have when guerrilla troops meet with the enemy at close range? The intention and activity of the guerrillas would be obvious even without a uniform.

To link the right of the people to defend its native land and its honor to a uniform would be to carry the question of defense to an absurdity. Patriotism is not packed only in a military uniform, just as it is impossible for the activities of the spontaneous hurricane to be set forth in the rules of a meteorological observatory. 39.51.

Marx in his letter to Engels of September 2, 1870, has already ironically said, "The declaration that no one has the right to defend his 'fatherland' except one who wears a uniform rings true."<sup>25</sup>

What must those people do who, being subjected to attack, either because of limitations on their military budget or for other reasons have had no chance to prepare large supplies of uniforms? Shall they renounce arms and submissively subordinate themselves to the conditions of slavery established by the usurpers? That would clearly be absurd.

The opponents of defense by the people, including the Hitlerites, have further required that a person responsible for their actions be in command of the guerrilla troops. Guerrillas are distributed in "unorganized bands." They seem to represent arbitrary action since they have no organization in civil war but group themselves arbitrarily as they wish into groups, and this would seem not to guarantee conformity to the rules of war by the guerrillas. Such arguments are directed against the very substance of a war of the people. Guerrilla warfare, when it is developed, is organized, embracing broad masses of the people. Guerrilla troops are broken down into small groups only for convenience. These small groups defend with systematic consistency the interests of the people, which are the same as the interests of the state under Soviet conditions. In view of this the question whether the guerrilla troops have authority from the government or not loses force. History shows examples where the government, responsive to the interests of the people, appeals to the masses in a moment of military danger with a call to guerrilla warfare. If they have often been unable to carry this to its ultimate conclusion, it is because the gap between them and the people has been too wide, because they were afraid of a people in revolt.

As to persons who must be at the head of guerrilla troops and be responsible for their actions, any one who is the least bit familiar, for example, with Soviet guerrilla warfare, knows how high discipline was with Soviet guerrilla

<sup>25</sup> Marx and Engels, Vol. 24, p. 390.

warfare and how high was the authority of the commanding officer. Soviet guerrilla warfare was created as a fundamental part of the people's defense of their conquests and achievements.) It has drawn its experience from the history of people's warfare in the past and, especially, from the grandiose experience of the land of the Soviets, which even in the civil war demonstrated how competent the people is, as the master of its country and its fate.

In the war for the fatherland Soviet citizens of temporarily occupied regions are witnesses to the fact that Hitlerites killed their own unarmed people—old people, women and children; how they shamed their wives, sisters and mothers; how they destroyed their homes; how they desecrated their native soil, mocking national feeling.

(The juridical meaning of "necessary defense" is not treated here as solely personal defense. Under the conditions of the Hitlerite occupation necessary defense was the moral duty of citizens devoted to their native land and its people.) In defending themselves Soviet citizens defended society, the people. J. V. Stalin has said,

War with fascist Germany must not be thought of as customary war. It is among other things a war of the Soviet people against the German-fascist troops.

(Guerrilla troops are the leading people of the formerly occupied regions. They fought not only with weapons. They are political fighters, organizers, propagandists, agitators. They inspired confidence and cheer in the mass of the people, and recruited new fighters for the defense of Soviet statehood. Soviet guerrilla warfare was not, therefore, a private matter of volunteer guerrilla troops. The Soviet people in defending itself utilized all kinds of defense and attack, both in the form of the regular army and in the form of guerrilla units.) In this fact the popular character of the war against fascism was emphasized once more. For this very reason the commands of the guerrilla units subordinated their activities to the tasks of the Red Army, which is the basic military force of the Soviet state. The commander of guerrilla troops answered for his acts to the Soviet people in the person of its Red Army and its General Staff. The orders of the Supreme Commander, Comrade Stalin, directed to the Red Army men, were also directed to the men and women who fought as guerrilla troops. There is not and cannot be a sharp line between the army and the people in a Soviet country.

One of the demands of those opposed to the guerrilla movement was that weapons be carried openly. This demand appeared, as a rule, when there were still no weapons such as those used today, when weapons consisted largely of rifles, machine guns and artillery. Now not only the regular army but the guerrillas as well use all contemporary weapons, even to tanks and aviation. Art consists partly in camouflaging weapons. The Germans themselves camouflaged their guns.

the weapons of contemporary warfare. But such a laughable demand was made by the Hitlerites to their enemies. The guerrilla troops set out to achieve the objectives which were given, and these never conflicted with international law. From the point of view of these objectives, directed towards the liberation of their native land, it is entirely immaterial how the aggressor is destroyed—by weapons carried openly or concealed. It was important that they be destroyed.

And the last: the Hitlerites demanded the guerrilla troops take the norms of international law into account in their activities. Such a demand is a dominating one for all defending their freedom, honor and independence. It would be superfluous to prove that such a demand on the part of the Hitlerites was plain mockery and an outrage to international law.

The Hitlerites tried to represent guerrilla warfare as improper and unequal. What is "proper warfare" in their opinion? They considered a war "proper" when they with predominant forces under the screen of treaties and agreements concluded previously fell upon poorly defended countries, such as Norway, Denmark, Greece, Yugoslavia and others. But when they met with the powerful rebuff of the people, they spoke of "improper war."

It is clear to every one that a search must be made not in the field of treaties apparently designed to protect international law to find the reason for the hatred of reactionary elements, in particular of the Hitlerites, for guerrilla troops. The reason must be looked for in the cowardliness of the Hitlerites before the people, who have proved that it would never submit to foreign oppression. The formal arguments of the Hitlerites were to screen the predatory substance of frantic fascism. In Spain in the war of 1936-1939 foreign volunteers were included in the regular army and wore the appropriate uniform, bore arms openly, and so on. Nevertheless they were mercilessly shot by the Hitler-Mussolini interventionists, because the struggle was not one of form but of substance: the fascists were trying to put down a powerful republican-democratic movement which had settled a matter which concerned not only Spaniards, but as Comrade Stalin has remarked, a matter for all progressive humanity. On the Soviet-German front it was made even clearer that there was no mention made by the Hitlerites of adhering to the norms of international law and the law of war, but they followed simply the covetous objectives of robbers and marauders.

\* \* \* \* \*

The fatherland war against Hitlerism and its vassals was a living important struggle of the people for its self-preservation, for its future. The struggle against fascism has flowed into a war of the peoples for national liberation and independence, for democracy, for self-preservation from the "new order" and its destructive policies. For that very reason guerrilla warfare spread widely in Yugoslavia, France, Poland, and elsewhere.



It is not by chance that Germany during the period of its recent history has hardly known guerrilla warfare. Even during the most trying times of the state, as was the case during the war against Napoleon, efforts to broaden guerrilla warfare resulted in failure. This is explained by the fact that (a) the Prussian regime has always been an enemy of everything loving freedom and of the people, (b) Germany became a united state at a late time; as late as the Napoleonic war separate German states (Southern) fought on the side of Napoleon against the Germans—there was not and could not be broad national enthusiasm, (c) later, after the unification of Germany and its Prussianization, the ruling Junker upper class created its army as an anti-popular aggrandizing army and embedded in the thinking of the masses the thought that war would always be carried on on foreign soil. They pounded on the lowest instincts of the Germans, convincing them that their well-being would depend on the aggrandizing and plundering activities of the armies, that every German must prepare himself to be a master on foreign soil. The Hitlerites to the very top carried on this "education" of the masses.

Fascism and the right of peoples to self-determination are incompatible. As experience has shown one cannot speak of law with fascism nor of international law in particular. Could one really restrain bloodthirsty plundering with norms and rules worked out for brotherly, peaceful cohabitation of peoples? States, protecting the life and well-being of peoples must, therefore, pull out fascism by the roots, since it represents danger for civilization.

Contemporary international law—and its basic part, the law of war,—has developed since the end of the 18th century under the influence of democratic principles in which peoples have been interested. Every person who violates the established norms of international law must take into consideration that he will have against him the public opinion of peoples who have never approached the question of law dogmatically, or from a formal legalistic point of view. If one speaks of an unjust war, then it will not be concealed by any formal legalistic arguments. It will call forth the protest of the masses. It is enough to call to mind the relationship of the peoples to the interventionists during the civil war of the Soviet peoples in 1918–1920.

The right of peoples to defense against aggression is supported by the Charter of the United Nations, adopted at San Francisco. Article 51 of this document of international law says:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security. \*

It is clear that this self-defense does not exclude popular guerrilla warfare in the rear of an aggressor—a warfare which will be supported by all freedom-loving peoples and which will be under the protection of international law. And, *vice versa*, if the inspirer and defender of aggressive

war, that is, unjust war, tries to use guerrilla methods of warfare, then such "guerrillas" cannot be under the protection of international law.

The war with Germany is over. The Hitler regime has suffered complete bankruptcy. The press states, however, that the Hitlerites are still trying to preserve underground nests. It is possible that those of the underground will attack, using methods of guerrilla warfare. But these will not be guerrillas in the sense of current international law, participants in a national just war. The principles of international law are directed to the stamping out of aggression, which requires first of all,

to wipe out the Nazi Party, Nazi laws, organizations and institutions, remove all Nazi and militarist influences from public office and from the cultural and economic life of the German people; and take in harmony such other measures in Germany as may be necessary to the future peace and safety of the world.<sup>30</sup>

Also at the Berlin Conference of the three Powers it was said in the communiqué (at the beginning of August, 1945):

German militarism and Nazism will be extirpated and the Allies will take in agreement together, now and in the future, the other measures necessary to assure that Germany never again will threaten her neighbors or the peace of the world.

The Nazi who appears with arms in his hands (whether openly carried or concealed) against the Allied armed forces is a tool of fascist terrorism, an enemy of the freedom of peoples and must bear full punishment for his acts.

Guerrilla warfare is and remains one of the regular forms of the people's, that is, just, war and in this sense it is included in the collection of rules of international law directed to the prevention of any type of aggression.

<sup>30</sup> Declaration of the leaders of the three Allied Powers at the Crimea Conference, February, 1945.

*The Brussels Conference*

The representatives of the European powers who met in Brussels in 1874 to formulate a code of war were divided into two camps, one representing the interests of countries with large armies, the other those of Spain, Belgium, Holland, and Switzerland. Those with the great armies urged that the status of lawful belligerency should attach only to organized forces and that members of a *levée en masse* should meet the requirements of other combatants.<sup>4</sup> Thus, the original Russian project at Brussels included the following qualifications for lawful belligerency:

. . . Armed bands not complying with the above-mentioned conditions shall not possess the rights of belligerents; they shall not be considered as regular enemies, and in case of capture shall be proceeded against judicially.<sup>5</sup>

Individuals belonging to the populations of a country in which the enemy's power is already established, who shall rise in arms against them, may be handed over to justice, and are not regarded as prisoners of war.

Individuals who at one time take part independently in the operations of war, and at another return to their pacific occupations, not fulfilling generally the conditions of paragraphs (a) and (b), do not enjoy the rights of belligerents, and are amenable, in case of capture, to military justice.<sup>6</sup>

The smaller powers, however, because of their relatively small organized forces, were reluctant to limit in any way the right of inhabitants in occupied territory to rise up and defend their country.<sup>7</sup> As a result of the discussions, the negative provisions, excluding from the category of belligerents all persons not exhibiting certain specified qualifications, were dropped. The Declaration, as finally drawn, merely enumerated certain conditions under which combatants were to be regarded as lawful and it was expressly understood that these conditions were not to be treated as exclusive.<sup>8</sup> The various points of view and the questions left undecided were summarized by Baron Lambhertmont, the Belgian Delegate, as follows:

As this Article deals only with armies, militia, and corps of volunteers, in short, with bodies of men, the Delegate of Belgium had inquired what would be the fate of a citizen who, acting singly, and in an unoccupied part of the country, would do hostile acts intended, for instance, to impede the movement of the enemy. The answer returned to him was that the law did not provide for such special cases. It was therefore

still be governed by the unwritten law of nations. The second question relates to risings in an unoccupied part of a country. The first Russian text refused the character of belligerents to populations rising in an occupied territory; the second, on the contrary, allowed them this character on certain conditions. Finally, the Project drawn up by the Delegate of Germany did not admit the title of belligerents in favour of inhabitants taking up arms in the case in question. These texts, after a discussion on the part of several Delegates, have disappeared one after the other, and it is left understood that the question whether and under what conditions a population taking up arms to resist a hostile army in an occupied territory can claim the rights according to belligerents has not been solved by the Project, and, like the preceding one, remains subject to the rules of the unwritten law of nations.<sup>9</sup>

#### *The Hague Regulations*

The question of fixing the qualifications for lawful belligerents which had been considered at the Brussels Conference were reconsidered at the Hague in 1899.<sup>10</sup> General Sir John Ardagh, technical delegate of Great Britain, proposed to add to the Regulations the following provision:

Nothing in this chapter is to be considered as tending to modify or suppress the right which a population of an invaded country possesses of fulfilling its duty of offering the most energetic national resistance to the invaders by every means in its power.<sup>11</sup>

There was considerable discussion on this proposal. It appears that certain of the delegates refrained from pressing it only because of the adoption of a declaration (which subsequently became with slight change part of the preamble to the Convention) construing Articles 1 and 2 as not being exclusive. Discussion on the proposal was summarized as follows:

From a reading of the minutes of the meeting of June 20 it would seem that most of the members of the subcommission were of opinion that the rule thus formulated added nothing to the declaration which Mr. Martens had read at the opening of that meeting. The delegation of Switzerland, nevertheless, appeared to attach great importance to this additional article and went so far as to suggest that its adhesion to Articles 1 and 2 (Brussels 9 and 10) might not be given if the proposal of Sir

Mr. Kunzli spoke to that effect. On the part of Germany, Colonel Gross stated that Article 9 of Brussels was not a declaration of belligerent status depend

is not yet occupied under the sole condition that it respects the laws of war, but that he had nevertheless voted for that article in a spirit of conciliation. "At this point, however," said the German delegate most emphatically, "my concessions cease; it is absolutely impossible for me to go one step further and follow those who declare for an absolutely unlimited right of defense."

At the end of the debate and in consideration of the declaration adopted on motion of Mr. Martens, Sir-John Ardagh withdrew his motion, for the sake of harmony.<sup>12</sup>

The Hague Regulations did not leave the question of belligerent qualifications in a very satisfactory state. Spaight declares:

The very important question of risings in an occupied territory has not been legislated for at all, and, as regards unoccupied districts, two Articles have been approved which are to some extent mutually destructive. The one—Article I—is designed to meet the views of the great Continental Powers who have adopted universal service and who look askance at all unorganised resistance. The other—Article II—is the tribute of the Conferences to the divine right of national defence. One may almost say that the delegates endeavoured to reconcile the elements of sheer undiluted militarism and sheer undiluted patriotism (if one may so call the view which champions spontaneous, unorganised, national resistance), and that the solution has not resulted in a successful chemical blend.<sup>13</sup>

He adds, however, that the silence of the Hague Regulations on the question of a *levée en masse* in occupied territory "would almost certainly be construed" by the majority of the powers, despite the resolution proposed by the British delegate to the Hague in 1899,<sup>14</sup> as warranting the most extreme punishment being inflicted on a population which unsuccessfully attempts to oust an enemy occupant.<sup>15</sup>

#### *Additional Requirement; Necessity for Government of Some Kind*

In addition to the requirements set forth in the Hague Regulations, it is also requisite, before the members of a military force are entitled to be treated as lawful belligerents, that they serve a political entity which is a state de jure or de facto, or which at least exhibits certain indicia of that status.<sup>16</sup> This additional requirement is a fundamental premise implicit in the Hague Regulations. An individual does not become a lawful com-

arms openly, and is commanded by a person responsible for his subordinates.<sup>17</sup> Thus Gentili, one of the earliest authorities in international law, stated:

That is to say, the war on both sides must be public and official and there must be sovereigns on both sides to direct the war.<sup>18</sup>

He is an enemy who has a state, a senate, a treasury, united and harmonious citizens, and some basis for a treaty of peace, should matters so shape themselves. Cicero with absolute accuracy applied this distinction against the followers of Antony, treating them as brigands; while Charles Martel said of the Saracens, that because they roved about in great numbers, and had leaders, camps, and standards, they were none the less brigands, since they had no motive for war. "It is the motive which everywhere renders things effective," and our learned men also advance this same opinion with regard to those roving Saracens. Pirates may follow the customs of war, and not those of brigands, as Paterculus writes of those against whom Pompey made his campaign; yet they do not wage war.<sup>19</sup>

The comments of Westlake, an eminent authority, are also pertinent. He states:

We, therefore, accepting the definition of Grotius in other respects, will say that *war is the state or condition of governments contending by force.*

Whether and how far individuals can be treated as parties to a war is a question to be discussed in the sequel, and is not prejudiced by the use of the word "government," as indeed it would not have been by the use of the word "state": if they are treated as parties to a war, that can only be justly done when there is reason for their being identified with their state or government.<sup>20</sup>

Similarly, Oppenheim states:

Since International Law is a law between States only and exclusively, no rules of International Law can exist to prohibit private individuals from taking up arms, and committing hostilities against the enemy. But private individuals committing such acts do not enjoy the privileges of members of armed forces, and the enemy has, according to a customary rule of International Law, the right to consider, and punish, such individuals as war criminals. Hostilities in arms committed by private individuals are war crimes, not because they really are violations of recognised rules regarding warfare, but because the enemy has the right to consider and punish them as acts of illegitimate warfare.

<sup>17</sup> The requirement that combatants serve some kind of government does not mean that they must be directly authorized by their government as members of its regular armed forces.

The conflict between praiseworthy patriotism on the part of such individuals and the safety of the enemy troops does not allow of any solution.<sup>21</sup>

This fundamental concept was recognized by Francis Lieber in his Instructions for the Government of the Armies of the United States in the Field.<sup>22</sup> Lieber's code instituted the first official codification of the laws of war and served in large measure as the basis for the Brussels code, which, in turn, was the basis for the Hague Regulations.<sup>23</sup> The Lieber Code provided in part as follows:

Art. 20. Public war is a state of armed hostility between sovereign nations or governments. It is a law and requisite of civilized existence that men live in political, continuous societies, forming organized units, called states or nations, whose constituents bear, enjoy and suffer, advance and retrograde together, in peace and in war.

Art. 57. So soon as a man is armed by a sovereign government, and takes the soldier's oath of fidelity, he is a belligerent; his killing, wounding, or other warlike acts, are not individual crimes or offences (italics supplied).

Art. 67. The law of nations allows every sovereign government to make war upon another sovereign state, and, therefore, admits of no rules or laws different from those of regular warfare, regarding the treatment of prisoners of war, although they may belong to the army of a government which the captor may consider as a wanton and unjust assailant.

The application of these principles to possible factual situations are the basic questions: What is the nature of the political entity which has its armed forces to the status of lawful combatants? Under what circumstances do they become merely bandits or outlaws? The requirement of a lawful belligerent is not under some kind of governmental authority. It has appeared most often in cases concerning so-called guerrilla warfare. At the outset it must be noted that the term "guerrilla" has been subject to much loose characterization and it is used in the literature on the subject to include both lawful and unlawful combatants. As pointed out in Oppenheim, "guerrilla war must not be confused with guerrilla tactics." The latter entails hostile acts committed by soldiers of soldiers in the rear of the enemy's lines during a real war. "Illegal guerrilla or irregular warfare" may be divided into two principal classes: first, where it is conducted by the remnants of the regular forces of a government which has surrendered or whose principal forces have been defeated so that there is no longer organized resistance; and second, where

<sup>21</sup> Oppenheim, *International Law*, Vol. 1, § 41.

<sup>22</sup> G. O. No. 100, April 24, 1864.

<sup>23</sup> See Davis, *Guerrilla Warfare*, Vol. 1 (1907).

at pp. 22, 23.

<sup>24</sup> Oppenheim, *International Law*, Vol. 1, § 41.

<sup>25</sup> See G. O. No. 100, April 24, 1864.

is conducted by individuals or small bands, which do not conduct their operations according to the laws of war. These two classes do not constitute, by any means, precise groups into which all guerrillas or irregulars fall and in any particular case they may have the characteristics of both or other classes. This article is not concerned with the second class of irregulars. Under the 4th clause of Article 1 of the Hague Regulations,<sup>25a</sup> these irregulars are unlawful combatants regardless of whether there is an existing government which is entitled to be treated as a lawful belligerent.<sup>25b</sup>

### *Historical Precedents*

Let us examine the historical precedents to determine whether there exists any customary rule as to the first class of irregulars.<sup>26</sup> The examples which follow are not exhaustive, but they are representative of the practice which has been adopted in modern warfare.

#### *Mexican War*

During the Mexican War, after General Winfield Scott's victory over the Mexican forces at Cerro Gordo on April 18, 1847, warfare by bands of *guerrilleros* became the regular means of resistance sanctioned by the Mexican Government. As has usually been the case in guerrilla warfare, many bands of guerrillas degenerated into little more than murderers and highway robbers. They mutilated wounded American soldiers, divided among themselves the goods taken from the enemy, and carried on "war without pity in every manner imaginable."<sup>27</sup> On October 6, 1847, Secretary of War W. L. Marcy wrote a letter to Scott in which, after referring to the termination of the unsuccessful negotiations for peace, he said:

We have hitherto been far more forbearing than is our enemy in exercising the extreme and even some of the ordinary rights of belligerents. . . . The guerrilla system which has been resorted to is hardly recognized as a legitimate mode of warfare, and should be met with the utmost allowable severity.<sup>28</sup>

On December 12, 1847, after first giving a warning to the guerrillas, Scott issued General Order Number 37, Headquarters of the Army, Mexico, which recited:

There are four scrutable ways by which combatants can state the law of a country which are set forth in the War Department Rules of Land Warfare. War Department Field Manual, 1846, pp. 1-10, para. 345-350. That class are often to be recognized. *Ex parte* *Quinn*, 311, U. S. 1, 1919, 20, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

The customs of war are defined in the Hague Regulations, Article 38, which states:

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The highways of Mexico, used, or about to be used, by the American troops, being still infested, in many parts, by those atrocious bands called *guerrilleros* and *rancheros*, who, under instructions from the late Mexican authorities, continue to violate every rule of warfare observed by civilized nations, it has become necessary—in order to insure vigor and uniformity in the pursuit of the evil—to announce to *all* the views and instructions of general headquarters on the subject. . . .

A council of war may . . . for any flagrant violation of the laws of war, condemn to death [such *guerrillero*] . . . on satisfactory proof that such prisoner, at the time of capture, actually belonged to any party or gang of known robbers or murderers, or had actually committed murder or robbery upon any American officer or soldier or follower of the American army.<sup>29</sup>

Less than two months after this order was issued, a treaty of peace was signed, and went into effect on ratification by the Mexican Senate on May 25, 1848. 20 | 4 | 57

### Mexico, 1865

In 1865, following the civil war in Mexico between the rival governments of the Constitutionalists under Juárez and the Conservatives under Miramón, and the intervention of the European governments, "Emperor" Maximilian of Austria was endorsed in a nominal Mexican plebiscite, at the instance of Napoleon III. The forces of Juárez continued to resist the French troops, and after defeat in open battle, resorted to guerrilla warfare. Although the conduct of the guerrilla warfare was remarkably free from the usual excesses, Maximilian issued a decree on October 3, 1865, which authorized the court-martial and summary execution of any rebel, regardless of his political principles or the nature of his organization, and the fining and imprisonment of anyone aiding the rebel cause.<sup>30</sup> The immediate result of this decree was the execution of thousands of Mexican patriots, many of whom had surrendered as prisoners of war. The decree was denounced in the United States Senate as an "inhuman and barbarous decree, issued in violation of the laws of war, the rights of the Mexican people, and of the civilization of the nineteenth century."<sup>31</sup> The war continued until 1867 when Juárez was victorious, largely because of the withdrawal by Napoleon of the French troops. Maximilian was captured on May 15, 1867, and Juárez was reelected President of Mexico. Maximilian was tried by court-martial and executed, after a conviction based largely upon the murders resulting from his decree of October 3, 1865. Winthrop, in stating his approval of the sentence, said: ". . . the soundest, under the law of war, of the grounds advanced for the trial and sentence of the so-called 'Emperor' Maximilian of Mexico, was his decree of October 3, 1865."<sup>32</sup>

<sup>29</sup> General Scott's Orders, 1847-1848, Book 41 ½, United States Archives.

<sup>30</sup> Chynoweth, W. H., *The Fall of Maximilian*, 1872, p. 51.

<sup>31</sup> *Cong. Globe*, 40th Cong., 1st Sess., 1867, 598.

<sup>32</sup> Winthrop, W., *Military Law and Precedents*, 1920, 798, N 62.

*United States Civil War*

*R.* In the American Civil War, well-known Confederate leaders such as Wheeler, Forrest, Morgan, and Mosby carried on war by guerrilla tactics independently of the regular operations of the main Confederate armies. In April, 1862, the organization of Partisan Rangers was authorized by the Confederate Government,<sup>33</sup> although previously to that time isolated bands of men had been recognized by Confederate commanders as soldiers.<sup>34</sup> Their excesses, or often the excesses committed by others under the protection of their name, gave rise to repeated correspondence on the part of the opposing generals. On July 3, 1862, when in command of the District of West Tennessee, General Grant issued the following order:

The system of guerrilla warfare now being prosecuted by some troops organized under the authority of the so-called Southern Confederacy, and others without such authority, being so pernicious to the welfare of the community where it is carried on, and it being within the power of the communities to suppress this system, it is ordered that wherever loss is sustained by the Government, collections shall be made by seizure of a sufficient amount of personal property from persons in the immediate neighborhood sympathizing with the rebellion to remunerate the government for all loss and expense of collection.

Persons acting as guerrillas without organization and without uniform to distinguish them from private citizens are not entitled to treatment as prisoners of war when caught, and will not receive such treatment.<sup>35</sup>

General Sherman gave the following instructions to General Burbridge in June 1864, regarding the treatment of guerrillas:

You may order all your post and district commanders, that guerrillas are not soldiers, but wild beasts, unknown to the usage of war. To be recognized as soldiers, they must be enlisted, enrolled, officered, uniformed, armed, and equipped by some recognized belligerent power and must, if detached from a main army, be of sufficient strength, with written orders from some army commander to do some military thing.<sup>36</sup>

During the war there were many instances of guerrillas sentenced to death for homicide or other acts of violence.<sup>37</sup>

Lieber's "Instructions" summarized the Union view as follows:

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Partisans are soldiers armed and wearing the uniform of their army, but belonging to a corps which acts detached from the main body for the purpose of making inroads into the territory occupied by the enemy. If captured, they are entitled to all the privileges of the prisoner of war.

<sup>33</sup> 1 *Official Records of the War of the Rebellion*, Series IV, pp. 1094, 1095.

<sup>34</sup> Winthrop, p. 783, n. 53, 54.

<sup>35</sup> 17 *Official Records of the War of the Rebellion*, Series I, Par. 2, p. 69.

<sup>36</sup> Bowman and Irwin, *Sherman And His Campaign*, 1865, 234.

<sup>37</sup> Winthrop, p. 784, n. 57.

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Men, or squads of men, who commit hostilities, whether by fighting, or inroads for destruction or plunder, or by raids of any kind, without commission, without being part and portion of the organized hostile army, and without sharing continuously in the war, but who do so with intermitting returns to their homes and avocations, or with the occasional assumption of the semblance of peaceful pursuits, divesting themselves of the character or appearance of soldiers—such men, or squads of men, are not public enemies, and, therefore, if captured, are not entitled to the privileges of prisoners of war, but shall be treated summarily as highway robbers or pirates. ✓

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Armed prowlers, by whatever names they may be called, or persons of the enemy's territory, who steal within the lines of the hostile army for the purpose of robbing, killing, or of destroying bridges, roads, or canals, or of robbing or destroying the mail, or of cutting the telegraph wires, are not entitled to the privileges of the prisoner of war.

After the surrender of Lee's army on April 9, 1865 and of J. E. Johnston's army on April 26, 1865, when it seemed possible that resistance would continue along guerrilla lines, General Grant refused to regard the one remaining Confederate army as possessing belligerent status. In assigning General Sheridan to the command West of the Mississippi on May 17, 1865, Grant gave him the following instructions:

If Smith [General Edmund Kirby Smith, the commander of the Trans-Mississippi Department, the only remaining organized Confederate force] holds out, without even an ostensible Government to receive orders from or to report to, he and his men are not entitled to the consideration due to an acknowledged belligerent. Theirs is the condition of outlaws, making war against the only Government having an existence over the territory where war is now being waged.<sup>22</sup>

#### *Franco-German War*

During the Franco-German war, the serious defeats inflicted on the French armies in 1870 led to the formation, throughout the country, of the famous bodies of *francs-tireurs*, detached bodies of men who harassed the enemy from within, without using guerrilla tactics. One corps of *francs-tireurs*, *Les partisans de Gers*, had papers showing that they were in the Government service; their officers held commissions, and their military character was admitted, though their only distinctive marks were a red sash, black coat, and Calabrian hat. But the original type of *franc-tireur* carried no papers, wore no recognizable uniform except occasionally a small and easily removable badge, and the chiefs of bands were not responsible

<sup>22</sup> 2 Sheridan, P. H., *Personal Memoirs of P. H. Sheridan*, p. 208. Smith surrendered on May 26, 1865.

to any superior officer.<sup>39</sup> Many German commanders, judging all francs-tireurs by the offenders, issued proclamations similar to the one posted outside Metz, which stated:

The Commander-in-Chief of the 2nd German Army again makes it known that each individual who does not belong to the regular French Army or Garde Mobile found bearing arms, under the name of Francs-tireur or other designation, will be considered as a traitor and hanged or shot at the place where he is taken without further consideration.<sup>40</sup>

A notice at St. Mihiel declared that francs-tireurs or other persons bearing arms, but not wearing uniforms so as to distinguish them from the civil population, were by the "Prussian laws of war" punishable with death. Another notice at Vendresse declared that persons in plain clothes fighting without papers or authorization from their Government would be tried by court-martial, and sentenced to ten years' imprisonment, or, in aggravated cases, executed.<sup>41</sup> The following slightly more reasonable decree was issued in other parts of occupied France:

The commander-in-chief hereby notifies the inhabitants of the arrondissement that a prisoner to be treated as a prisoner of war ought to make good his quality as a French soldier by establishing that, by an order emanating from legal authority and addressed to his person, he has been called to the service and enrolled on the lists of a corps militarily organized by the French Government. At the same time his quality of soldier, he being a part of the active army, ought to be indicated by military and uniform insignia, inseparable and recognizable by the naked eye at rifle shot.

The individuals who have taken up arms without having complied with the conditions above cited, will not be considered as prisoners of war. They will be judged by a council of war, and unless they have rendered themselves culpable of action which carries with it a more severe penalty, will be condemned to ten years of hard labor and detained in Germany till the expiration of the sentence.<sup>42</sup>

These proclamations were enforced by the execution of innumerable francs-tireurs as unlawful belligerents.<sup>43</sup>

### *Philippine Insurrection*

Toward the end of the Spanish-American War, after Commodore Dewey's defeat of the Spanish fleet at Manila Bay but before the fall of Manila, the Filipinos declared their independence of Spain on June 12, 1898. They proclaimed a provisional republic with Emilio Aguinaldo as president, and

<sup>39</sup> Edwards, H. S., *Germans In France*, as cited in 2 Halleck, H. W., *International Law*, 1878, p. 8, n. 5; Spaight, p. 42.

<sup>40</sup> Robinson, G. I., *The Betrayal of Metz*, p. 231, as quoted in Spaight, p. 43, n. 2.

<sup>41</sup> Edwards, H. S., *Germans In France*, as cited in 2 Halleck, H. N., *International Law*, 1878, p. 8.

<sup>42</sup> 2 *Revue De Droit International*, p. 663, as quoted in Bordwell, p. 91.

<sup>43</sup> See Spaight, pp. 43, 44.

made their capital at Malolos. On September 29 a revolutionary assembly ratified Filipino independence, and the Malolos Constitution, by virtue of which the Philippines were declared a republic, was approved by the assembly and proclaimed on January 23, 1899. Aguinaldo was elected first president of the new republic. Meanwhile the Treaty of Paris, ceding the Philippines to the United States, was concluded between representatives of United States and Spain on December 10, 1898, and ratifications of the treaty were exchanged by the two Governments on April 11, 1899. On February 4, 1899, Aguinaldo issued a proclamation of war against the United States. The Filipinos were defeated at all points, and on March 31 Malolos was captured by the American forces and the Filipino Government fled northward. On November 12, 1899, a council of war, presided over by President Aguinaldo, adopted a resolution that the insurgent forces were incapable of further resistance in the field, and it was therefore decided to disband the army. The officers and men were to return to their own provinces and organize the people for general resistance by means of guerrilla warfare.<sup>44</sup> One of the orders of that council provided:

The troops which will operate in all of the described districts will manoeuvre in flying columns as guerrilla bands; these will be under the orders of the aforesaid commander, to whose orders all the other leaders and subjects reporting to him and receiving from him instructions of the government; nevertheless, all orders from the government will be obeyed and adhered to the superior commander

The purpose of the guerrillas shall be to constantly worry the Yankees in the pueblos occupied by them, to cut off their convoys, to cause all possible harm to their patrols, their spies and their scouts, to surprise their detachments, to crush their columns if they should pass in favorable places, and to exterminate all traitors to prevent natives to vilely sell themselves for the invader's gold.<sup>47</sup>

Some of these guerrillas were officially regarded as lawful belligerents.<sup>48</sup> Thus the report stated:

Of course everything is being done consistent with American civilization and the laws of war to terminate the crisis in its present form.<sup>49</sup> . . . The bands of insurgent guerrillas are not soldiers in the true sense of the word, but it is a mistake to classify them as ladrones or armed robbers. There is considerable evidence of record to the effect that the insurgent leaders have themselves suffered at the hands of the latter, who are outlaws pure and simple.<sup>50</sup>

Other guerrillas were not entitled to the privileges of prisoners of war, according to an official proclamation issued on December 20, 1900, by General MacArthur, which provided:

Men who participate in hostilities without being part of a regularly organized force, and without being continuously in its operations, but who do so with intermittent reference to their homes and avocations, divest themselves of the rights of soldiers, and, if captured, are not entitled to the privileges of prisoners of war.

In practice, a distinction was made between guerrillas and regular military commissions between guerrillas and regular military commissions.

Panay, who enlisted in the Philippine forces in November, 1898, to fight against Spain, and continued to fight against the United States. He became a captain in the insurgent army, and later rose to the rank of "first official *guerrillero*," in command of a group of volunteers from Pavia. Even after the United States occupation, many of his men occasionally returned on extensive visits to their families in Pavia, but Gumban returned only once, when his son died. He and his men received no pay for their services, but were given a fixed allowance of the necessities and a few of the luxuries of life. In 1900, pursuant to orders from his superior officers, Gumban led thirty soldiers to Pavia for the purpose of attacking the seventeen American soldiers stationed there. When the band reached Pavia they put cloth over their uniforms and leaves on their guns to avoid attracting the attention of the American soldiers, with the alleged intention of throwing them off at the moment of attack. While Gumban was arranging for a signal for a general assault, the *presidente* of the *pueblo* approached and asked Gumban his intentions. Gumban attempted to take the *presidente* prisoner, and during the ensuing struggle the *presidente* was fatally stabbed. No attack was made. Several months later, Gumban and his men surrendered to the Americans because of lack of food. Gumban was tried for murder, and violation of the laws of war in (1) commanding "an irregular company of *insurrecto* soldiers for the purpose of attacking the American garrison," (2) leading the band "not clothed in a distinctive uniform," and (3) commanding an irregular company of insurgents "not being part or parcel of the organized hostile army, and not sharing continuously in regular warfare, but who did intermittently return to their homes and avocations." The Trial Judge Advocate relied mainly on Art. 82 of Lieber's Instructions in his presentation of the case. Gumban was found guilty and sentenced to death by hanging. In disapproving the sentence and freeing the accused, the Commanding General, Division of the Philippines, found that the accused was a lawful belligerent who killed the *presidente* while attacking the enemy under orders of his superior officers as a regular commissioned officer of a hostile army. His identity was known, he shared continuously in the war, and he did not return to his home intermittently and assume peaceful avocations. The *ruse de guerre* was held legitimate and supported by ample precedent in similar acts of civilized warfare.

Almost daily examples of punishment for the illegal type of guerrilla tactics are found in the General Orders, Headquarters Division of the Philippines, 1900-1901. Typical of the offenses usually punished by death, are: acts of violence such as murder,<sup>53</sup> burial alive,<sup>54</sup> assault and battery with intent to kill,<sup>55</sup> abduction,<sup>56</sup> kidnapping,<sup>57</sup> robbery,<sup>58</sup> arson,<sup>59</sup> and raiding<sup>60</sup>

<sup>53</sup> G. O. 9, 82, 91, 105, 137 (1900); G. O. 56, 63, 94 (1901). <sup>54</sup> G. O. 57 (1901).

<sup>55</sup> G. O. 9, 77, 98 (1900).

<sup>56</sup> G. C. 77, 103 (1900).

<sup>57</sup> G. O. 115 (1900); G. O. 69 (1901).

<sup>58</sup> G. O. 77 (1900).

<sup>59</sup> G. O. 77, 116 (1901).

<sup>60</sup> G. O. 157 (1900).

by members of guerrilla bands not part of the regular forces; acts of hostilities by guerrillas who occasionally assumed the semblance of peaceful pursuits,<sup>61</sup> who were not members of any recognized military organization<sup>62</sup> or who were not in uniform;<sup>63</sup> and the use of violence and threats to force peaceful natives to join the insurgent army and brand their bodies so to indicate.<sup>64</sup> These acts of violence were carried on against peaceful natives,<sup>65</sup> natives who refused to pay taxes in support of the insurgent forces,<sup>66</sup> natives who sympathized with or aided the United States forces<sup>67</sup> and United States Army personnel and materiel.<sup>68</sup>

### *South African War*

During the South African War the British formally annexed the Orange Free State on May 24, 1900. On June 1 a proclamation was issued warning the burghers that "inasmuch as the Orange River Colony, formerly known as the Orange Free State, is now British territory . . . all inhabitants thereof, who, after fourteen days from the date of this Proclamation, may be found in arms against Her Majesty within the said Colony, will be liable to be dealt with as rebels and to suffer in person and property accordingly."<sup>69</sup> The Free State government continued in existence, and the war lasted for two years after this proclamation was issued. The government had no settled abode, but issued its orders from a railway carriage, a northern village, or a farmhouse in the safety of the mountains, and its authority was recognized by the leaders in the field. Although few Boers appear to have been brought before the courts-martial on the mere charge of bearing arms, the proclamation was frequently enforced by the burning of farms. In the list prepared by the British Government of the farms that were burnt, the only cause assigned in many cases was that the owner was "on commando" (a military raiding expedition or body). The punishment thus inflicted apparently had much to do with the renewed activity of the Boers and the prolongation of the war. The injustice of treating those "on commando" as rebels was condemned by foreign jurists and also British statesmen like Sir William Harcourt and James Bryce—names of great weight in international law and history. Bryce referred to it in the House of Commons as:

A monstrous proclamation, a proclamation absolutely opposed to the first principles of international law, a proclamation based upon a paper annexation made seven days before, which purported to treat the inhabitants of the two republics as rebels—rebels, forsooth, on the basis of this paper annexation.<sup>70</sup>

<sup>61</sup> G. O. 81, 137, 147 (1900); G. O. 25, 38 (1901).      <sup>62</sup> G. O. 42, 95, 120 (1900).

<sup>63</sup> G. O. 108, 13, 137 (1900); G. O. 37 (1901).      <sup>64</sup> G. O. 129 (1900); G. O. 37 (1901).

<sup>65</sup> G. O. 82, 92 (1900).

<sup>66</sup> G. O. 56, 57, 59, 69, 71, 83, 151 (1900).      <sup>67</sup> G. O. 17 (1901).

<sup>68</sup> G. O. 9, 81, 98, 108, 137, 147 (1900); 25, 38, 63, 94 (1901).

<sup>69</sup> Proclamations of Lord Roberts as quoted in Spaight note 13 at pp. 330, 331.

<sup>70</sup> Same, p. 331.



As Gibson Bowles also pointed out in the House of Commons, King David himself was once a "perambulating government."<sup>71</sup> As a result of this criticism, by proclamation of September 1, 1900, Lord Roberts declared that only those burghers resident in the Orange River Colony, who had not been continuously "on commando" since a time prior to the annexation were considered as subjects of the Queen and that burghers who had been so on commando, should, if captured, be treated as prisoners of war.<sup>72</sup>

In addition to those punished under the Proclamation of June 1, 1900, many Boers were punished as "marauders" for carrying on warfare by illegal guerrilla tactics. Marauding was defined by the British authorities as consisting of "acts of hostility committed by persons not belonging to an organized body authorized by a recognized Government,"<sup>73</sup> and was made punishable by death. The records of courts-martial show many convictions of Boers on such charges as "committing an act of hostility as a marauder by firing on British troops when not on commando" and "committing an act of hostility—he at the same time not being a person belonging to any commando or organized military body authorized by any recognized Government, nor under any military orders of any officers of any Government."<sup>74</sup> On August 7, 1901, Lord Kitchener issued the last of a series of proclamations which recited that British troops were in possession of the seats of Government and principal towns of the two Boer republics which had been annexed to the British Empire, that 35,000 burghers were prisoners, that the scattered Boer forces had lost most of their guns and munitions, and possessed no regular military organization capable of carrying on regular warfare. The proclamation warned that the Boer forces were not proper belligerents, and pronounced sentence of banishment against all leaders who did not surrender by September 15 of the same year.<sup>75</sup> Most jurists condemned this proclamation, which was even denounced in the House of Commons by Sir William Harcourt.<sup>76</sup> The authoritative *Times History of the War in South Africa* says that the proclamation was issued while the Free State was still in existence, and its recital of the military situation is "a strange tissue of half-truths and perverted logic."<sup>77</sup> Only a small number of Boers surrendered because of the proclamation, and in the end it became a dead letter, the sentence of banishment never being executed.<sup>78</sup>

### X World War II

During the present war cases of guerrilla warfare have been many but they have generally not followed the traditional rules.

<sup>71</sup> Same, p. 64.

<sup>72</sup> 56 *Parliamentary Papers*, 1900, cd. 426, as cited in Bordwell, p. 146.

<sup>73</sup> *Papers on Martial Law, South Africa*, cd. 981, 16 as quoted in Spaight, p. 62.

<sup>74</sup> Same, p. 201.

<sup>75</sup> De Wet, C., *Three Years War*, pp. 3-6-308.

<sup>76</sup> Spaight, p. 65.

<sup>77</sup> Vol. 5, 321.

<sup>78</sup> 2 Wilson, H. W., *After Pretoria: The Guerilla War*, p. 635; Spaight, p. 65.

On July 4, 1940, the Reich Commissioner for the Occupied Netherlands Territories issued the following order:

Section I. (1) The property of persons or associations which have furthered activities hostile to the German Reich or Germanism, or of whom it must be assumed that they will further such activities in the future, may be confiscated in whole or in part.<sup>79</sup>

On July 9, 1941, Rumanian General Antonescu issued the following decree from his headquarters on the Rumanian-Russian front:

Article III. Persons who violate the above regulations, as well as persons who attack German or Rumanian soldiers or the civilian population, or those who destroy or injure stocks or goods, or attempt to commit acts of espionage or of sabotage behind the armies or in the territories occupied by them, shall be punished by death.

The trial and execution shall take place within twenty-four hours.

In case of *flagrante delicto*, the culprit shall be executed on the spot.<sup>80</sup>

In 1941 in Yugoslavia, while the Partisans under Tito were continuing to resist, one of the first decrees promulgated by the German commander in chief of the Army for occupied Yugoslav territory stated:

Any person who undertakes to commit any acts of violence or sabotage against the German armed forces, its members, or installations, shall be punished by death.<sup>81</sup>

On December 25, 1941, the Commander in partially occupied Serbia issued the following order:

Any person who undertakes to resist the orders of the German armed forces and the officials appointed thereby or of the Serbian Government approved by the German armed forces, (a) by force of arms, (b) by sabotage, or (c) by any other illegal act, may be punished, in addition to any other penalties incurred, by confiscation of his personal or real property.<sup>82</sup>

On May 17, 1941, the Admiral of the Free French naval forces made the following reply to Hitler's announcement that he did not recognize the men of the Free French Naval Forces as lawful belligerents:

Hitler has announced that he does not recognize as belligerents the officers and men of the "Free French" naval forces, but we have retained our French uniforms and I have conveyed to the enemy that if any of our men should be treated as *francs-tireurs*, for every one who was shot I would hang two Germans and three Italians.<sup>83</sup>

<sup>79</sup> *Verordnungsblatt*, 194-, No. 9, 128, as quoted in Lemkin, R., *Azis Rule in Occupied Europe*, 1944, p. 478.

<sup>80</sup> *Monitorul Oficial*, No. 161, July 1-, 1941, quoted same, at p. 566.

<sup>81</sup> *Verordnungsblatt Für Das Besetzte Jugoslawische Gebiet*, No. 1, 1941, 4, quoted same, p. 597, 598.

<sup>82</sup> *Verordnungsblatt Des Befehlshabers Serbien*, No. 27, 1941, 19, quoted same, pp. 598, 599.

<sup>83</sup> *The New York Times*, May 18, 1941, p. 1, col. 1.

On June 11, 1944, after the Allied landings in France, the Paris radio broadcast a decree from Field Marshal General Karl von Rundstedt saying that all French caught resisting the Germans would be treated as francs-tireurs to whom the usual international conventions regarding prisoners of war would not be applied.<sup>84</sup> The French Forces of the Interior (FFI), composed of approximately 500,000 men, continued to play their assigned role in the battle of liberation, in spite of the German threat. French headquarters predicted that as soon as the FFI had captured substantial numbers of German prisoners, the Nazis would be forced to treat the FFI as lawful belligerents. A similar threat to shoot summarily as francs-tireurs all members of the Free French forces was reconsidered by the Germans when those forces had captured large numbers of German prisoners.<sup>85</sup> The Germans carried out their threat by executing civilian hostages in reprisal for the resistance of the FFI, and also by executing captured members of the FFI. The FFI indicated that they intended to carry out suitable reprisals against "prisoners."<sup>86</sup> On July 15, 1944, General Eisenhower announced that the FFI were a combatant force commanded by Major General Joseph-Pierre Koenig, formed an integral part of the Allied Expeditionary Force, bore arms openly against the enemy, and wore distinctive emblems. Under these circumstances, warned General Eisenhower, reprisals against members of these groups would violate the rules of war.<sup>87</sup> To this warning, the Germans answered that the FFI violated the German-French armistice treaty, the French laws, and The Hague Convention. They said that the appointment of a French general, who lives in London, as supreme commander of all civilians in France who are carrying arms did not alter the status of the FFI.

The Japanese attitude toward Filipino guerrillas was clearly revealed in a battle order dated March 8, 1945, captured from the commander of the Fuji group, a Japanese army unit. The order stated: "Shoot guerrillas. All who oppose the Emperor, even women and children, will be killed." This attitude has been proved time and again in the campaign in Luzon where the Japanese have wantonly slain thousands on even a faint suspicion of guerrilla activity.<sup>88</sup>

The German guerrilla warfare received the official sanction of Propaganda Minister Joseph Goebbels in his weekly article in the magazine *Reich*, which was broadcast by the German news agency on April 19, 1945. After calling on Germans to attack allies with hand grenades or by planting mines or by firing on them from cellars, he said: "All the rules of warfare are obsolete and must be thrown overboard. All means are fair and permissible in the struggle against the terrible foe."<sup>89</sup> Another German radio announcement stated that underground forces called "werewolves" had been formed in territory occupied by the Allies and vowed to risk death "daily

<sup>84</sup> *The New York Times*, June 12, 1944, p. 7, cols. 2, 3.

<sup>85</sup> *Ibid.*, June 18, 1945, p. 1, col. 6.

<sup>86</sup> *Same*, June 28, 1944, p. 7, cols. 1-3.

<sup>87</sup> *Same*, June 1944, p. 23, col. 5.

<sup>88</sup> *Washington Post*, April 15, 1945.

<sup>89</sup> *The New York Times*, April 20, 1945.

and joyfully without regard to the childish rules of so-called decent bourgeois warfare."<sup>90</sup>

### Conclusion

It is apparent from this examination of the historical examples that there has not been uniformity on the precise nature of the government which must exist to entitle its armed forces to be treated as lawful combatants. It appears clear, however, that even under the most humane of interpretations the requirement that combatants serve a government has been regarded as satisfied only where it is a responsible and fairly representative political entity which can exercise authority over its armed forces. If there is a formal surrender by the enemy government and capitulation of the main body of armed forces, there is noteworthy precedent, particularly in the position taken by General Grant in the Civil War, for regarding as unlawful combatants those who continue to resist, even though they may be substantial in number. The fact that the surviving combatants may be impelled by patriotic motives in continuing to resist does not appear to have been regarded as material to their status as lawful combatants. Of course it may be that those who continue to resist may be large in number and may themselves constitute a *de facto* government; if so, they should be treated as lawful combatants. Although there is little authority, the complete military defeat of the enemy armed forces, the disintegration of the Government, and the occupation of its territory would seem to have the same consequences upon the status of those who continue to resist as does a formal surrender. Thus Oppenheim states:

On the other hand, one speaks of guerrilla war or petty war when, after the defeat and the capture of the main part of the enemy forces, the occupation of the enemy territory, and the downfall of the enemy Government, the routed remnants of the defeated army carry on the contention by mere guerrilla tactics. Although hopeless of success in the end, such petty war can go on for a long time, thus preventing the establishment of a state of peace, in spite of the fact that regular war is over and the task of the army of occupation is no longer regular warfare. Now, the question whether such guerrilla war is real war in the strict sense of the term in international law must, I think, be answered in the negative, for two reasons: First, there are no longer the forces of two States (or even the forces of a State and of an opposing Government) in the field, because the defeated belligerent State has ceased to exist through the military occupation of its territory, the downfall of its established Government, the capture of the main part and the routing of the remnant of its forces. . . . If, then, guerrilla war is not real war, it is obvious that in strict law the victor need no longer treat the guerrilla bands as a belligerent Power, and their captured members as soldiers. It is, however, advisable that he should do so, so long as they are under responsible commanders and observe the laws and usages of war.

<sup>90</sup> Asso.

quoted in Yank, April 27, 1945, p. 19.

For I can see no advantage in treating those bands as criminals, and no reason why they should be so treated, although in strict law it could be done (*italics supplied*).<sup>91</sup>

(There is no precise gauge by which it can be definitely determined when a disintegrating government has reached the point where it no longer can exercise governmental functions and is no longer entitled to be regarded as a lawful belligerent.) However, certain standards may be used as guides, such as the number of the members of the armed forces still resisting, their cohesion as fighting units, and the responsibility of the officials purporting to act for the government.<sup>92</sup>

The conclusion in any particular case as to the legality of guerrilla forces is likely to be affected by two counterbalancing factors. One is the desire to end as quickly as possible enemy resistance which has no chance of success. The other is the reluctance to treat as war criminals any large body of men who continue to fight solely for patriotic reasons of their own. The answer in a close case may well be dictated by political and military, rather than legal, considerations.

<sup>91</sup> Oppenheim, L., *International Law*, ed. by McNair, 1925, sec. 60. In accord is Spaight, p. 65. But see, Wheaton, H., *International Law*, 1944, p. 803.

<sup>92</sup> Cf., *Prize Cases*, 67 U.S. 635, 666-367 (1862), where it is stated:

"The parties belligerent in a public war are independent nations. But it is not necessary to constitute war, that both parties should be acknowledged as independent nations or sovereign States. A war may exist where one of the belligerents claims sovereign rights as against the other.

"Insurrection against a government may or may not culminate in an organized rebellion, but a civil war always begins by insurrection against the lawful authority of the Government. A civil war is never solemnly declared; it becomes such by its accidents—the number, power, and organization of the persons who originate and carry it on. When the party in rebellion occupy and hold in a hostile manner a certain portion of territory; have declared their independence; have cast off their allegiance; have organized armies; have commenced hostilities against their former sovereign, the world acknowledges them as belligerents, and the contest a war. They claim to be in arms to establish their liberty and independence, in order to become a sovereign State, while the sovereign party treats them as insurgents and rebels who owe allegiance, and who should be punished with death for their treason.

"The laws of war, as established among nations, have their foundation in reason, and all tend to mitigate the cruelties and misery produced by the scourge of war. Hence the parties to a civil war usually concede to each other belligerent rights. They exchange prisoners, and adopt the other courtesies and rules common to public or national wars."

## MANCHURIAN BOOTY AND INTERNATIONAL LAW

By DANIEL H. LEW \*

In its reply to the identical notes sent by Secretary of State James F. Byrnes on February 9, 1946, to the Chinese and Soviet Governments concerning the disposition of Japanese external assets, the Government of China stated that the claim of the Soviet Government "that all Japanese enterprises in the Chinese Northeastern Provinces which had rendered services to the Japanese Army were regarded by the Soviet Union as war booty of Soviet forces" is considered by the Chinese Government "as far exceeding the scope of war booty as generally recognized by international law and international usage."<sup>1</sup>

The international law applicable to war booty is found in the Hague Conventions of 1899 and 1907 which, though flagrantly violated in both World Wars by the German Government, remain supported and respected by most governments and international law authorities. Convention IV of the 1907 Hague Conference, in consonance with the growth of humane sentiments respecting war, partly as fostered by such men as Vattel and Wellington, defines the rights and obligations of the occupying armies based on pure military necessity and for the sole purpose of bringing the enemy to quick surrender.<sup>2</sup> It therefore states in precise language the nature and role of the occupying state and imposes upon it more obligations than rights.

The occupying State shall be regarded only as administrator and usufructory of public buildings, real estate, forests and agricultural estates belonging to the hostile State, and situated in the occupied country. It must safeguard the capital of these properties, and administer them in accordance with the rules of usufruct.<sup>3</sup>

The rights of occupancy, it has been established, "cannot be coextensive with those of sovereignty."<sup>4</sup> Wheaton defines usufructory as

a person who has a special interest in property, which he must use in such manner as not to impair its *corpus*. . . . An occupant may not

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<sup>1</sup> *Contemporary China*, Vol. V, No. 22; March 18, 1946.

<sup>2</sup> "In earlier days it was a generally recognized rule that from the moment one State was at war with another it had a right to seize on all the enemy's property of whatever kind and wherever found, and to appropriate it to its own use or to that of the captors. But in modern times . . . the principle grew up that no use of force against an enemy is legitimate unless it is absolutely necessary to accomplish the purpose of the war." H. B. Wheaton, *International Law*, London, 1944 (7th English ed., by A. B. Keith), Vol. II, pp. 247-248.

<sup>3</sup> Article 55.

<sup>4</sup> Wheaton, p. 233. Also L. Oppenheim: *International Law*, 1940 (6th ed., by H. Lauterpacht), Vol. II, Section 169.

appropriate or alienate public immovable property, as he is not entitled to exercise the rights of sovereignty until the occupied territory has been duly annexed; he may appropriate only the produce.<sup>5</sup>

It is possible that a point of issue may be raised over the fact that in the Soviet Union there is no private property in the traditional sense and that consequently a difference in "rules of usufruct" may exist. In the Soviet Union there is "socialized," "cooperative," and "personal" property, and it would be conceivable for the Soviet Government to apply these concepts to property outside its borders by obviating the difference between "private" and "public" property in Manchuria.<sup>6</sup> But should the Soviet Government regard all such private property as government-owned, the local law of Manchuria should nevertheless be applied inasmuch as Article 43 of the Hague Regulations, in defining the general authority of the occupant, calls upon him to respect, "unless absolutely prevented, the laws in force in the country."<sup>7</sup>

The obligations and prohibitions of the occupant state are explicitly provided in the Hague Regulations. Article 43 further reads: "The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore and ensure, as far as possible, public order and safety. . . ." In contrast to ancient practice, "private property cannot be confiscated."<sup>8</sup> and "pillage is formally forbidden."<sup>9</sup> These stipulations have been given recent endorsement by a group of international jurists who expressed the following opinion:

The vice of invalidity or nullity flows from an excess of powers or usurpation of power by the occupant. The occupant has, under international law, only a limited right of jurisdiction and administration. He has no right to dispose of goods or services acquired from the inhabitants for purposes other than the maintenance of the necessary forces of occupation and the welfare of the inhabitants, and he has no right to transfer titles to property, rights or interests outside the country. This applies in principle also to State property.<sup>10</sup>

The rights of the occupant are expressly qualified by the needs of the army of occupation, particularly for use in military operations. "Requisitions in kind and services shall not be demanded from municipalities or inhabitants

<sup>5</sup> Wheaton, p. 258.

<sup>6</sup> Japan's economic empire in Manchuria operated through the South Manchuria Railway Corporation and the Manchuria Industrial Development Corporation. The former was formed under an Imperial Ordinance in 1906. The latter was a state-controlled holding company engaged in 72 types of heavy industries with 150 suborganizations.

<sup>7</sup> On this stipulation Wheaton has commented: "One cannot conceive any insuperable hindrance to the application of laws of usufruct obtaining in the occupied country": p. 258. However, T. A. Taracouzio in his *The Soviet Union and International Law*, 1935, believes that this provision and Article 46 are "obviously in conflict" and "incompatible" with Soviet principles: p. 338. See below, p. 591.

<sup>8</sup> Article 46, paragraph b.

<sup>9</sup> Article 47.

<sup>10</sup> *International Law Conference*, collated and edited by W. R. Bisschop, London, 1943.

except for the needs of the army of occupation."<sup>11</sup> The right of public seizures is further limited to movable property only.

An army of occupation can only take possession of cash, funds and realizable securities which are strictly the property of the State, depots of arms, means of transportation, stores and supplies, and, generally, all movable property belonging to the State which may be used for military operations.<sup>12</sup>

Thus movable public enemy property may be appropriated by a belligerent, provided that it can directly or indirectly be useful for military operations.<sup>13</sup> But appropriation of public immovables is not lawful.<sup>14</sup> This prohibition was kept in mind by the Study Group of the Council on Foreign Relations when it recommended that:

Any United Nation during hostilities may confiscate all Axis public property found in its territory and movable Axis public property in its possession or under its control subject to the exceptions established by international law, and property owned by Axis nationals which can fairly and properly be treated as governmental in character.<sup>15</sup>

It emphasized that international law recognizes the right of a belligerent to confiscate movable but not immovable public property belonging to the enemy and found in the belligerent's own territory and that immovable property may be administered for the benefit of the belligerent.

"War booty," strictly defined, is limited to movable articles on the battlefield and in besieged towns. Private property which may be taken as booty is restricted to arms, munitions, pieces of equipment, horses, military papers, and the like.<sup>16</sup> Public enemy property which may be seized as war booty is limited to movables on the battlefield, and these need not be for military operations or necessity.<sup>17</sup>

The occupation of Manchuria by the Soviet armies following the Soviet Government's declaration of war on Japan on August 8, 1945, until the start of Soviet withdrawals from Mukden on March 11, 1946, placed the Soviet Union in the role of occupying State. The Japanese Government, however, formally surrendered on September 3, 1945, thus rendering the military necessity clause ineffective thereafter.<sup>18</sup> The Hague Conventions of 1907, which the Russian Government ratified on November 27, 1909, clearly define

<sup>11</sup> Article 52, paragraph a.

<sup>12</sup> Article 53, paragraph a.

<sup>13</sup> Oppenheim, Sec. 137, p. 309, and <sup>14</sup> Sec. 134, pp. 307-308.

<sup>15</sup> *The Postwar Settlement of Property Rights*, Council on Foreign Relations, 1945, p. 42.

<sup>16</sup> Articles 4 and 14 of the Hague Regulations and Article 6 of the Prisoners of War Convention of 1929. See Wheaton, pp. 248 and 250.

<sup>17</sup> Oppenheim, Sec. 139, pp. 310-311.

<sup>18</sup> No complete official report on the Manchurian removals has yet been released. So far as it is publicly known, the earliest date of Soviet removals was given by Mr. Tang Pao-yen, investigator of the Mukden Arsenal, according to whom more than 2,768 major pieces of machinery and boilers were removed from the arsenal alone between September 10 and December 8, 1945. *Sin Wen Pao*, Shanghai, March 31, 1946.



and limit the rights and duties of the occupant State in enemy territory. It follows that the restraints thereby imposed should be observed with no less diligence in relation to a friendly Allied Power. For there is an important difference between enemy territory and the status of Manchuria during the war. Manchuria was not enemy territory or a hostile State but was enemy occupied territory, its sovereignty having consistently remained Chinese by virtue of its non-recognition as the state of "Manchukuo" on the part of almost all the United Nations, including the USSR.<sup>19</sup> It had been, as the Joint Communiqué on the Cairo Conference declared, "stolen" by Japan, and, with the main exception of the Axis Powers, it had never been accorded *de jure* recognition by the world. Furthermore, the League of Nations, in its "Assembly Report of February 24, 1933, on the Sino-Japanese Dispute," without qualification stated that "the sovereignty over Manchuria belongs to China."<sup>20</sup>

China's sovereignty over Manchuria, moreover, should give China rights under the general law relating to fixtures, *quicquid plantatur solo, solo cedit*. Under this general rule of law that whatever is annexed to the land becomes part of it, China should be entitled to the rights of property formerly acquired by Japan in Manchuria. The inclusion of these rights appears to be tacitly assumed in a joint statement of general principle relating to forced transfers of property announced by members of the United Nations, including the United States, the British Commonwealth, China and the Soviet Union, on January 5, 1943. These nations

reserve all their rights to declare invalid any transfers of, or dealings with, property, rights and interests of any description whatsoever, (a) which are or have been situated in the territories which have come under the occupation or control, direct or indirect of the governments with which they are at war, or (b) which belong or have belonged to persons, including juridical persons, resident in such territories. This warning applies whether such transfers or dealings have taken the form of open looting or plunder or of transactions apparently legal in form even when they purport to be voluntarily effected.<sup>21</sup>

Whatever rights of seizing property Japan possessed either directly or indirectly through the puppet "Manchukuo" Government were war rights at most, their exercise not being a legal act but a case of *force majeure*, permitted by the laws of war but producing no legal effects.<sup>22</sup>

The Soviet justification for the removal of machinery from Japanese fac-

<sup>19</sup> See the recent interpretation of the non-recognition doctrine expounded in R. L. Redmond, C. M. Micou and Q. Wright, "The Concept of Unlawful Belligerency: Its Significance in the Development of International Law" in *The Postwar Settlement of Property Rights*, *supra*, Supplement A.

<sup>20</sup> W. W. Willoughby, *The Sino-Japanese Controversy and The League of Nations*, 1935, Appendix 4, p. 724.

<sup>21</sup> *Inter-Allied Declaration*; British Foreign Office, Misc. No. 1 (194) Cmd. 6418, London.

<sup>22</sup> See observations of James L. Brierly in *International Law Conference*, above.

tories in Manchuria<sup>23</sup> was made by Maj. Gen. Andrei Kovtoun-Stankevitch, commander of the Red Army garrison in Mukden, who claimed that it had been done under an agreement reached by the Governments of Great Britain, the United States, and the Soviet Union.<sup>24</sup> He said he was not sure where the decision had been made but added that it might have been reached at Yalta or at the Potsdam conference. Secretary of State Byrnes disclaimed any knowledge of such an agreement,<sup>25</sup> and Foreign Secretary Ernest Bevin on March 6, 1946, told the House of Commons that "I am not aware of any treaty or agreement which would confer such a right."<sup>26</sup> Both the British

<sup>23</sup> Manchuria once before had suffered the experience of being a battleground, namely in the Russo-Japanese War of 1904. Yet even without the benefit of the revised Hague Conventions that were not signed until two years after the conclusion of the war, China was reasonably successful in maintaining her neutrality and in avoiding serious injury beyond the main battle centers of Dairen, Port Arthur, and Newchwang which were Russian leased territories. The Chinese charges against Russian violations of neutrality were mostly "trivial": Amos S. Hershey, *The International Law and Diplomacy of the Russo-Japanese War*, 1906, p. 268. However, in a Circular Note to the Powers issued in January, 1905, Russia threatened to "consider the neutrality of China from the standpoint of her own interests in case the actual situation in China (being alleged breaches of Chinese neutrality), to which attention is now earnestly invited, shall continue" (Quoted in Hershey, p. 258). Nevertheless this threat of Russia to absolve herself from her agreement with the Powers by an *ex parte* decision of all questions relating to Chinese neutrality was successfully resisted. This agreement was the acceptance of the principles of the Hay Note of February 10, 1904 by Russia and Japan. According to Hershey "The Hay Note, backed up by subsequent representations, must be held to have at least contributed toward the prevention of serious violations of Chinese neutrality and to have thereby aided in preventing serious international complications leading to a possible international catastrophe" (p. 268). The Hay Note, sent to the American representatives at St. Petersburg, Tokyo, and Peking on the day of Japan's declaration of war, read as follows: "You will express to the Minister of Foreign Affairs the earnest desire of the Government of the United States that in the course of military operations which have arisen between Russia and Japan, the neutrality of China and in all practicable ways her administrative entity shall be respected by both parties and that the area of hostilities shall be localized and limited as much as possible, so that undue excitement and disturbance of the Chinese people may be prevented, and the least possible loss to the commerce and peaceful intercourse of the world may be occasioned." Favorable replies were received from nearly all the leading European nations after they were informed of this action.

In the present situation the United States and British Governments have similarly sent notes to the Governments of China and the Soviet Union. Undersecretary of State Dean Acheson has, however, indicated that the United States has, since receipt of the Soviet reply, abandoned hope of settling through diplomatic channels the differences with the Soviet Union over war booty removal and would instead depend on Reparations Commissioner Edwin W. Pauley to find some solution: *The New York Times*, April 29, 1946.

<sup>24</sup> Same, February 27, 1946.

<sup>25</sup> Same. In a statement issued on March 1, 1946, by Michael J. McDermott, Special Assistant to the Secretary of State for Press Relations, the United States Government declared: "We have no agreement, secret or otherwise, with the Soviet Government or any other government in regard to 'war booty' in Manchuria. This Government does not accept any interpretation of 'war booty' to include industrial enterprises or the components thereof, such as Japanese industries and equipment in Manchuria." *Department of State Bulletin*, Vol. XIV, No. 349 (March 10, 1946), p. 364.

<sup>26</sup> *The New York Times*, March 7, 1946.

and American Governments, in separate notes to the Soviet Government, have maintained that Japanese machinery in Manchuria, which the Russians have removed to Siberia, must be regarded as part of reparations from Japan and that its distribution must be decided by all the Allies jointly.<sup>27</sup> The Chinese Government is of the opinion that China, having fought longest and suffered most in the war, should receive a preferential quota and high priority in respect to the total amount of reparations to be paid to the Allied Powers by Japan, and that, as to the Japanese public and private properties and enterprises in Chinese territories, they should be regarded as a part of the reparations to be paid to China.<sup>28</sup> During the Foreign Ministers' Conference held in London in September, 1945, Dr. Wang Shih-chieh informed the American Secretary of State and the Soviet Foreign Commissar of this stand taken by the Chinese Government. "The American Secretary of State in his reply expressed his full endorsement of the Chinese stand, while the Soviet Commissar also raised no objection in his letter addressed to me."<sup>29</sup> The step taken at London by the Chinese Foreign Minister was in conformity with international law and usage. For the original owner of any real or immovable property is entitled to what is called the benefit of postliminy, and title acquired in war must be confirmed by a treaty of peace before it can be considered as completely valid.

This rule (observes Wheaton) becomes practically important in questions arising out of alienations of real property, belonging to the government, made by the opposite belligerent while in the military occupation of the country. Such a title must be expressly confirmed by the treaty of peace, or by the general operation of the cession of territory made by the enemy in such treaty. Until such confirmation, it continues liable to be divested by the *jus postliminii*.<sup>30</sup>

In accordance with this rule, the United States Government holds that the disposition of Japanese external assets, such as the industries in Manchuria, is a matter of common interest and concern to those Allies who bore the major burden in defeating Japan, and that it would be most inappropriate at this time to make any final disposition of Japanese external assets in Manchuria either by removal from Manchuria of such industrial assets as "war booty" or by agreement between the Soviet and the Chinese Governments for the control of those assets.<sup>31</sup>

The question of Manchurian "booty" and international law brings to the fore a vast and fundamental problem. This question, together with that of the Soviet view that the Italian fleet, which surrendered to the American and

<sup>27</sup> Same, March 6 and 10, 1946.

<sup>28</sup> *Contemporary China*, as cited above.

<sup>29</sup> Excerpt from Wang's report in same.

<sup>30</sup> Work cited, pp. 258-259. Professor Keith writes that in Belgium, during World War I, "Factories and workshops were denuded of their machinery, for the purchase of which criminal proceedings were later brought against the German manufacturers": same, p. 250.

<sup>31</sup> Statement released by Michael J. McDermott, cited above.

British navies, is war booty and should be shared with the Soviet Union,<sup>32</sup> brings out the basic problem of a sharp cleavage between the Soviet theory of international law and the theory commonly understood by other members of the family of nations. The Communist concept envisages international law as "a provisional inter-class law which aims to further the interests of organizing national laboring classes in their common struggle for proletarian world supremacy."<sup>33</sup> The fundamental divergence of political concepts and ideals could hardly lead to any other but differing theories of international law. The Communist state, for example, necessarily involves a struggle of social classes; the Communist idea of persons theoretically denies political nationality; the Communist concept of property excludes the right of private ownership of land and makes no distinction between movable and immovable property.<sup>34</sup> The naturalist school of international law is incompatible with Marxian political philosophy for a Marxist finds it impossible to conceive of an ideal law uniform for all classes. Similarly the positivist school which seeks to build up international law on the basis of established practices of nations is not altogether acceptable to Soviet theorists for the reason that such practices imply a usage rooted in pre-Soviet days.

The Soviet Government has, however, found some methods of compromise between the abstract revolutionary theories of the Communists and the concrete political necessities with which it is confronted. "This compromise is effected by transfusing the fundamental principles of international law with a Communistic interpretation, while leaving their practical application to the dictates of political opportunism."<sup>35</sup> Thus the Soviet Government has sometimes referred to custom as an authoritative source whenever the interests of the Soviets call for this concession.<sup>36</sup>

While repudiating all treaties concluded by the Czarist regime, the Soviet Government also has from time to time acceded to certain provisions of international conventions. For example, on June 3, 1919, the People's Commissary for Foreign Affairs, Chicherin, protested to the Polish Ministry for Foreign Affairs against violations of the rules of war by Polish

<sup>32</sup> See text of Secretary Brynes' address on the Paris Conference, in *The New York Times*, May 21, 1946. Reparations Commissioner Edwin W. Pauley has said that the United States and the Soviet Union have not agreed on the definition of war booty. According to him, the Soviet Government holds that anything used by the enemy forces in the war is booty. The American Government, he said, contends that booty is the product of such facilities and not the facilities themselves: *The New York Times*, April 25, 1946.

<sup>33</sup> Taracouzio, work cited, p. 12.

<sup>34</sup> Article 21 of the Civil Code of the RSFSR reads: "The land is owned by the State and cannot be the object of private transactions. Possession of the land is allowed only by usufruct."

"Note: With the abolition of the right of ownership of land, the division of the property into movable and immovable is discontinued." Quoted in same, p. 150.

<sup>35</sup> Same, p. 343.

<sup>36</sup> Article 3 of the Treaty between the RSFSR and Afghanistan of Feb. 28, 1924, stipulates that "the embassies and consulates of Each Contracting Party shall enjoy all diplomatic privileges, in conformity with the customs of international law." Quoted in same, p. 13.

troops, including the giving over to pillage of towns and cities.<sup>37</sup> More recently, Foreign Commissar Molotov declared on April 27, 1942, that "the Soviet Government . . . continues as hitherto to observe the obligations undertaken by the Soviet Union with regard to the regime for war prisoners according to the Hague Convention of 1907."<sup>38</sup> On the other hand, it has been observed that

the practice of the Soviets regarding territories under military occupation proves . . . that the rules of the Hague Regulations of 1907, relative to taxes, contributions and requisitions, appropriation of movable state property, etc., must all be considered as hardly consistent with Communist philosophy. Indeed, anxious to establish a system of government patterned after that existing under the Soviet Regime, and to assist the local proletariat in reorganizing the social order in the occupied territory to conform to their Communistic ideas, the Soviets naturally could not consider themselves bound by the traditions of the capitalist order.<sup>39</sup>

An urgent need therefore arises for the discovery of a common ground on which the principles and provisions of international law can be universally accepted. But to hold that this cannot be achieved without first obtaining world uniformity in political and legal philosophies would be false. For the Moscow Declaration and the United Nations Charter have already laid the main foundations for the future development of international law. Paragraph 5 of the Declaration signed at Moscow on October 30, 1943, by the United States, the Soviet Union, the United Kingdom, and China provides

That for the purpose of maintaining international peace and security pending the reestablishment of law and order and the inauguration of a system of general security, they<sup>40</sup> will consult with one another and as occasion requires with other members of the United Nations with a view to joint action on behalf of the community of nations.

Article 13, Paragraph 1 of the United Nations Charter provides that

1. The General Assembly shall initiate studies and make recommendations for the purpose of: a. promoting international coöperation in the political field and encouraging the progressive development of international law and its codification.

There is little question that the changing nature of international relations and modern warfare has rendered obsolete many provisions of international law. The revised Hague Conventions, for example, were concluded in 1907 when the scale and nature of modern war were unknown. Some of their provisions should be further revised to meet modern needs. But until a system of international law is achieved to regulate effectively and fairly the mutual conduct of states no nation should take it upon itself to act in contravention of existing international law. For to do so would be to jeopardize the faith of all other nations not only in existing international law but also in future international law as such.

<sup>37</sup> Same, p. 330.

<sup>38</sup> *Izvestiya*, April 28, 1942.

<sup>39</sup> Taracouzio, p. 338.

<sup>40</sup> Article 106 of the United Nations Charter incorporates Paragraph 5 of the Moscow Declaration and includes France in the provision of this paragraph.

## THE UNITED NATIONS AND SPECIALIZED AGENCIES

By GUSTAV POLLACZEK \*

### I. INTRODUCTION

International coöperation in economic and social fields, a direct consequence of the amazing progress attained in the field of transportation and communications, has progressed during recent decades with remarkable speed. There were leagues and associations of states even in ancient times, and some of them were formed and maintained for economic as well as for political purposes, but modern economic and social coöperation extends to the most varied spheres of human activity and emphasizes more and more the interests of individuals as contrasted with those of states.<sup>1</sup> It finds its most characteristic expression in the so-called public international unions, associations of sovereign states for the accomplishment of certain definite tasks in the economic and social field, but it is embodied also in the important work of private international associations. Organizations of the latter type have often been instrumental in bringing about important international regulations.

For a long time the various public international unions have been permitted to develop independently. In each of the member states their promotion was intrusted to different sets of officials. Whenever these functionaries were experts in their fields international coöperation in the particular area may have benefited from this arrangement, but the attempt to keep the various branches of international legislation isolated from one another is, in the long run, self-defeating. It narrows the outlook of the legislators, withholds precious experience won in one branch from persons concerned with others and leads to incomplete, unsatisfactory, and even contradictory legislation. This state of things is of concern not only to specialists in particular fields. Seemingly restricted as its particular sphere of action may be, each international convention has nevertheless a much wider significance as a part of the nascent code of international administration, and each of the existing international agencies as a subdivision of the future world government.

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<sup>1</sup> This does not mean, of course, that modern international legislation ordinarily recognizes individuals as direct subjects of international rights. However some international conventions in the field of transportation and communications provide for and regulate the rights of individuals to submit cases arising from international transport contracts to the courts of the member states. Other exceptions, contained in the Peace Treaties concluded after World War I, and in bilateral arrangements occasioned by World War I, have been quoted by Kelsen (*General Theory of Law and State*, 1945, p. 347). These treaties contain important economic and social provisions.

This emerging world organization has recently been outlined in the United Nations (UN) Charter agreed upon at San Francisco.<sup>2</sup> As was the case when the League of Nations was founded, several agencies with world-wide authority have been created, and they have been authorized to establish other auxiliary agencies and commissions. The existence of older international organizations could not be overlooked either. The Charter tries to consolidate them also, thus envisaging a harmonious structure headed by the newly created Economic and Social Council.

It might be useful to assess the chances of accomplishing this task, and to try to visualize the international legislative and administrative structure in the economic and social fields, if it should be successfully accomplished. It is the main purpose of the present study:

(a) To describe the position of the Economic and Social Council within the framework of the UN and to compare functions and powers of the supreme organs of League of Nations and UN (Section II);

(b) To review the various international organizations existing in economic and social fields, among them the important forerunners of the newly founded auxiliary agencies of the UN (FAO, UNESCO, and others) (Section III);

(c) To analyze the provisions of the Charter which deal with the so-called specialized agencies, in particular the provisions regulating their relationship with the UN, their coördination with each other, and the establishment of new organizations (Section IV);

(d) To point out the more important prerequisites of successful international coöperation in the economic and social fields, in particular the necessity of spreading the knowledge of international organization, and the essential part which the Educational, Scientific, and Cultural Organization of the United Nations (UNESCO) could play in this respect (Section V).

## II. THE UN AND THE ECONOMIC AND SOCIAL COUNCIL

Article 7 of the United Nations Charter distinguishes between principal and subsidiary organs. Principal organs of the UNO are "a General Assembly, a Security Council, an Economic and Social Council, an International Court of Justice, a Trusteeship Council, and a Secretariat."

The Economic and Social Council is thus only one among several governing bodies of the new world organization, and not a very powerful one at that. We shall see, in fact, that while the Court may properly be defined as the judicial branch of the UN, the General Assembly in certain respects as something like its legislative branch, and the Security Council as its executive branch, the two remaining councils have merely been endowed with advisory functions which, besides, are shared by the General Assembly. They have been named councils, however, because, like the Security Council, they are in charge of one of the three major activities of the UN.

<sup>2</sup> The Charter was signed on June 26, went in effect October 24, and, by December 27, 1945, had been ratified by all fifty-one members.

These activities may roughly be defined as concerning:

1. The maintenance of international peace and security,
2. The achievement of international coöperation in solving international problems of an economic, social, cultural or humanitarian character, and
3. The advancement of the well-being of the inhabitants of territories whose peoples have not yet attained a full measure of self-government.

It will be remembered that the League of Nations, although it was supposed to perform analogous tasks,<sup>3</sup> had only one Council. To assess the importance of the innovation a few words should be said about the functions of the various League and UN organs.

Both the Council and the Assembly of the League could be considered legislative bodies,<sup>4</sup> and both of them had in addition important executive powers.<sup>5</sup> But they were hampered by the unanimity rule,<sup>6</sup> by the lack of a clear demarcation line between their respective jurisdictions,<sup>7</sup> and they did not sit continuously,<sup>8</sup> as will the Security Council of the UN.<sup>9</sup>

<sup>3</sup> The Covenant, which had only 26 articles as compared with the 111 articles of the Charter, treated peace and security problems mainly in Articles 8-13, 15-17, 19 and 23 (d), economic and social problems in Article 23 (a-c, e, f), and colonial problems in Articles 22 and 23 (b). The principal provisions on the just treatment and advancement of native populations, contained in Article 22 of the Covenant, applied only to former enemy-dominated territories. Article 77 of the Charter, on the other hand, envisages the possibility that territories may be placed voluntarily under the trusteeship system by states responsible for their administration.

<sup>4</sup> Both Assembly (Article 3 (3)) and Council (Article 4 (4)) of the League were expressly empowered to deal at their meetings "with any matter within the sphere of action of the League or affecting the peace of the world." The French version used the legal term "*connaître de toute question*."

<sup>5</sup> See in particular Articles 15 and 16 of the Covenant.

<sup>6</sup> See Article 5 of the Covenant, also, for exceptions from this rule.

<sup>7</sup> Lord Balfour declared correctly (*Dictionnaire Diplomatique*, Paris, 1933, Vol. II, p. 778, English translation by the present writer): "It seems impossible to draw a definite line of demarcation between the two organs of the League established by the Covenant. Not only do their functions overlap, but upon the points of greatest importance they are absolutely identical." The noted British statesman drew the surprising conclusion: "The less one seeks to define in explicit terms the functions bestowed respectively upon the Council and the Assembly, the more one does for the good of the League. A group of exact formulas would attract undue attention to the uncertainties (doubtless left by intention) in the Covenant, and would give rise to judicial controversies which would entirely destroy the usefulness of the League. Hence"—continued the former premier—"I recommended that the Council should abstain from initiating any action likely to draw attention to the conflicts of authority which might develop—although unlikely to do so—on account of the terms of the Covenant. In the absence of clear terms Lord Balfour relied, somewhat optimistically, on "tact, *bon sens*, and *tolérance mutuelle*."

<sup>8</sup> According to their rules of procedure the Assembly met at least once in a year, while four annual meetings were foreseen for the Council. See Harley, J. E., *Documentary Textbook on International Relations*, 1934, pp. 82 and 86.

<sup>9</sup> Article 28 of the Charter, it is true, says rather cautiously that the Security Council "shall be so organized as to be able to function continuously."



The Secretariat of the League was permanent. Divided into several departments, roughly comparable to the ministries or departments of a national administration, it soon became the backbone of the Geneva organization, performing important preparatory research and coordinating tasks which, although auxiliary in principle, were, like the drafting of international legislation, rather essential in fact. This work of the Secretariat dealt to a large extent, if not primarily, with social, economic, and cultural problems. It may be predicted incidentally that very much the same thing will happen in the case of the UN Secretariat.

It is obvious that the most carefully prepared projects were of immediate practical value only if the members of the League could be persuaded to endorse them. The reluctance on the part of the members to renounce what they considered sovereign rights was strong, however,<sup>10</sup> and whatever authority the Council of the League possessed had to be used to conquer it.

But the League which, like the UN, was chiefly concerned with the maintenance of peace, had only one Council. Its efforts to avoid the recurrence of armed conflicts were, unfortunately, not too successful, but it is probably accurate to say that they distracted the attention of the Council from the important preparatory work done by the Secretariat and commissions in the economic and social fields. It may therefore be an advantage to the UN that this field of international government has been provided with a supreme authority of its own.

In defining the exact position of this new Council it must be kept in mind that neither the General Assembly nor the three councils of the UN have been endowed with true legislative rights. Since the legislative functions of the League bodies could hardly be exercised, this change need not be regretted, for the Covenant offered the deceptive picture of a stage of world government which had not yet been attained.

Passing on to the rights which the three councils really possess, it will become clear that the highest rank and the greatest prerogatives have been conferred upon the Security Council. As chief guardian of international peace and security this body may decide upon non-military sanctions (Article 41<sup>11</sup>) and, aided by the Military Staff Committee (Article 46) it even may "take action by air, sea or land forces" (Article 42).

But even under normal conditions the superior status of the Security Council, as compared with that of the two other councils, is shown by two

<sup>10</sup> In perusing the minutes of international conferences it is sometimes hard to decide whether objections to international legislation, based on alleged violations of sovereign rights, are genuine though mistaken, or merely prompted by the desire to show the objectors' patriotic concern. Thus when the long overdue international rules on responsibility for collisions of inland navigation vessels were elaborated under the sponsorship of the League, the Yugoslav delegates objected suddenly that the treaty, once in force, would be but the first step to the "internationalization of their national waters" (see *League of Nations Publications*, Geneva, 1931, VIII. 13, p. 250). The convention was consequently denatured by an additional "special protocol." It never went into force.

<sup>11</sup> See below, p. 615.

major responsibilities which it shares with the General Assembly: it "recommends," *i.e.* selects the Secretary General who is then formally appointed by the General Assembly (Article 97), and it has equal rights with the General Assembly in appointing the members of the International Court of Justice (Statute of the Court, Article 8).

On principle the General Assembly would seem to rank higher than all three councils, including the Security Council, since it approves the budget of the organization (Article 17), elects part of the council members<sup>12</sup> and receives the annual reports of the councils. But the Security Council has obviously been established as an independent organ to which specific powers were granted directly.<sup>13</sup> The organization's responsibilities in social and economic fields and in trusteeship matters, on the other hand, are exercised not only by the respective councils but also by the General Assembly and whatever functions the two minor councils exercise "are discharged under the authority of the General Assembly" (Articles 60 and 85).

Before discussing the functions of the Economic and Social Council a few words should be said about the aims of the UN with respect to social and economic coöperation (Chapter IX of the Charter). These aims have been proclaimed in the Preamble, in Articles 1 (3) and 55 of the Charter, and have perhaps best been summarized in (b) of the last named Article. According to this provision, the UN shall promote "solutions of international economic, social, health, and related problems, and international cultural and educational coöperation." Paragraphs (a) and (c) of the same Article, which promise, respectively, the promotion of "higher standards of living, full employment, and conditions of economic and social progress and development," and of "universal respect for, and observance of human rights and fundamental freedom for all, without distinction as to race, sex, language, or religion," indicate the spirit in which the solution of the aforementioned problems are to be attempted.

The Covenant of the League of Nations approached the problem in a different way, as will be remembered. Article 23, which was dedicated largely to economic and social coöperation, contained not so much the program of the Geneva organization as a list of obligations the fulfillment of which was pledged by the individual members of the League.<sup>14</sup>

<sup>12</sup> The General Assembly elects the six non-permanent members of the Security Council (Article 23; only the "big five" are permanent members), all the eighteen members of the Economic and Social Council (Article 61) and half of the members of the Trusteeship Council (Article 86). Each member is to have one representative.

<sup>13</sup> Especially in Chapter VII (Articles 39-51; action with respect to threats to the peace, breaches of the peace and acts of aggression).

<sup>14</sup> In the case of the prevention of the traffic in women and children, and in opium and other dangerous drugs (Article 23c), and of the trade in arms and ammunition with certain countries (Article 23d, a security measure) the members recognized the authority of the League. They assumed, on the other hand, individual responsibility for the promotion of "fair and humane conditions of labor" (Article 23a) and of "freedom of communications

The Charter would seem to be more thorough in this respect. Article 55, as quoted above, outlines the program of the organization, while according to Article 56 "all members pledge themselves to take joint and separate action, in coöperation with the organization, for the achievement of the purposes set forth in Article 55."

The "functions and powers" of the General Assembly in economic and social fields, and the functions and powers of the Economic and Social Council, will be treated in the chapter dealing with the "specialized agencies" to which most of these functions and powers refer.

### III. INTERNATIONAL ORGANIZATIONS IN ECONOMIC AND SOCIAL FIELDS

The pattern of preëxisting international associations and unions is extremely varied. In recent decades they have entered nearly every field of human interest and activity. Among the governmental associations, or public international unions, special attention seems to be due to the organizations dealing:

1. With the development of international law, in particular of private international law (conflicts of law), and with the unification of law;
2. With the protection of foreigners, minorities, and refugees;
3. With labor and population problems;
4. With education and intellectual coöperation;
5. With health problems (including the fight against opium and other dangerous drugs);
6. With the prevention of crime;
7. With financial and monetary relations;
8. With agricultural problems, the conservation of resources, and fisheries;
9. With trade and customs problems;
10. With transportation and communications (including aerial, fluvial, and maritime navigation).<sup>15</sup>

The range of activities of the private international associations is, if possible, even wider.<sup>16</sup> These associations are particularly important as the forerunners of governmental associations in their fields, and the formal

and of transit and equitable treatment for the commerce of all members of the League" (Article 23e), and for the "prevention and control of disease" (Article 23f). The provisions of the Covenant were, incidentally, by far more specific than those of the Charter but, considering the elastic formulas used in Article 23, were not really binding.

<sup>15</sup> The order in which the various spheres of activity have been enumerated does not imply any attempt at classifying them according to their importance. The greatest practical significance must probably be attributed to several public international unions which are active in the field of transportation and communications.

<sup>16</sup> Some of these organizations, such as the International Law Association or the International Chamber of Commerce, were active in many different sectors of international life and legislation. A quarterly bulletin, published by the League of Nations, listed the periodical meetings of the more important among these international associations.

recognition given them in Article 71 of the Charter<sup>17</sup> may be considered a well deserved acknowledgment of the essential part which they have played in the development of international legislation.

It is not surprising that associations of immediately interested parties have also contributed to this end. In the field of transportation, for example, the international organizations of carriers have exercised great influence. It would be unjust to characterize this influence as necessarily harmful; but it must be remembered that associations of this type may easily assume a cartel-like character. Thus, when a transport convention is elaborated, an association of railroad enterprises may certainly be able to offer useful suggestions of a technical character. But the same association may also function as a price or distribution cartel—and this will almost certainly be true of separately organized groups of its members. Legislative proposals emanating from such an organization should consequently be treated with great caution whenever they refer to the transportation contract, since transport conditions of every kind have their bearing on freight and fare. Coöperation producers' associations need not necessarily be rejected, but should be counterbalanced by granting equal opportunities to associations of consumers and independent expert and professional men and women.

Both public and private international associations may be universal or at least intended as such (that is, open to the accession of any nation desirous of joining), or may be limited to the nations of a given area. The most catholic of the older public international unions is the Universal Postal Union, to which practically all the countries of the world belong. The most important among the regional governmental associations are those formed by the nations of the Americas; in Europe there were associations formed by the Scandinavian, the Balkan, and the successor states of the former Austro-Hungarian monarchy.

Private international organizations that wish to further or influence international association in the broader sense of the word are seldom regionally exclusive. On the other hand, it is not only international associations of this kind that take an interest in international legislation. Since national associations too may be able to make important contributions to the nascent world code, they have expressly been mentioned in Article 71 of the Charter.<sup>18</sup>

The ultimate purpose of international coöperation is always the advancement of general interests in a given field. But the immediate aim which any international agreement can expect to attain will, as a rule, depend upon the stage of development that has been reached in this particular domain of international relations. Thoroughgoing research and study are—or at least should be—considered an indispensable prerequisite to effective international legislation. If this preparatory work has not been done by individual governments, private associations or scholars, the first step of

<sup>17</sup> See below, p. 609.

<sup>18</sup> Same.

international governmental coöperation will appropriately consist in the setting up of an international research institute.

Thus it was the purpose of the Convention of Rome, of June 7, 1905, to create an International Institute of Agriculture designed to collect, study, and publish statistical, technical, and economic information on a wide range of agricultural problems, and "to submit to the approval of the governments, if there is occasion for it, measures for the protection of the common interests of farmers and for the improvement of their condition."<sup>19</sup> In later years the Institute prepared several concrete conventions some of which went into force.<sup>20</sup> This agency is about to be replaced by the much vaster Food and Agriculture Organization of the United Nations (FAO) which, to use Ambassador L. B. Pearson's words, is the first functional international agency "which sets out with so bold an aim as that of helping nations to achieve freedom from want."<sup>21</sup>

After World War I similar functions in different fields were entrusted to three international agencies: the International Institute of Intellectual Coöperation, in Paris (founded in 1924), the Educational Cinematographic Institute of Rome (founded in 1928), and the Institute for the Unification of Private Law of Rome (founded in 1926). These international institutes were not established by international conventions in the customary sense of the word but through agreements entered into by the French and Italian Governments on the one hand and the League of Nations on the other; although under the direction of the League they were financed by the two

<sup>19</sup> United States, *Treaty Series*, No. 484; Harley, p. 290.

<sup>20</sup> One of these agreements was the Convention on the Organization of the Fight against Locusts, of Rome, October 31, 1920 (Hudson, M. O., *International Legislation*, Vol. I, p. 27). The contracting states promised to take measures necessary for fighting locusts which might damage the crops of neighboring states (*susceptibles de nuire aux cultures des Etats voisins*) and recognized the Institute as their official center of documentation and information. This was an interesting attempt to proceed somewhat abruptly to the universal regulation of a problem which—although possibly universal itself—would seem to call primarily for concerted action by the countries of individual geographic areas. The convention might nevertheless have attained its purpose had it been universally accepted. But ten years after its conclusion it had been ratified only by a small number of states most of which were separated by the seven seas.

In 1926, coöperation in the same field was found necessary by some of the Levantine countries (Palestine, Transjordan, Iraq, Turkey and Syria). But instead of adhering to the Convention of 1920 they concluded a new agreement "creating the International Bureau of Locusts" (see Hudson, Vol. 3, p. 1888 and p. 1891). The Bureau also collects information and submits proposals, but has been given more concrete responsibilities than the Institute, though in a more specialized field; the convention is, incidentally, open to the adherence of other states without regard to their geographic position.

<sup>21</sup> *Food and Agriculture Organization of the United Nations*, Report of the First Session of the Conference held at the City of Quebec, Canada, October 16 to November 1, 1945, Washington, 1946, p. ix. See also, p. 55, the recommendation to wind up the affairs of the International Institute of Agriculture, to transfer its library, archives, and property to the FAO and to substitute FAO for the Institute "in the execution of the provisions of the international conventions which attribute functions to the Institute."

governments.<sup>22</sup> The Cinematographic Institute drafted the Convention for Facilitating the International Circulation of Films of an Educational Character<sup>23</sup> which—a not unusual occurrence—was soon followed by a similar inter-American treaty.<sup>24</sup> The Institute of Intellectual Coöperation not only prepared conventions of its own<sup>25</sup> but also attempted to broaden the sphere of action of the Cinematographic Convention elaborated by its sister institute in Rome; the importance of its contribution to this end was recognized by the Assembly of the League.<sup>26</sup> It is also interesting to note that in a neighboring field valuable work was done by the International Bureau of Education at Geneva; this was a private international organization, to which, however, many governments and ministries of education belonged.<sup>27</sup> The responsibilities of most of the aforementioned organizations will be transferred to the newly founded Educational, Social, and Cultural Organization of the United Nations (UNESCO).

There are other cases where an international convention also provides for the establishment of international agencies, but where these permanent organizations, important as they are, disappear behind the even more important legal rules contained in the convention (which are usually necessitated by, and characteristic of, a rather advanced stage of international relations in this particular field). This is, *e.g.*, the case with the postal, telecommunications, and transport unions which, at present, are administered at Berne, Switzerland. These unions are also characterized by the statutory non-permanent organs with which they have been endowed, namely their periodical conferences, also called conferences of revision. Even the

<sup>22</sup> Namely the Paris institute by the French Government and the Rome institutes by the Italian Government. Like many other international institutions the institutes received occasional support from American foundations; see, *e.g.*, the *League Report on the Paris Institute for 1936*, Paris, 1937, p. 12.

<sup>23</sup> Geneva, October 11, 1933, Hudson, Vol. VI, p. 456. The treaty came into force on January 15, 1935.

<sup>24</sup> Convention concerning Facilities for Educational and Publicity Films, Buenos Aires, December 23, 1936, Hudson, Vol. VII, p. 611. The treaty came into force on April 1, 1938.

<sup>25</sup> In particular the Convention concerning the Use of Broadcasting in the Cause of Peace, Geneva, September 23, 1936, Hudson, Vol. VII, p. 409. The treaty came into force on April 2, 1938.

<sup>26</sup> See the *League Report on the Institute for 1937*, Paris, 1938, p. 70. Apart from its valuable "collections" (series of books: "Conversations," "Open Letters Series," "Intellectual Coöperation Series"), the Institute published the following periodicals: *Coöperation Intellectuelle* (monthly); *Museum* and its *Supplement*, organ of the International Museums Office (monthly); *Index Translationum* (quarterly); *Scientific Museums* (monthly); *Students Abroad* (twice a year); *Bulletin de l'Office International des Instituts d'Archéologie et de l'Histoire de l'Art* (three times a year); *Bulletin for University Relations*.

<sup>27</sup> The Institute of International Education, New York, a private national association with international affiliations, represents another type of internationally important organizations. The Institute was active in the international exchange of students which, as is well known, was facilitated by the Rhodes Scholarships, and by those granted by the Guggenheim Foundation, the Rockefeller Foundation, and the Carnegie Endowment for International Peace.

original elaboration of one of the three basic conventions, the Convention on the Transport of Goods by Rail, was almost exclusively intrusted to conferences of this type.<sup>28</sup>

Other treaties are practically of equal significance, both on account of their general contents and because they establish vitally important international agencies. Thus, the Bretton Woods Agreements of July 22, 1944, could not confine themselves to setting up an international bank and an international fund (International Bank for Reconstruction and Development, and International Monetary Fund). In his message to Congress of February 12, 1945, President Roosevelt declared not only that "the articles of agreement constituting the charter of the bank have been worked out with great care by an international conference of experts and give adequate protection to all interests," but also that the fund agreement "establishes a code of agreed principles for the conduct of exchange and currency affairs."<sup>29</sup>

The American "Proposals for Expansion of World Trade and Employment" of December, 1945, suggest that an International Trade Organization be created, to stand beside the international agencies dealing with currency, investment, agriculture, labor, and civil aviation. Like the Bretton Woods Agreements, these "proposals" contemplate not only the establishment of a central international agency (to deal with trade and employment), but also "the adherence by all members to a detailed charter which would establish rules of trading policy and conduct."<sup>30</sup>

The foregoing remarks might lead to the assumption that such international conventions provide necessarily for the establishment of international agencies, albeit agencies of varying importance. If this can be considered a rule it nevertheless has numerous—and on the whole rather regrettable—exceptions, where either no permanent agency whatever has been put in charge of the activities contemplated by the convention<sup>31</sup> or where certain

<sup>28</sup> The first conference for the elaboration of this treaty took place in 1878, but the Convention went into force only on January 1, 1892. It might be argued that, had a permanent international agency for the preparation of the Convention been established by the conference of 1878, an agreement might have been reached at an earlier date. But the method of preparing international legislation was a different one in this case: the work was done not through the instrumentality of a permanent organ, but by means of ensuing conferences which, step by step, cleared the way of obstacles.

<sup>29</sup> *Congressional Record*, Vol. 91, p. 1062.

<sup>30</sup> See Address by Assistant Secretary of State Clayton at the semi-annual meeting of the Academy of Political Science, New York, April 11, 1946 (State Department Press Release No. 244, p. 6), and the analysis of the "Proposals" in *The New York Times* of December 7, 1945, p. 14.

<sup>31</sup> For example the public international union for the Technical Unity of Railroads, formed by the European countries between the Spanish and Russian borders, has no international bureau. (The main charter of this union entered into force in 1882, and amended versions became effective in 1886, 1907, 1914 and 1939; see the latest text in *Bulletin des Transports Internationaux*, Berne, 1940, Annexe.) Certain preparatory and research tasks have been entrusted to the International Railway Union, Paris, a private international association.

coördinating tasks have been entrusted not to an independent international body but to the government of one of the contracting states.<sup>32</sup> In all of these cases the Governments could, incidentally, rely upon the assistance of several private international associations which did the necessary legislative research work on an international basis. The Warsaw Private Air Law Conference, of 1929 explicitly requested the CITEJA (*Commission Internationale Technique d'Experts Juridiques Aériens*, a semi-official body of government-appointed experts) "to continue its work of preparing draft conventions" for the continuous improvement of the Air Law Convention. Shortly before the end of World War II the Chicago Civil Aviation Conference of 1944 recommended the resumption "at the earliest possible date of the CITEJA sessions which were suspended because of the outbreak of the war" and the coördination of the activities of CITEJA and of the international bodies created at Chicago.<sup>33</sup>

These divergencies are worthy of attention since, as we shall see, the coördinating provisions of the Charter's chapters on economic and social co-operation refer to agencies and not to conventions or public international unions. It also should be mentioned in this connection that the Charter introduces a new and distinctive description of the international agencies working in the economic and social field which, although well chosen, is used in two different meanings. Article 57 (1) calls these bodies "specialized agencies" and describes them as "established by inter-governmental agreement and having wide international responsibilities as defined in their basic instruments in economic, social, cultural, educational, health, and related fields" but paragraph 2 of the same Article reserves the same designation for specialized agencies "brought into relationship with the organization" (UN). This short term is, of course, nothing but a code-like abbreviation;<sup>34</sup> probably there will still be specialized agencies not brought into relationship with the UN, just as there were international bodies which remained independent of the League of Nations.

There remains one classification of international agreements which—probably for good reasons—has seldom been tried out, although it must be deemed essential from the point of view of practice. The authoritative collections of international treaties, such as Martens' *Recueils Généraux*, the Treaty Series of the League of Nations, or Judge Hudson's "International Legislation" (which has wisely been limited to multilateral instruments), would seem to present imposing masses of codified international coöpera-

<sup>32</sup> Thus certain tasks frequently performed by international bureaus were entrusted to Belgium in the case of the Bills of Lading Convention of 1924, to France in the case of the Warsaw Private Air Law Convention of 1929, and to Great Britain in the case of the Safety of Life at Sea Convention of 1929.

<sup>33</sup> Final Act of December 7, 1944, Recommendation No. VII.

<sup>34</sup> This abbreviation has, however, not always been used, for instance not in Article 96 (2) of the Charter.



tion. They contain, however, not only legislation pertaining to various fields, and of differing purpose and local applicability, but also agreements of greatly varying practical importance, which, although clothed in similar legal forms, range from conventions of the greatest significance for the social and economic life of the member states to somewhat shadowy and lifeless declarations of good will and friendly intentions.

Conventions of the latter type, many of which were concluded under the auspices of the League of Nations, may be so complete and detailed as to offer an outwardly satisfactory semblance of international codification, and nevertheless be so full of loopholes as to be thoroughly devoid of practical significance. They are not entirely valueless; frequently they are the fruit of the painstaking efforts of conscientious legislators, and, at a later juncture, they may still become useful, if purged of their countless reservations and ambiguous formulas. But they also raise expectations without fulfilling them, and since they fail to meet the needs which led to their conclusion, they tend to discredit international coöperation as such.

Considering the great variety of international agreements it would obviously be futile to prescribe detailed recipes for international legislation. For a different reason such formulas would obviously be out of place also in the case of preliminary conventions which merely provide for the establishment of international research centers or for consultations among the contracting states. It can be said, however, that, in order to be workable, truly regulatory conventions should, above all, fulfill the requirements of adequacy, fairness, binding force (including enforceability) and easy amendability. Conventions in the same or neighboring fields should, furthermore, be effectively coöordinated.

A treaty may be considered adequate if it devises as complete a solution of the underlying problem as can be attained at the particular time of its conclusion. An international instrument will often be unsatisfactory in this respect, because the parties reached an agreement only on some, and not on all, important aspects of the matter under consideration. This incomplete coverage of the field is often due to unfounded distrust, or lack of expert knowledge, on the part of the negotiators, or both.<sup>35</sup>

It must be admitted, of course, that the selection of qualified representatives poses a difficult problem, especially where an international convention attempts to regulate the relations between various economic and social groups. It should be obvious, however, that no fair solution of contested issues can be expected if expert representatives are taken merely or predominantly from one of the interested groups.

On the whole it was rather the lack of binding force than lack of adequacy or fairness of individual treaties which tended to discredit international legislation in the past. Naturally a treaty which indulges in weak and hesi-

<sup>35</sup> See the example given in note 10, above.

tant verbiage can hardly ever be enforced. If all that recalcitrant contracting parties undertake boils down to the promise to consider, to consult about, or even to promote and to encourage, certain useful measures—then it will, even if nothing much comes out of these pledges, be hard to prove that they have been violated. If a treaty is strongly worded and unequivocal one may rely upon the solemn word of the contracting states. It will nevertheless be safer to include economic sanctions and to provide for recourse to international courts or to international arbitration. Both devices have been successfully adopted in the case of the International Convention for the Transport of Goods by Rail.<sup>36</sup>

The postulates of easy amendability and coördination result necessarily from the accelerated pace of scientific and economic progress. Treaties of practical significance to the everyday life of the member states may become entirely valueless if urgently needed amendments have to undergo the time-honored ordeal of ratification by scores of contracting states—especially if these states are not even obliged to submit to their legislative bodies the amendments which they have signed.<sup>37</sup> Various public international unions have shown the way, in particular the Universal Postal Union,<sup>38</sup> the Berne Transport Union<sup>39</sup> and the Paris Air Navigation Union of 1919.<sup>40</sup> The hope that past distrust or caution will be abandoned, that these examples will be followed by other public international unions, and that the UN will lead its members toward this goal, may, at first sight, seem exaggerated, since the new organization itself holds to the requirement of ratification (Article 108 of the Charter). But this need not necessarily preclude

<sup>36</sup> The jurisdiction of the Central Office (see Manley O. Hudson and Louis B. Sohn, "Fifty Years of Arbitration in the Union of International Transport by Rail," this JOURNAL, Vol. 37 (1943), p. 597) and its right to strike railway lines from the official list (see Article 57d and Annexe VI, Article 3 of the Convention) become operative only in conflicts between carriers belonging to different countries. (However the most important of these carriers are, in fact, government agencies.) Litigations between the Governments regarding the convention are subject to the procedure provided for in general or special treaties of arbitration. Litigations between carriers and shippers are judged by the courts of the member states according to the rules laid down in the convention.

<sup>37</sup> This obligation exists for the members of the ILO. See below, p. 608.

<sup>38</sup> "Proposals between meetings" (see Article 19 of the Cairo Convention of 1934), "preparatory commissions," and especially the insertion in the text of the convention of the date of its effectiveness. "This," remarked Evaristo Garbani-Nerini, Director of the Universal Postal Union from 1925 to 1937, "is one of the most characteristic peculiarities of our institution. . . . It follows that the member states very frequently apply the new conventions . . . for months and years before ratifying them . . . the signature is equal to a provisional ratification . . . valid up to the moment where a declaration to the contrary has been made" (*Les bases, l'organisation et le développement de l'Union Postale Universelle*, 1935, p. 15).

<sup>39</sup> See this writer's study, "International Legislation in the Field of Transportation," this JOURNAL, Vol. 38 (1944), p. 581, on the "Commission of Experts."

<sup>40</sup> The International Committee on Aerial Navigation (CINA), established by the Convention on the Regulation of Aerial Navigation of Paris, October 13, 1919, had broad legislative powers. See Anne Pignochet, *L'Organisme le plus évolué du droit international*, Paris, 1936.

a more liberal attitude with respect to the constitutions of international agencies with a much more limited sphere of action.

At the International Civil Aviation Conference in Chicago (1944) a characteristic step was made in this direction. In one paragraph the Paris Air Navigation Union of 1919 was mentioned; the charter of this union, the Convention on the Regulation of Aerial Navigation of Paris, October 13, 1919, provided for the establishment of the International Committee on Aerial Navigation (CINA), an agency which was placed under the direction of the League of Nations and which had broad legislative powers.<sup>41</sup> For both reasons the United States was not able to join the Paris Union,<sup>42</sup> and, as a consequence, the competing Habana Convention of 1928 was concluded among the states of the western hemisphere.<sup>43</sup> Now the Chicago Convention of 1944 is, according to its own Article 80, designed to supersede both the Paris and the Habana Convention. In bestowing true legislative rights on an international body it does not go as far as the Paris Convention, but adopts the principle of the Berne Commission of Experts,<sup>44</sup> stipulating that any annex or any amendment of an annex "shall become effective within three months after its submission to the contracting States or at the end of such longer period of time as the Council may prescribe, unless in the meantime a majority of the contracting States register their disapproval with the Council."<sup>45</sup>

Amendments to the Convention itself still need ratification by at least two-thirds of the total number of contracting states. But "if in its opinion the amendment is of such a nature as to justify this course, the Assembly (of the International Civil Aviation Organization) in its resolution recommending adoption may provide that any state which has not ratified within a specified period after the amendment has come into force shall thereupon cease to be a member of the Organization and a party to the Convention."<sup>46</sup>

The wish to free as many amendments as possible from the cumbersome ratification procedure is noticeable also in the constitutions of the FAO and of the UNESCO, auxiliary organizations of the UN which were founded at the end of 1945.<sup>47</sup> In the case of the FAO, amendments which do not involve new obligations for member nations shall take effect on adoption by

<sup>41</sup> See Pignochet, note 40.

<sup>42</sup> See Hackworth, G., *Digest of International Law*, Washington, 1940-44, Vol. IV, p. 363.

<sup>43</sup> See Manley O. Hudson, "Aviation and International Law," in this JOURNAL, Vol. 24 (1930), p. 234, and Louis C. Cassidy, in "Does the Havana Aerial Convention Fulfill a Need?", *Air Law Review*, 1931, p. 42.

<sup>44</sup> See note 39.

<sup>45</sup> Article 90 of the Chicago Convention. By April 15, 1946, the Convention—which, according to Article 91, as soon as ratified or adhered to by twenty-six States, shall come into force among them on the thirtieth day after deposit of the twenty-sixth instrument—had been ratified by Canada, China, the Dominican Republic, Nicaragua, Paraguay, Peru, Poland, and Turkey (Department of State Press Release No. 251).

<sup>46</sup> Article 94 of the Chicago Convention.

<sup>47</sup> See note 21 on the FAO and note 65 on the UNESCO.

the Conference by a vote concurred in by a two-thirds majority of all the members of the Conference (Article XX of the FAO Constitution). Article XIII of the UNESCO Constitution contains a similar rule but requires also that "amendments which involve fundamental alterations in the aims of the Organization" be subsequently accepted (*i.e.* ratified) by two-thirds of the member states.

#### IV. CHARTER PROVISIONS ON SPECIALIZED AGENCIES

The League of Nations and the United Nations were created as centers of international coöperation but both recognized that the foundations had been laid by previous arrangements and agencies. The Geneva institution in particular, to which some of the most important members of the community of nations did not belong, also had to reckon with the probability, or rather certainty, that new international arrangements and agencies would be established outside of its orbit. The two organizations handled this intricate problem in different ways.

In dealing with this question, the League did not distinguish between "security" and "economic and social" arrangements. The Covenant stated unmistakably its supremacy over all other international legislation, and declared with equal firmness that functional organizations working in the international field should be subordinated to the League. There were explicit stipulations regarding both past and future in this respect.

With respect to international legislation, Article 20 (1) of the Covenant said:

The Members of the League severally agree that this Covenant is accepted as abrogating all obligations and understandings *inter se* which are inconsistent with the terms thereof, and solemnly undertake that they will not hereafter enter into any engagements inconsistent with the terms thereof.

The second paragraph of the same Article added:

In case any Member of the League shall, before becoming a Member of the League, have undertaken any obligations inconsistent with the terms of this Covenant, it shall be the duty of such Member to take immediate steps to procure its release from such obligations.

This provision was quite obviously aimed at treaties between members and non-members of the League. The Covenant made it clear that it did not consider such obligations abrogated if the requested release could not be obtained.<sup>48</sup>

The Charter contains no provision corresponding to Article 20 (2) of the Covenant. Article 103 says simply:

<sup>48</sup> Article 21 of the Covenant:

Nothing in this Covenant shall be deemed to affect the validity of international engagements, such as treaties of arbitration or regional understandings like the Monroe Doctrine for securing the maintenance of peace.

was expanded into Chapter VIII of the Charter (Regional Arrangements, see below, p. 614).

In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.

It would seem that provisions contained in treaties concluded between UN members and third parties are to be considered void, whether or not any release has been procured or even requested.

The important principle of compulsory registration of treaties (Article 18 of the Covenant) was fully maintained in Article 102 of the Charter.

While the provisions of the Charter on international legislation as such are intended to be stronger than the regulations contained in the Covenant, the San Francisco legislators proceeded differently in the case of the international agencies. It was said in Article 24 (1) of the Covenant:

There shall be placed under the direction of the League all international bureaux already established by general treaties if the parties to such treaties consent. All such international bureaux and all commissions for the regulation of matters of international interest hereafter constituted shall be placed under the direction of the League.

Some caution seemed to be indicated in this respect. The attempt to subordinate the international bureaux to the League had not been very successful, apart from administrative and budgetary difficulties, mainly because important members of public international unions either did not belong to the League, or were of less influence there than in the particular union whose coördination with (or rather subordination to) the League was contemplated. Thus the Charter speaks only of bringing the agencies into relationship with the UN, and not of placing them under its direction.<sup>49</sup> On the other hand, the coördination of the various agencies in the economic and social field which had not expressly been mentioned in the Covenant, is treated extensively in the Charter. At first sight it would seem that the relations between these agencies and the UN were, on the side of that organization, limited to the General Assembly, the Economic and Social Council (and, of course, to the Secretariat), but we shall see that, strictly speaking, this is not the case.

The functions of the UN in the economic and social field are two-fold; they are either of a general character, or are closely related to the existing (or newly created) public international unions. The Charter mentions as general responsibilities, both of the General Assembly (Article 13 (1b)) and of the Economic and Social Council (Articles 62, (1) and 62, (2)) the making or initiating of studies, reports and recommendations for the purpose of promoting international coöperation in the economic, social, cultural, educational and health fields, and assisting in the realization of human rights and basic freedoms for all. According to Article 62 (3) the Economic and Social Council may also "prepare draft conventions for submission to the

<sup>49</sup> See below, p. 610.

General Assembly, with respect to matters falling within its competence." Article 62 (4) provides that "it may call, in accordance with the rules prescribed by the United Nations, international conferences on matters falling within its competence."

This text does not say expressly that the Council may submit draft conventions to these international conferences, nor does it state whether, if such draft conventions have been submitted to the General Assembly, this body may assume the responsibilities of a specialized (functional) conference. It would seem, however, that both questions should be answered in the affirmative. One even might argue that the right to make recommendations (Articles 13 and 62) includes the right to recommend the signing and ratifying of treaties. It can be assumed that, as was the case under the League, these conventions will, in fact, be prepared by the Secretariat, in cooperation with the commissions set up by the Economic and Social Council (Article 68),<sup>50</sup> and probably also with the secretariats of the newly founded ancillary organizations in the agricultural, financial and monetary, educational, and other fields.

The members of the UN are not expressly obliged to submit draft conventions to their legislative bodies, as were the members of the ILO,<sup>51</sup> but Article 56 of the Charter, which reads,

All members pledge themselves to take joint and separate action in cooperation with the organization for the achievement of the purposes set forth in Article 55.<sup>52</sup>

might be interpreted as intimating a somewhat similar responsibility.

Critical observers might also find that the right to make and initiate studies and reports, and even recommendations and draft conventions does

<sup>50</sup> In its January, 1946, session the Economic and Social Council established a Commission on Human Rights, with a Sub-Commission on the Status of Women; an Economic and Employment Commission to have three Sub-Commissions, on Employment, Balance of Payments, and Economic Development, respectively; a Temporary Social Commission; a Statistical Commission; a Temporary Transportation and Communications Commission; and a Commission on Narcotic Drugs. It decided to establish at its next session a Demographic Commission, a Fiscal Commission, and a Coördination Commission. It also established Committees on Refugees, on Specialized Agencies, on Non-Governmental Organizations, and the necessary Preparatory Committees in connection with forthcoming functional conferences. (See "The United States and the United Nations," Report of the U. S. Delegation to the First Part of the First Session of the General Assembly of the United Nations, London, England, January 10-February 14, 1945.)

<sup>51</sup> "Each of the Members undertakes that it will, within the period of one year at most from the closing of the session of the Conference, or if it is impossible owing to exceptional circumstances to do so within the period of one year, then at the earliest practicable moment and in no case later than eighteen months from the closing of the session of the Conference, bring the recommendation or draft convention before the authority or authorities within whose competence the matter lies, for the enactment of legislation or other action" (Article 19 (5) of the Constitution of the International Labor Organization).

<sup>52</sup> See text of Article 55 on p. 596, above.

not reach too far, since the very same "right" could be and in fact has often been exercised by private national and international organizations, and even by single individuals. However, the recommendations of the world organization will carry greater weight than those emanating from any other source although their practical influence will depend in the long run upon the authority which the UN will have gained, and, in individual cases, upon the expertness and practicability of these recommendations.

Recognizing that the fundamentals of international social and economic coöperation have been laid by preëxisting associations, the Charter devotes more space to the special functions of the UN related to these associations than to the organization's general obligations in this field. Coöperation is envisaged even with private organizations; thus Article 71 declares:

The Economic and Social Council may make suitable arrangements for consultation with non-governmental organizations which are concerned with matters within its competence. Such arrangements may be made with international organizations and, where appropriate, with national organizations after consultation with the member of the United Nations concerned.

In dealing with governmental organizations in the economic and social domain, the Charter speaks, as has been mentioned before, of "the various specialized agencies established by inter-governmental agreement and having wide international responsibilities as defined in their basic instruments in economic, social, cultural, educational, health and related fields" (Article 51). Against this method of focusing attention on "the specialized agencies," the objections might be raised:

1. That the setting up of such agencies, in the past, has not been the sole nor even the primary objective of the so-called public international unions, and that certain of these unions even omitted to establish them;
2. That where such agencies do exist, they are not necessarily the most important organs of the union. In many cases the real aim of international legislation was what the Charter now defines as the "solution of international economic, social, health and related problems" (Article 55 (b)) through the setting up of international regulations which were intended to become the law of the contracting states.<sup>53</sup> And the most important organ of a union is frequently its periodical conference, also called conference of revision, scheduled to meet at stated intervals in order to amend the original convention.

It may, however, be argued that no public international union is thoroughly complete and none can be expected to work with full efficiency if it is not endowed with a permanent office, the natural center of inter-governmental activity in a given field. It is furthermore obvious that a permanent international organization like the UN can more easily coöperate with other permanent international organs than with periodical conferences

<sup>53</sup> See above, p. 600.

or with the single members of a public international union that has failed to create any international organs at all.

The tasks devolving on the UN in connection with the specialized agencies are threefold: the existing agencies are to be brought into relationship with the UN, they are to be coördinated one with another, and new specialized agencies are to be created. It also is planned that the UN will actually take action to facilitate and render more efficient the operation of the specialized agencies. This is implied in the Charter of the UN. Thus, it is hoped that the UN will offer certain technical services and assistance (e.g., translating, publishing, a central statistical service, et cetera) to all the agencies. It is also hoped that the UN will standardize fiscal policies, personnel policies and so forth.<sup>54</sup>

The basic rule on this relationship is laid down in Article 63 of the Charter, according to which the Economic and Social Council may enter into agreements, approved by the General Assembly, with any of the agencies referred to in Article 57, defining the terms on which the agency concerned shall be brought into relationship with the United Nations. The Charter provides clearly for two possible types of relationship. The more remote one would not greatly affect the independence of the agency. Under it the Economic and Social Council may make recommendations to the agency (Article 62 (1)); it may "take appropriate steps to obtain regular reports" from it (Article 64 (1)); it may "with the approval of the General Assembly, perform services" at the request of the agency (Article 66 (2)); and may, according to Article 70:

make arrangements for representatives of the specialized agencies to participate, without vote, in its deliberations and in those of the commissions established by it, and for its representatives to participate in the deliberations of the specialized agencies.

Most of these provisions look like codifications of what was practice under the League, even with regard to agencies which had not been put under its direction. The quoted paragraphs of Articles 62, 64, 66 and 70 of the Charter, however, use the term "specialized agencies," which, according to Article 57 (2), should be reserved to agencies brought into relationship with the UN; hence they would seem to be inapplicable to agencies not brought into relationship with the new world organization.

The influence of the UN on the agencies will, of course, be much greater and may lead to complete integration or absorption, if it pays all or most of their expenses.<sup>55</sup> This too is foreseen, since according to Article 17 (3):

<sup>54</sup> See *Report of the Preparatory Commission of the United Nations*, December 23, 1945, Chapter III, Section 5.

<sup>55</sup> On the other hand a specialized agency need not necessarily lose its independence when it accepts the financial aid of the UN. Thus, the Educational, Scientific, and Cultural Organization of the United Nations (UNESCO) apparently expects to obtain the financial backing of the UN while, at the same time, retaining its autonomy "within the fields of its competence" (Article X of the Constitution of the UNESCO).



the General Assembly shall consider and approve any financial and budgetary arrangements with specialized agencies referred to in Article 57 and shall examine the administrative budgets of such specialized agencies with a view to making recommendations to the agencies concerned.

It will be remembered that the Covenant of the League contained a similar provision (Article 24 (3)). At first sight the possibility of obtaining financial support would seem likely to enhance the willingness on the part of specialized agencies "to be brought into relationship" with the UN. The UN will probably be more successful than was the League only if its own budget will permit it to offer really substantial assistance.

The second task entrusted to the UN in the economic and social field consists in the coördination of the international activities exercised in this domain. This the Charter emphasizes repeatedly: The purpose of the UN is to achieve international coöperation in many fields; and "to be a center for harmonizing the actions of nations in the attainment of these common ends" (Article 1 (4)); "the organization shall make recommendations for the coördination of the policies and activities of the specialized agencies" (Article 58); and the Economic and Social Council "may coördinate the activities of the specialized agencies through consultation with and recommendations to such agencies and through recommendations to the General Assembly and to the members of the United Nations" (Article 63 (2)).

It is to be hoped that the warmth of these professions, and the sincere belief in the necessity and attainability of coördination which evidently inspires them, will make up for the lack of concrete indications as to what coördination implies and how it is to be made effective. Past experience suggests three stages of development. In its most primitive stage coöperation will probably be characterized by arrangements with or among the specialized agencies working in related fields; these agreements will provide for reciprocal representation according to the pattern of Article 70 quoted above. This is a mere beginning however. Such measures are useful but are neither new <sup>56</sup> nor too important. "Observers" necessarily reciprocate the courtesy displayed in their admission by the corresponding courtesy of avoiding anything that might smack of interference.

Coördination is bound to become much more efficient if it is both broadened and deepened, that is, limited neither to immediate neighbors in the functional area, nor to voteless or entirely mute observers. Thus it does not suffice to coördinate the activities of the various international agencies working in each of the fields of labor, agriculture, financial relations, transportation, and so on. The interest of the labor agencies in most of these questions will hardly be disputed; it is less obvious but nonetheless true that,

<sup>56</sup> See the example given above, p. 599, or, e.g., *Monthly Bulletin of Agricultural Science and Practice*, 1939, No. 7 (first blue page) on coöperation between the International Agricultural Institute and the Permanent Agricultural Commission of the ILO, etc.

*e.g.*, currency problems may be of great concern to certain public international unions in the field of transportation.<sup>57</sup> Successful coöperation presupposes, furthermore, more than last-minute invitations sent by one international agency to another, asking it to send representatives to an impending meeting. Such representatives must be given time to become familiar with the particular problems of the inviting agency, and must have ample opportunity to impart and to receive information which might prove essential to the work of both agencies. By means of appropriate "recommendations" to the specialized agencies (Article 63 (2)) the Economic and Social Council could do much to initiate this second stage of closer coördination, which finally may lead to the ultimate goal the complete integration of all international activities in the economic and social field.

The third task of the UN consists in the creation of new specialized agencies. According to Article 59:

The organization shall, where appropriate, initiate negotiations among the states concerned for the creation of any new specialized agencies required for the accomplishment of the purposes set forth in Article 55.<sup>58</sup>

It may be added that the "international conferences falling within its competence" which the Economic and Social Council may convene, "in accordance with the rules prescribed by the United Nations" (Article 62 (4)), will, if successful, frequently establish such specialized agencies. It is also noteworthy that certain public international unions of great prospective importance, particularly in the agricultural, financial and educational field, which were either founded shortly before the establishment of the UN, or else may be set up in the near future, will probably start their activities at the same time that the new world organization does so.

The existence or imminence of such organizations points to the close interdependence of the three "agency" functions of the UN. These organizations, such as Bank and Fund, and agricultural and educational agencies, seem destined to exercise broader functions than did the older agencies that had been active in similar fields<sup>59</sup> and may very well replace or engulf their

<sup>57</sup> In the years following World War I, and in the decade before the outbreak of World War II many Continental countries adopted stringent currency control measures. Many of these regulations violated the rules of the International Convention on the Transport of Goods by Rail (in particular the provisions on the payment of freight by consignor or consignee, on cash advances, etc.). The Conferences of Revision of Berne (1923) and Rome (1933) took cognizance of the fact that certain of their members put commerce into strait jackets in order to protect their currencies, and that other members might wish to protect themselves against the protective measures devised by their partners. The far reaching concessions made by both conferences obviously did not satisfy all the member states, and new infringements on the treaty rules occurred. These are matters to be negotiated between international transportation and currency agencies.

<sup>58</sup> See text of Article 55 on p. 596, above.

<sup>59</sup> See above, p. 599.

predecessors; they will also be linked to the UN from the outset. The passing of the older agencies, which have done valuable pioneer work, would be a loss in many respects, and it would be ill advised to throw away the precious experience gathered by many of them. But the task facing the UN would become easier if it could be accomplished through the instrumentality of a limited number of overall organizations which, in close relationship with the world organization, would in turn integrate the activities of the minor agencies working in their functional domain.

As has been mentioned before the relations of the economic and social agencies with the UN will not be limited to the General Assembly and to the Economic and Social Council, but will extend to the International Court of Justice, to the Trusteeship Council, and even to the Security Council.

The Court which "shall be the principal judicial organ of the United Nations" and which shall function in accordance with a statute annexed to the Charter (Article 92) will "be open to the states parties to the present Statute" (Article 35 (1), Court Statute); while

The conditions under which the court shall be open to other states shall, subject to the special provisions contained in treaties in force, be laid down by the Security Council. . . . (Article 35 (2)).

The jurisdiction of the Court in cases affecting public international unions may be established in different ways; it may be based on the constitution of such a union (Statute, Article 36 (1); see also Article 37), or on general acceptance of the compulsory jurisdiction of the Court (Statute, Article 36 (2)) on the part of litigant members of a public international union, or it simply may be brought about because the parties agree to submit a special case to the Court (Statute, Article 36 (1)).

Although no judicial case can be brought before the Court without the previous consent of the parties—which, as has been said, may be given once and for all (Statute, Article 36 (2))—the specialized agencies brought into relationship with the UN may request advisory opinions of the Court on legal questions arising within the scope of their activities (Charter, Article 96(2)). To do this they do not need the consent of the member states but only the authorization of the General Assembly—which, it may be hoped, will be given them in advance, at the time of their integration into the UN. The Court Statute provides in Article 34 for further coöperation between World Court and specialized agencies.

The relations between the specialized agencies and the Trusteeship Council are conditioned by the fact that the more important among them are universal and functional in character, like the Security and the Economic and Social Council, while the Trusteeship Council must be considered largely territorial in character. In territories "whose peoples have not yet attained a full measure of self-government (Article 73 (1)) and which have been placed under the Trusteeship system (Article 77 (1)), the General Assembly and the Trusteeship Council exercise, generally speaking, the func-

tions both of the Security and of the Economic and Social Council (Articles 76, 85, and 87). The Trusteeship Council shall, therefore, according to Article 91, "when appropriate, avail itself of the assistance of the Economic and Social Council and of the specialized agencies in regard to matters with which they are respectively concerned."<sup>60</sup>

In certain cases the UN may also have to deal with economic and social agencies and arrangements from the security angle. Article 52 (1) stipulates:

Nothing in the present charter precludes the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action, provided that such arrangements or agencies and their activities are consistent with the purposes and principles of the United Nations.

It is noteworthy that this paragraph (as well as the rest of Chapter VIII of the Charter to which it belongs) is unlike Chapters IX and X in that it mentions international arrangements the parties to which may have failed to establish permanent agencies.<sup>61</sup> This difference in redaction stems probably from the fact that the various chapters of the Charter were drafted by different committees and commissions.<sup>62</sup>

More important is the fact that Chapter VIII is concerned with regional arrangements and agencies only, while Chapters IX and X fail to mention regional agencies. To discuss the possible fate of older universal peace and security conventions would surpass the necessary limits of this study. But the question might be raised whether Chapters IX and X, with which this discussion deals, do apply to international agencies which either by nature or by special agreement are limited to specific areas or groups of states. Since such regional agencies may nevertheless have "wide international responsibilities" (Article 57), this question should, in the present writer's opinion, be answered in the affirmative.<sup>63</sup>

<sup>60</sup> This is the general rule. But according to Article 82 certain areas of a trust territory may be declared as "strategic," and in these areas all functions of the UN shall be exercised by the Security Council (Article 83 (1)). This Council shall, however,

subject to the provisions of the trusteeship agreements and without prejudice to security considerations, avail itself of the assistance of the Trusteeship Council to perform those functions of the United Nations under the trusteeship system relating to political, economic, social, and educational matters in the strategic areas (Article 83 (3)).

It might have been preferable to mention also the Economic and Social Council and the specialized agencies. There is nothing to prevent the Trusteeship Council from consulting them in turn (Article 91), but this procedure seems somewhat cumbersome.

<sup>61</sup> See above, p. 601.

<sup>62</sup> See Grayson Kirk and Lawrence H. Chamberlain, "The Organization of the San Francisco Conference," in *Political Science Quarterly*, Vol. IX, No. 3 (September 1945), p. 321 (esp. p. 334-339).

<sup>63</sup> For an even more liberal interpretation of Article 57 see *Report of the Preparatory Commission of the United Nations*, December 23, 1945, Chapter III, Section 5, p. 40.—On the project of setting up a European subcommission of the Economic and Social Council see rtram D. Hulen in *The New York Times*, April 25, 1946, p. 3.

Article 52, however, may be interpreted as applying to international arrangements and agencies which belong both to the security and to the social and economic field, and which, at the same time, are regional in character. This may not have been the intention of the legislators, since the Chapter as a whole points rather to regional treaties of arbitration. But organs like the European Waterway agencies, envisaged in President Truman's radio speech of August 9, 1945<sup>64</sup> also seem to fit the description given in Article 52 (1) of the Charter.

According to Article 41 of the Charter

The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.

Article 48 (2) says that "such decisions shall be carried out by the Members of the United Nations directly and through their action in the appropriate international agencies of which they are members." Many of these "appropriate international agencies" will be "specialized agencies" in the sense of Article 57 (2). The Charter itself foresees no direct interaction between the Security Council and these agencies. But it has been proposed by the Preparatory Commission of the UN that Article 48 (2) "should be implemented by including in the agreement with each specialized agency an undertaking to assist the Security Council upon its request, in the application of measures envisaged in Article 41 of the Charter."<sup>65</sup>

#### V. PREREQUISITES OF SUCCESSFUL INTERNATIONAL COÖPERATION

The prospects of international economic and social coöperation depend to a large extent upon the general climate of international relations and upon the good will of the various members of the community of nations. It is an irrefutable truism that the most perfect machinery cannot make up for lack of coöperative spirit on the part of the countries which this machinery is supposed to serve. However, it should not be forgotten that no community has ever been run by good will and brotherly love alone. These sentiments are essential and should be cultivated, but only if wisely directed may they be expected to further economic and social progress, the basis of peace. The international community will be efficiently administered if the machinery provided by the Charter is interpreted and applied constructively, and if not only the government and legislators of the respective members of the UN, but also their populations, are adequately informed about the importance of international administration, and sufficiently interested in its progressive development. Both requirements are essential. Good govern-

<sup>64</sup> See *The New York Times*, August 10, 1945, p. 12.

<sup>65</sup> *Report of the Preparatory Commission of the United Nations*, December 23, 1945, Chapter III, Section 5, No. 19 (p. 43).

ment is based on efficient legislation and administration, both of which are in turn dependent upon the steady support of enlightened public opinion.

Applied to the various international agencies in the economic and social field this means that they will have to be kept free from deficiencies which impair their usefulness or which even deprive them of any practical value whatever. It has been pointed out before that the constitutions of the public international unions should be adequate, fair, binding, but easily amendable, and that they should provide for inter-agency coöperation in neighboring fields. The Charter deals at length only with one of these problems, that of coördination, and if its solution is undertaken with energy and thoroughness, somewhat along the lines laid down above, a decisive progress in international relations may be attained. The Charter does not provide that the statutes of specialized agencies must be adequate and fair, which international courtesy always presumes them to be in spite of all evidence to the contrary. But whenever this benevolent assumption is refuted by undeniable facts the UN would be entitled and even called upon to intervene. If an international convention is inadequate or unfair it obviously does not contain the solution of the individual problem which the United Nations are jointly and severally pledged to promote (Articles 55 (b) and 56). In such a case the Economic and Social Council would have to proceed according to Article 62—that is to propose the necessary reforms; the weight and effect of its recommendations will, of course, depend upon the authority of the world organization as a whole.

It must be admitted that, generally speaking, "recommendations" are rather weak tools. However, the UN should be able to exercise considerable influence upon new agencies founded under its own auspices (Article 59) and also upon those among the older organizations which accept its leadership and financial assistance (Articles 57 and 17 (2)). It also could greatly contribute to the modernization of independent agencies and governmental associations, not only because most of them are maintained or formed by its own members, but also because the new international agency in the educational field which might become instrumental for the formation of public opinion, will be closely connected with the UN.

The success of international coöperation will depend largely upon the condition that the peoples of the United Nations shall be sufficiently informed about, and interested in, matters of international legislation and administration; but it has to be admitted that our knowledge of and concern about these matters is still far from adequate.<sup>66</sup> To expect more might

<sup>66</sup> Any newspaper file would yield abundant proof. Of course one should not judge too severely the expert in various fields who, in a letter addressed to, and published by, a prominent newspaper, apparently mistook the Universal Postal Union for an international association of stamp-collectors, or the news agency which, not so long ago, confused the Economic and Social Council and the Trusteeship Council of the UN. Such mistakes are a direct consequence of the slight attention paid to international legislation in economic and social

seem too ambitious at first sight since, as a rule, even matters of domestic law and administration arouse frequently but slight interest outside the ranks of lawyers and political scientists. Hence it might seem extravagant to anticipate popular enthusiasm for problems of international legislation and administration.

To dispose of this argument is rather simple, however. Every effort is made in politically advanced nations to acquaint the whole population with legislative and administrative matters of basic importance to the whole community; whenever the necessity arises, the principal leaders of public opinion, such as educators, legislators, and political writers, may be relied upon to enlighten the public with respect to particular issues. While the same may be attained in the international field, there can be no doubt whatever that it will not be attained without purposeful and conscientious efforts on the part of responsible and informed groups. Ultimately the same professional circles which have done so much to increase our knowledge of domestic affairs will be both called upon and qualified to offer similar guidance in the international field. But it would be premature to expect satisfactory guidance from them now, since comparatively few of our elected representatives, teachers, or newspaper editors have had sufficient theoretical training or practical experience in the field of international organization, to give their opinions final weight. Since practical experience in international administration, despite its envisaged expansion, will still be limited to smaller groups of persons than similar experience in the domestic field, the heavier responsibility rests upon concerted efforts in the educational domain. It is, undoubtedly, highly encouraging that this necessity has been recognized by the administration of the biggest city of the world<sup>67</sup>—at least with respect to the Charter, the basic instrument of international co-operation. This heartening example may be of great value, especially if given the necessary publicity; but it would be wise not to rely solely upon the initiative of enlightened local governments. To spread the knowledge of international organization should be considered one of the most urgent

fields. Speaking of the international bodies, which are the main subject of this study, Leonard S. Woolf said correctly: "These associations are sometimes called public international unions, and in standard works on international law a few meagre details about them will be found under such headings as international unions, international offices, international commissions, etc." (*International Government*, 1916 and 1929, p. 157). Even the meagre details are, by the way, frequently misleading. Woolf's judgment still holds true. Even an otherwise excellent book (Edith Wynner and Georgia Lloyd, *Searchlight on Peace Plans*, 1944) has little space (one page out of 532) for the public international unions by which, according to the authors' own statement (p. 395) "organized, functioning world government, to provide continuous legislation on a world scale is foreshadowed." See also C. G. Fenwick's remarks in this JOURNAL, Vol. 29 (1935), p. 284.

<sup>67</sup> According to the Secretary to the Superintendent of Schools, the City of New York considers the teaching of the Charter, copies of which will be available in all schools, one of its major new educational projects: *The New York Times*, September 7, 1945, p. 25.

tasks of the new Educational, Scientific, and Cultural Organization of the United Nations (UNESCO).

The program laid down in the Constitution of the UNESCO,<sup>68</sup> in many points an eloquent restatement of the objectives of the International Institute of Intellectual Coöperation,<sup>69</sup> undoubtedly deserves general approval. The preamble declares:

That ignorance of each other's ways and lives has been a common cause throughout the history of mankind of that suspicion and mistrust between the peoples of the world through which their differences have all too often broken into war.

Hence the contracting parties "are agreed and determined to develop and to increase the means of communication between their peoples and to employ these means for the purposes of mutual understanding and a true and more perfect knowledge of each other's lives."

It is also said in the preamble that peace must "be founded, if it is not to fail, upon the intellectual and moral solidarity of mankind," because "a peace based exclusively upon the political and economic arrangements of Governments would not be a peace which could secure the unanimous, lasting, and sincere support of the peoples of the world." The less so, one might add, if the peoples of the world are ignorant of these arrangements and of their importance to modern life and culture. In this connection one might find it regrettable that the Constitution of the UNESCO seems to avoid any direct reference to the fact that international administration and legislation are, in themselves, worthy and urgent subjects of education.

It will be advisable to include as soon as feasible such references by way of amendment. But it seems self-evident that even the present text of its Constitution entitles the UNESCO to propose and further educational programs in the field of international coöperation. For Article I of the Constitution describes it as the purpose of the organization to contribute to peace and security by promoting collaboration among the nations in order to further universal respect for the rule of law—which of course includes international law and legislation; to realize this purpose the organization will "give fresh impulse to popular education and to the spread of culture by collaborating with members at their request in the development of educational activities" (Article I (2b)) and "maintain, increase and diffuse knowledge by encouraging coöperation among the nations in all branches of intellectual activity" (Article I (2c)). According to Article X of the Constitution the UNESCO will be one of the specialized agencies which, "as soon as practicable shall be brought into relation with the UN."<sup>70</sup> The agreement between the two organizations shall provide for their effective coöperation "in the pursuit of their common purposes."

There can be no doubt that the UNESCO will be able to contribute most

<sup>68</sup> See Final Act of November 16, 1945.

<sup>69</sup> See above, p. 599.



effectively to the UN's efforts by spreading the knowledge of international organization in the economic and social field. The educators and educational institutions are the first whose attention should be called to the aforementioned field of international legislation, to its extent and ramifications, to its importance to satisfactory international relations, to its past achievements, and to the necessity of its progressive development. All this should and could be taught without overburdening the curricula. Nobody will expect elementary or even high school teachers to spend hours on end interpreting, say, the Universal Postal Convention, or even the new Charter of the United Nations. But pupils of every grade should know that these treaties exist and what they stand for.

Effective international social and economic coöperation is one of the major problems of our time. As the Charter states, it must be promoted "with a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations." The UN will be able to do much to attain this goal. But its efforts will be successful only if based on universal popular approval. As soon as the peoples of the world, the beneficiaries of international coöperation in the social and economic field, are sufficiently informed about its crucial importance, its prospects will be bright.

<sup>70</sup> See above, p. 610.

From the refusal to surrender sovereignty to a confederation one may judge how much chance there is of the surrender to a world government, as demanded by Judge Roberts and his friends. The difficulty with the one-world theory is that its proponents hardly seem to believe in it, and justifiably so. Because if the theory were sound the United States would be in the depths of a depression caused by the European and Asiatic devastations, the climate all over the world would have to be the same and the peoples the same.

If we look at the Potsdam Declaration, which indicates the lines along which the new treaty of peace is to run, we are struck by the fact that it purports to abolish the long-established distinction between private and public property, and appropriates private property in liquidation of national claims.<sup>8</sup> This is an innovation or retrogression likely to have far-reaching effects. American statesmen have always insisted upon its illegality. Not only has it persuaded some nations to confiscate private enemy property, but it looks straight toward the abolition of private property as an institution. Whereas Article 297 of the Treaty of Versailles only authorized confiscation if so desired, the Potsdam Declaration seems to make such expropriation somewhat more obligatory. Whether the nations of the West are ready to take this suicidal course no one can yet say. The experiences of the past would seem to be an ineffective guide. It would be a mistake to attribute the new dispensation entirely to Soviet Russia, for the destructive aspects of the Potsdam Declaration are to be found in Anglo-American recommendations.<sup>9</sup> It is needless to say that the safety of private property now depends not on law but upon the preponderance of force, so that it actually becomes safer to invest in a weak than in a strong country. Indeed, the institution of foreign investment, if practised at all, will be forced mainly into inter-governmental channels, for it is hard to believe that private capital will run the risk of political expropriation.

It will be observed that neutral Switzerland, according to press reports,<sup>10</sup> has been forced to promise, under threat of sanctions, to surrender to the

<sup>8</sup> The Potsdam Declaration, referring to private property, announced agreement on reparations as follows: "Reparation claims of the U.S.S.R. shall be met by removals from the zone of Germany occupied by the U.S.S.R. and from appropriate German external assets. . . . The reparation claims of the United States, the United Kingdom and other countries entitled to reparations shall be met from the western zones and from appropriate German external assets." The U.S.S.R. was also to receive from the western zones certain equipment as specified. The Control Council was authorized to take appropriate steps "to exercise control and the power of disposition over German-owned external assets not already under the control of United Nations which have taken part in the war against Germany." *Department of State Bulletin*, Vol. XIII, No. 319 (August 5, 1945), pp. 156, 157.

See also the Final Act and Annex of the Paris Conference on Reparation in same, Vol. XIV, No. 343 (January 27, 1946), p. 114; the Law on Vesting and Marshaling of German External Assets in same, Vol. XIV, No. 347 (February 24, 1946), p. 283; and the Plan of the Allied Control Council in same, Vol. XIV, No. 354 (April 14, 1946), p. 636.

<sup>9</sup> See also the Report of the Crimea Conference in *Department of State Bulletin*, Vol. XII, No. 295 (February 18, 1945), p. 213.

<sup>10</sup> *The New York Times*, May 22, 1946, p. 13, col. 2.

United States, England, and France for the inter-Allied reparation pool, 50 per cent of its German-owned property and some \$50,000,000 in gold.<sup>11</sup> We leave aside the recovery of Nazi loot. Apart from this, the coercion involves so grievous a departure from what had been deemed to be impregnable rules of international law—not to speak of Swiss law<sup>12</sup>—that one necessarily wonders how the state system and the capitalistic system can proceed under the new dispensation.

Another feature of the new era has been the doctrine of non-recognition which made recognition an approval and non-recognition a disapproval of the government to be recognized. There is a strong literary movement which asks rather logically but not soundly that governments intervene in the internal composition of foreign states to prevent dictatorships.<sup>13</sup> The misfortunes attending this theory in Argentina and in Spain seem to have induced some realization that perhaps the Founders of this country were better advised in endorsing the recognition of *de facto* governments as the only tolerable way of international life. We are now informed by Secretary Byrnes that the recognition of *de facto* governments will again become an axiom of American policy.<sup>14</sup>

We have observed that there is strong objection in the country to military conscription at this time and in times of peace in general. This creates a curious dilemma for the government, since the policy of occupation, now extended, it is believed, to some twenty countries, requires conscription as its handmaiden. The objection, therefore, really lies to the policy of occupation, and yet so deeply involved has this government become that occupation of foreign countries has the semblance of a permanent policy with which the people disagree. How this dilemma can be solved I will not suggest.

There are other features of the Potsdam Declaration which give rise to equal doubts, such as territorial amputations, mass migrations, the restoration of slave labor, and so on. It must be recalled that there are only two elements of restraint upon the natural tendencies of a belligerent, first, the law of neutrality, whose violation always carried with it the danger of converting the neutral into an enemy, and, second, the fear of enemy reprisals. While the latter has not altogether exhausted its force, evident in the large number of prisoners taken by both sides, it has decidedly weakened in effect. Indeed, the atom bomb puts a premium on the speed of belligerency. The whole question needs a fundamental reexamination in the cold light of reason. Otherwise the human race will have shown its incapacity to suffer civilized restraints. It will have determined that its major activities no longer justify the restraints imposed by law.

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<sup>11</sup> Above, note 8.

<sup>12</sup> "Shall Switzerland Surrender Its German-Owned Property?", by F. X. Peter, of Lucerne, Switzerland, translated by Dr. Konrad Gutman, New York, 1946.

<sup>13</sup> Karl Loewenstein, *Political Reconstruction*, New York, 1946. See also this JOURNAL, Vol. 40 (1946), p. 164, note 8. <sup>14</sup> *The New York Times*, April 20, 1946, p. 1, col. 6.

## A PLEA FOR MORE STUDY OF INTERNATIONAL LAW IN AMERICAN LAW SCHOOLS

This JOURNAL was opened with Elihu Root's<sup>1</sup> insistence on the need for popular understanding of international law; he spoke of popular understanding, not of expert knowledge. Much is being done in this respect in this country. In addition, international law is taught in the departments of political science of many universities.<sup>2</sup> And while the latest Conference of Teachers of International Law and Related Subjects seemed to fear that international law in the Colleges had been pushed into the background by the "Related Subjects," and while certainly much still remains to be done in this area,<sup>3</sup> the situation is more favorable in the United States than in other countries.

But the teaching of international law by and to political scientists cannot replace the study of international law by lawyers, just as courses on "American Government" do not remove the necessity of studying "Constitutional Law" in the Law Schools.

We are concerned in this paper with the neglect of international law in American law schools, that is, its neglect exactly there where it, as a legal discipline, primarily belongs. Even here, certainly, the situation has improved, compared with the complaints made about forty years ago.<sup>4</sup> American funds support the *Institut de Droit International*, the *Académie de Droit International* at The Hague, the *Institut Universitaire de Hautes Etudes Internationales* at Geneva. There is the American Society of International Law, publishing this JOURNAL. There is the important "Research in International Law, Harvard Law School," under the direction of Professor Manley O. Hudson. There are the highly valuable scientific publications of the Carnegie Endowment for International Peace. There are in this country magnificent libraries of international law, which, in leading instances, form parts of law school libraries. An important and characteristic American science of international law<sup>5</sup> is in existence.

<sup>1</sup> E. Root, "The need of popular understanding of international law," in this JOURNAL, Vol. I (1907), pp. 1-3.

<sup>2</sup> F. Symons, *Courses on international affairs in American Colleges*, with Introduction by J. T. Shotwell, 1931, pp. 353.

<sup>3</sup> Professor Shotwell (work quoted above, n.2) gave warning in 1931 that the importance of the many courses on international affairs "must not be overestimated, because, frequently, it is only a consequence of the desire to be up to date," only a question of a "journalistic interest in half-understood things." Dean Vanderbilt laments to-day that the students coming to the law schools have obtained in their pre-legal training "no intimate knowledge of foreign relations in the broadest sense or any interest with respect to the matter" (Arthur T. Vanderbilt, *A Report on Prelegal Education*, published by American Bar Association, 1944, p. 42).

<sup>4</sup> Gregory, "The study of international law in Law Schools," in *American Law School Review*, Vol. 2 (1907), p. 41.

<sup>5</sup> See this writer's studies, *Die nordamerikanische Völkerrechtswissenschaft seit dem Weltkrieg*, in *Zeitschrift für öffentliches Recht*, Vol. XIV, No. 3, pp. 318-351, and "The American Science of International Law," in *Law: A Century of Progress*, 1937, Vol. II, pp. 166-194.

The third,<sup>6</sup> fourth, and fifth<sup>7</sup> Conference of Teachers of International Law and Related Subjects carefully surveyed the problem of the study of international law in law schools. Yet even to-day the situation of international law in American law schools is entirely unsatisfactory. The same is true of Great Britain, where Sir Arnold D. McNair, the eminent British international lawyer, now a Judge on the International Court of Justice, read a paper<sup>8</sup> before the Grotius Society in London in 1944, stressing the need of a wider teaching of international law.

Apart from not being a subject of bar examinations, international law is taught only in a small number of American law schools at all. A search through the catalogues of a considerable portion of about 100 law schools members of the Association of American Law Schools, reveals that international law is given at only sixteen schools, not given at all in thirty-nine schools, including the law schools of many State Universities and other important universities.<sup>9</sup> This is a serious situation. It becomes more serious, if one considers that even where international law is taught in law schools it is offered sometimes by political scientists and sometimes by professors of law who are not specialists in this field. Few law schools have professors who dedicate their life primarily to the study of international law.

Not only is the situation in the law schools inadequate, as it is offered only in a small number of law schools and not always by men who can claim to be real authorities in this field, but it is also to be noted that international law, even where given, is nearly always elective, not required; in some law schools international law is offered only as a graduate course, in others, on the other hand, graduate studies and seminars in international law are not available. Finally, even where international law is offered and taught by first class men, the number of students taking these courses is infinitesimal, compared with the total number of law students. What Dean Vanderbilt stated<sup>10</sup> a generation ago, when a man of the authority of John Basset Moore was at Columbia Law School "lecturing to a mere handful of students on international law, while in nearby classrooms hundreds of bright young men were studying

<sup>6</sup> Manley O. Hudson, "The teaching of international law in America," in *Proceedings of the 3rd Conference of Teachers of International Law*, Washington, 1928, pp. 178-189.

<sup>7</sup> Edwin D. Dickinson, "The Law School Curriculum," in *Proceedings of the 5th Conference of Teachers of International Law*, Washington, 1933, pp. 117-122.

<sup>8</sup> Sir Arnold D. McNair, "The Need for Wider Teaching of International Law," in *Transactions of the Grotius Society*, Vol. 29, 1944, pp. 85-98.

<sup>9</sup> No international law was given at the law schools of the State Universities of Alabama, Arizona, Arkansas, Colorado, Georgia, Idaho, Illinois, Indiana, Louisiana, Maryland, Minnesota, Missouri, Ohio, South Dakota, Tennessee, Texas, Utah, West Virginia, Wisconsin, Wyoming. No international law was given at the law schools of the following Universities: Boston College, Buffalo, Chicago, Cincinnati, Denver, DePaul, Duke, Emory, Louisville, Loyola (Los Angeles), Marquette, Newark, Pittsburgh, Richmond, St. Louis, San Francisco, Southern California, Southern Methodist, Syracuse. The lists, of course, are not complete.

<sup>10</sup> Arthur T. Vanderbilt, "Law School Study after the War," in *New York University Law Quarterly Review*, Vol. XX, No. 2 (Nov. 1944), pp. 146-164, at p. 154.

"bread-and-butter subjects" is still true to-day; the same writer speaks <sup>11</sup> of international law as "a subject generally neglected in the law schools."

Sir Arnold D. McNair, pleading for wider study of international law at British Law Schools, bases his plea on three reasons: the national, the international and the professional reason. All these three reasons apply here even with greater force; but we would like to add as a very important fourth reason the scientific reason.

It is hardly necessary to dwell at length on the fact that this country has emerged from the Second World War as the most powerful nation in the world and as irrevocably committed to take a share, and a leading share, in international affairs from political and economic to cultural international relations. This country is pledged to the creation and maintenance of peace. Peace must be based primarily on law and justice. In consequence expert knowledge of international law by lawyers is essential. For national and international purposes, for the Department of State, for the American diplomatic and consular service, for American participation in the United Nations, other international organizations, and in international conferences, for American officials in these international organs, for American Judges and Commissioners upon and American agents before international Courts and Tribunals, lawyers are needed who are experts in international law and who are international lawyers by profession.

This national and international need is at the same time the basis for the professional reason. But there is more to it. At the Fourth Conference of Teachers of International Law, held in 1929, Sir Cecil Hurst explained the lack of interest in international law in Great Britain with the brutal sentence: "There is no money in international law." Even that is no longer true. "International law," says Vanderbilt,<sup>12</sup> "will inevitably become a bread-and-butter subject." Not only will lawyers, experts in international law, be needed for all the above-mentioned official national and international assignments, but international law is bound to play a great role in the work of the attorney-at-law. We need practitioners of international law, attorneys who are experts in international law. There are vast possibilities, even from the purely professional angle. The liquidation of the war, the enormous increase in international relations will bring up problems of international law in many cases before the Courts, in many instances of a practicing lawyer's duty to advise his clients.

But the study of international law at Law Schools will have even deeper significance. It will give the law students a more complete legal education than was thought possible, hitherto, under the "pressure of practicality." "Our law schools," says Vanderbilt,<sup>13</sup> "in concentrating on the law of our business civilization, have sadly neglected the study of public law. With

<sup>11</sup> A Symposium in Legal Education after the War, *Iowa Law Review*, Vol. XXX, No. 3 (March, 1945), p. 326.

<sup>12</sup> Same, p. 326.

<sup>13</sup> Vanderbilt, as cited above, note 10, pp. 154, 156.

new international relations thrust upon us willingly or unwillingly the law schools have an obligation to the nation that cannot be ignored"; and he laments <sup>14</sup> that the "law students neglect in law school the legal aspects of the problem of international relations with the result that the country to-day is suffering most seriously for want of enlightened leadership in the field of international affairs." Already in 1933 Edwin D. Dickinson <sup>15</sup> had written: "International law in the American law schools is a curricular luxury. It is actually affecting a very small percentage of the law students. It is the type of law school training . . . of legal technicians. We have placed an extraordinary emphasis upon the mechanics of law practice. It may well be doubted whether we have perfected a training which is adequate for the preparation of a well rounded and well qualified lawyer. . . . Great progress has been made in instruction in international law in the past century, but this progress has been essentially superficial. . . . An institution for higher international studies is very much needed in America." "Every University," writes Sir Arnold McNair, <sup>16</sup> "which aims at giving a legal education that is a liberal education and not merely a professional training should make international law a compulsory subject at some stage in its curriculum."

The task of the Law School is not only to teach law to students, but also to prepare professors of law and to advance the science of law, especially since "American universities," as Dean Landis remarks, <sup>17</sup> "are certain to become more important centers of world education than they were before the War."

Naturally the jurist who devotes his life to the study of international law must know and understand many things, such as history, politics, languages, and so on, in order to be fully equipped for his task: "the study of international law calls for a linguistic and cultural equipment that is unhappily none too common on the part of either instructors or students in American law schools." <sup>18</sup> But what is necessary too is the legal and scientific approach. It is no exaggeration to state that a great deal of the contents of the usual textbook on international law, much of the mass of monographs, articles, discussions, all allegedly on international law, have little or nothing to do with international law. They constitute often, as the case may be, pious sermons, propaganda, prejudiced political statements, fancy theories, wishful thinking, metaphysics, in a word what a French scholar ironically called "quasi-juridical novels." The unsatisfactory status of the science of international law, which often fails to approach its object with the necessary scientific neutrality and objectivity, and is sometimes not, as all science must be, interested only in truth, but in success, explains why Courts <sup>19</sup> have

<sup>14</sup> Vanderbilt, as cited above, note 3, p. 42.

<sup>15</sup> Dickinson, as cited.

<sup>16</sup> McNair, as cited, p. 97.

<sup>17</sup> *Annual Report, 1944-1945, of the Dean of Harvard Law School*, p. 12.

<sup>18</sup> Vanderbilt, in work cited above, note 11, pp. 326-327.

<sup>19</sup> "The views expressed by learned writers on international law have done in the past, and will do in the future, valuable service. . . . But in many instances their pronouncements

reproached international lawyers with confusing proposals *de lege ferenda* with the statement of the positive law, and why legal scholars had not much esteem for this science. In 1909 John Chipman Gray wrote: "On no subject of human interest, except theology, has there been so much loose writing and nebulous speculation as on international law." Edwin D. Dickinson quotes<sup>20</sup> this word of Gray today and speaks himself of a "labyrinth of pseudo-juridical effusion." Such "international law" can be a guidance neither to international courts, nor to the Bar and Bench. And the Bar and Bench are at this moment, as Charles Cheney Hyde recently testified in Washington, in great need of guidance, of solutions offered by the science of international law. The correct statement of the positive law is also the basis for worthwhile proposals *de lege ferenda*. To advance the science of international law, to make it a science, and not merely a multitude of purely subjective statements, is certainly a task in which the law schools have to play their role.

The law schools of this country, after a period of reduced activity in consequence of the war, are now about to enter an era of great expansion and to seriously reconsider their curricula and their method of approach toward the teaching of law. It is very much to be hoped that international law will gain the place in the law schools which is its due and which is made necessary by the world position of this country. Signs of such favorable development are not lacking. Judges and practicing lawyers show a great interest, the pages of the *American Bar Association Journal* have in these last years to a very considerable extent been devoted to problems of international law. Many important law reviews have published a number of studies of considerable value on topics of international law. The discussions and writings on post-war legal education stress the importance of the study of international law in the law schools. There is no doubt that the Association of American Law Schools and the American Bar Association, which are primarily concerned with raising the standard of legal education, will give their attention to the problem of international law. The American Law Schools have an obligation in this respect and, surely, they will be willing and able to meet the challenge of the law on a planetary basis. "The lessons of this war," writes Dean Landis,<sup>21</sup> "call for relating this experience to the place of the lawyer in our present and future society. . . . After all, the rule of law is humanity's only hope. The challenge to law is thus immeasurably increased. In the meeting of that challenge legal education has a primary role. . . . The fact

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must be regarded rather as the embodiments of their views as to what ought to be, from an ethical standpoint, the conduct of nations *inter se*, than the enunciation of a rule or practice so universally approved or asserted to as to be fairly termed . . . 'law': *West Rand Central Gold Mining Co. v. The King*, 1905, 2 K.B. 391.

<sup>20</sup> Edwin D. Dickinson, "International Law: An Inventory," in *California Law Review*, Vol. XXXIII, No. 4 (December 1945), pp. 506-542, at p. 541.

<sup>21</sup> Work cited, above, note 17, pp. 1, 9, 11, 12.



of war too frequently expresses itself in a distrust of all that law has meant in the past. It typifies itself in such observations as the notion that international law is outdated. The development of international relations on a far-flung scene . . . means an emphasis upon international law. Obviously, instead of discarding international law, the challenge is one to its fuller realization. The tragedy is not having done too much, but having achieved too little: . . ."

JOSEPH L. KUNZ

## CURRENT NOTES

### DR. SCOTT A PATRON OF THE SOCIETY

In accordance with the Regulation of the American Society of International Law concerning Patrons, adopted on May 1, 1943, the Executive Council of the Society, meeting on April 25, 1946, having been informed of Dr. James Brown Scott's bequest of \$10,000 to the Society "the income from which is to be applied toward the expenses of editing and publishing the American Journal of International Law," unanimously elected Dr. Scott posthumously as the first Patron of the Society, and directed that Dr. Scott's name be listed in each number of the American Journal of International Law, as prescribed by the Regulation. Dr. Scott's name will, therefore, appear on the inside of the front cover of the Journal beginning with the present issue, as Patron of the Society.

G. A. F.

### RECENT ACTIVITIES OF THE SECTION OF INTERNATIONAL AND COMPARATIVE LAW OF THE AMERICAN BAR ASSOCIATION

The Section of International and Comparative Law of the American Bar Association has a membership of approximately one thousand lawyers, about one-fourth of whom are also members of the American Society of International Law. Its activities, in the form of resolutions adopted at its annual and special meetings and reports of its thirty committees, have been described, for the years 1941 to 1944, inclusive, in the issues of this JOURNAL for October, 1942, October, 1943, and January, 1945. Its activities during the year 1945 are set forth in a brochure of 162 pages published under the title *Proceedings of the Section of International and Comparative Law, Cincinnati Meeting, December, 1945*.

The report presented at the Cincinnati meeting by Mitchell B. Carroll, Chairman of the Section from 1943 to 1945, refers to the significant contribution made by the Section through its recommendations (adopted at a special meeting of January 27, 1945) with respect to the Dumbarton Oaks Proposals. These recommendations were discussed by Mr. Carroll and by Messrs. Green H. Hackworth, Durward V. Sandifer, and Clyde Eagleton, of the Department of State, at a series of meetings of local bar associations throughout the country. They were incorporated to a large extent in the recommendations which were formally submitted by the American Bar Association to the American Delegation to the San Francisco Conference, and some of them are reflected in the Charter of the United Nations.

The Section and the Association adopted, at Cincinnati, three resolutions, proposed, respectively, by the Committee on Adjudication of War Claims, Amos J. Peaslee, Chairman, by the Committee on Fisheries and Territorial

Waters, John R. Gardner, Chairman, and by the Committee on Organization of an International Bar Association, Robert N. Anderson, Chairman.

The first of these resolutions read as follows:

*Resolved*, That, in the opinion of the American Bar Association, prompt action should be taken by the Congress of the United States to create one or more non-political, judicial commissions composed of not less than three and not more than five persons skilled in the knowledge and practice of international law, to consider and adjudicate all claims of American nationals against Japan, Germany, Italy, Bulgaria, Hungary, and Rumania, arising out of acts of the Governments of those nations or any of them from and after the dates of the beginnings of aggressions or hostilities by them, respectively, in the Far East and Europe.

The accompanying report contained an estimate of the amount of American claims against enemy countries resulting from World War II, a discussion of alternative methods of adjudication of these claims, and a consideration of the sources from which awards may be satisfied. It was noted that the amount of collateral security held or controlled by the United States was of major importance in connection with these claims.

The second resolution read as follows:

*Resolved*, That the United States Government should take appropriate steps (a) to secure a new fur seal treaty to replace that which the Japanese Government terminated by notice of October 23, 1940, and to require Japan to become a party to such new treaty, (b) to require Japan to become a party to the International Agreement for the Regulation of Whaling, and (c) to prevent Japanese nationals from encroaching on other fisheries which are regulated by any international convention.

It was accompanied by a report in which it was stated that, in view of the anticipated use of speedy long-range vessels and of airplanes, blimps, helicopters, radar, and sonic depth finders in fishing operations, the need for conservatory regulation of fisheries would soon be greater than ever before.

The third resolution read:

*Resolved*: 1. That the American Bar Association approves in principle coöperation among the units of the organized bar of the respective nations of the world.

2. That the Section of International and Comparative Law, through its appropriate committee, should continue its study and inquiry respecting the desirability of creating an International Bar Association composed of units of the organized bar, and that if, upon careful study, it appears that an International Bar Association can be formed on sound and durable lines, the Section should prepare and submit for consideration a draft constitution for such association.

3. That the endorsement or rejection of any existing or proposed organization in the international legal field constructed upon the basis of individual members rather than upon units of the organized bar is beyond the scope of the proper activity of the American Bar Association.

The report accompanying this resolution contained a list of questions submitted to the embassies and legations in Washington with a view to determining the feasibility of the organization of an International Bar Association composed of units of the organized bar in each country. It may be noted that, in pursuance of the resolution, the Committee has, during the present year, addressed letters to the heads of the organized bar in various European countries, inclosing a preliminary draft of a Constitution for the proposed International Bar Association.

Additional reports presented at the Cincinnati meeting, and included in the published Proceedings, were made by the Committees on Codification of International Law, Philip C. Jessup, Chairman, on International Double Taxation, Mitchell B. Carroll, Chairman, on International Law in the Courts of the United States, Harry LeRoy Jones, Chairman, on International Transportation and Communications, Carl I. Wheat, Chairman, on Pacific Settlement of International Disputes, James Oliver Murdock, Chairman, on Punishment of War Criminals, George A. Finch, Chairman, on European Law, Joseph H. Barkmeier, Chairman, on Far Eastern Law, Cornell S. Franklin, Chairman, on Latin-American Law, Otto Schöenrich, Chairman, on Private Claims Against Governments, Heber H. Rice, Chairman, on Social, Labor, and Industrial Legislation, Ellen L. Love, Chairman, and on Membership, Willard B. Cowles, Chairman.

The Committees enumerated in the January, 1945, issue of the *JOURNAL* have been supplemented during the present year by new Committees on International Interchange of Jurists, William Roy Vallance, Chairman, on Teaching of International and Comparative Law, Jerome Hall, Chairman, on Comparative Jurisprudence, Joseph Walter Bingham, Chairman, on Freedom of the Press and Freedom of Speech, Elisha Hanson, Chairman, and on Near Eastern Law, Vahan H. Kalendarian, Chairman. The plans of the new Committees were outlined at the Section's special meeting of April 27, 1946, held in Washington. Statements were made at the same time concerning the plans of two Committees whose names and functions have been changed: the Committee on United Nations Organization, Frederic M. Miller, Chairman, succeeding the former Committee on Constitutional Principles for World Order, and the Committee on Progressive Development of International Law and its Codification, Manley O. Hudson, Chairman, succeeding the Committee on Codification of International Law.

Newly appointed Chairmen of Committees include David A. Simmons, Chairman of the Advisory Committee, Howard S. LeRoy, Chairman of the Committee on Coöperation with the Inter-American Bar Association, Charles S. Rhyne, Chairman of the Committee on Membership, Willard B. Cowles, Chairman of the Committee on Fisheries and Territorial Waters, William A. Roberts, Chairman of the Committee on International Transportation and Communications, Aribert F. Wild, Chairman of the Committee on Comparative Civil Procedure and Practice, John N. Hazard,

Chairman of the Committee on European Law, Edward W. Allen, Chairman of the Committee on Far Eastern Law, and Archibald King, Chairman of the Committee on Military and Naval Law. George A. Finch continues as Director of the Division of International Law. The Division of Comparative Law is now headed by Phanor J. Eder.

The business transacted at the Special Meeting of April 27, 1946, included the discussion and passage of three resolutions, subject to further action, as provided in the Constitution of the Association, by the House of Delegates, which meets in Chicago from May 27 to 29, 1946. The first of these resolutions was presented by Robert E. Freer, Chairman of the Committee on International Trade Regulation, the second by Percy Shay, acting for John P. Bullington, Chairman of the Committee on Treatment of Property Rights in the War Settlement, and the third by James Oliver Murdock, Chairman of the Committee on Pacific Settlement of International Disputes.

In the first resolution the Section goes on record as favoring the establishment of a permanent International Trade Tribunal with jurisdiction over legal disputes between nationals of different States and between States on behalf of their nationals, with respect to the rights of individuals under provisions of customary international law or treaties relating to international trade or commerce. The second resolution provides, among other things, that legally established private claims of American citizens should be accorded priority over claims of the government, in its public right, with respect to payment out of sums obtained from the Axis nations. In the third resolution the Section, without specifying whether the action should be taken through Senate approval or by joint action of the two Houses of Congress, favors prompt acceptance by the United States of the Compulsory jurisdiction of the International Court of Justice in the types of legal disputes enumerated in Paragraph 2 of Article 36 of the Statute of the Court.

Plans are now being made for the Annual Meeting of the Section to be held at Atlantic City on October 28, 1946. The matters which will come before the Section for action at that time include a resolution, proposed by Mr. Fyke Farmer at the Cincinnati meeting of the Association, favoring the establishment of a World Federal Government.

EDGAR TURLINGTON \*

#### ACADEMIA DE ESTUDIOS INTERNACIONALES, COLOMBIA

An *Academia de Estudios Internacionales* was recently established at the *Universidad Catolica Bolivariana* at Medellin, Colombia, under Dr. Alfredo Cock Arango, as Honorary President, and with Dr. Gabriel Aramburo as President and Mr. Fernando Panesso Posada as Secretary. The new institution is intended to devote itself largely to the cultivation of inter-

\* *Of the Board of Editors; Chairman of the Section of International and Comparative Law, American Bar Association.*

national law. It is the desire of the founders and officers of the new academy to associate all interested scholars, individually and in groups, with their institution and promote correspondence among them. With this in view they have communicated with President Charles Cheney Hyde, noting the fact that Dr. Nicholas Murray Butler, Dr. Leo S. Rowe, and other distinguished scholars from this country are already corresponding members.

P. B. P.

PROCEDURE FOR ACCEPTING THE OPTIONAL CLAUSE OF THE STATUTE OF THE  
INTERNATIONAL COURT OF JUSTICE

Paragraph 2 of Article 36 of the Statute of the International Court of Justice, which is an integral part of the United Nations Charter, provides that "the states parties to the present Statute may at any time declare that they recognize as compulsory . . . the jurisdiction of the Court in" certain specified types of legal disputes. Paragraph 4 of the same Article provides that the declarations referred to "shall be deposited with the Secretary-General of the United Nations, who shall transmit copies thereof to the parties to the Statute and to the Registrar of the Court."

This option to recognize the jurisdiction of the International Court as obligatory in certain categories of legal disputes was likewise found in the Statute of the Permanent Court of International Justice established under the League of Nations, and is commonly referred to as the "optional clause."

The Secretary of State, Mr. Byrnes, has stated, in a letter to the President of the American Society of International Law dated April 20, 1946, that "one of the most impressive ways in which the United States could indicate its support of the United Nations would be a declaration by the United States of acceptance of the jurisdiction of the International Court of Justice in the types of legal disputes enumerated in Article 36 of the Statute of the Court."<sup>1</sup>

On July 28, 1945, Senator Morse introduced Senate Resolution 160, providing in substance that the Senate "recommends to the President" that he deposit a declaration accepting the compulsory jurisdiction of the Court under Article 36 on behalf of the United States. On November 28, 1945, Senator Morse introduced, on behalf of himself and 14 other Senators,<sup>2</sup> Senate Resolution 196, providing in substance that the Senate "advise and consent to the deposit by the President" of a declaration under Article 36 of the Statute.

The Morse resolutions raise an interesting Constitutional question regarding the proper procedure to be followed in the United States in order for this country to legally bind itself to the obligatory jurisdiction of the Court under Article 36.

<sup>1</sup> *Department of State Bulletin*, Vol. XIV, No. 357, May 5, 1946, p. 759.

<sup>2</sup> Senators Taft, Green, Fulbright, Smith, Ferguson, Aiken, Ball, Cordon, Wiley, Tobey, Magnuson, Johnston of South Carolina, Myers and McMahon.

In the course of the debate in the Senate on the ratification of the United Nations Charter, Senator Vandenberg raised the question with the Legal Adviser of the Department of State as to how the declaration under Article 36 of the Statute should be made on behalf of the United States. The reply of Mr. Hackworth, who was at that time Legal Adviser of the Department of State and has since been elected to a seat on the new International Court of Justice, was in the form of a memorandum which Senator Vandenberg caused to be printed in the *Congressional Record*.<sup>3</sup> In his memorandum Mr. Hackworth stated:

. . . if the Executive should initiate action to accept compulsory jurisdiction of the Court under the optional clause contained in Article 36 of the Statute, such procedure as might be authorized by the Congress would be followed and if no specific procedure were prescribed by statute, the proposal would be submitted to the Senate with request for its advice and consent to the filing of the necessary declaration with the Secretary General of the United Nations.

It seems clear that Mr. Hackworth intended primarily to allay any fear that the Executive alone might attempt to bind the United States to the compulsory jurisdiction of the Court without reference to Congress, rather than to specify the precise form which Congressional participation should take.

There would seem to be little doubt but that a declaration made pursuant to a statute, passed by both Houses of the Congress, would be a proper method under our Constitutional procedure for the United States to adhere to the obligatory general jurisdiction of the new Court. In this connection it may be noted that on December 17, 1945, Congressman Herter of Massachusetts introduced a joint resolution in the House of Representatives (House Joint Resolution 291), under which the President would be "authorized and requested" by the Congress to deposit a declaration under Article 36 of the Statute recognizing the obligatory jurisdiction of the Court.

It should be observed that the two Morse resolutions do not contemplate passage by the two Houses of Congress as in the case of a joint resolution, such as that introduced by Mr. Herter, and which may originate in either the House of Representatives or the Senate. In the case of both of the Morse resolutions action by the Senate only is contemplated. Senate Resolution 160, the earlier one, is in the form of a simple Senate resolution, the text of which reads in part as follows:

*Resolved*, That the Senate hereby recommends that the President of the United States deposit with the Secretary General of the United Nations . . . a declaration under paragraph 2 of Article 36 of the Statute of the International Court of Justice. . . . *Provided further*, That the President be and hereby is requested to furnish the Senate

<sup>3</sup> *Congressional Record*, July 27, 1945, p. 8249.

for its information a copy of any declaration filed by him pursuant to this resolution.

Ordinarily, the passage of a simple Senate resolution has no legal effect. It does not become a law. If the President does not already have authority to commit the United States to the obligatory jurisdiction of the Court under Article 36, it is difficult to see how the passage of Senate Resolution 160 by the Senate would add to his legal authority to act in this matter.

Senate Resolution 196, the later resolution introduced by Senator Morse for himself and 14 other Senators, reads in part as follows:

*Resolved* (two-thirds of the Senators present concurring therein), That the Senate advise and consent to the deposit by the President of the United States . . . of a declaration under paragraph 2 of Article 36 of the Statute of the International Court of Justice recognizing as compulsory ipso facto and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the International Court of Justice . . .

The legal theory underlying the later Morse resolution (Senate Resolution 196) is clearly based on the treaty-making power. The form of the resolution is the form used by the Senate in "advising and consenting" to the ratification of a treaty and the resolution requires by its own terms the concurrence of "two-thirds of the Senators present." Mr. Philip C. Jessup, in discussing the earlier Morse resolution in this JOURNAL,<sup>4</sup> suggested that its passage by a two-thirds vote in the Senate would amount to advance "advice and consent."

This raises the specific point whether the passage of either Morse resolution by a two-thirds vote of the Senate would give to the President the legal authority under the treaty-making power to commit the United States to the obligatory jurisdiction of the Court.

Section 2 of Article II of the Constitution provides that the President "shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur."

Can a unilateral declaration made pursuant to a provision of a treaty duly ratified by and with the advice and consent of the Senate, and which declaration the United States is at liberty to make or not, but which once made commits the United States to a binding international obligation to accept the obligatory jurisdiction of the International Court of Justice, be regarded as a treaty within the meaning of section 2 of Article II of the Constitution?

The usual concept of a treaty would seem to exclude the idea of a purely unilateral document — ordinarily a treaty means a contract between two or more countries — in this case the United Nations Charter (including the Statute on the Court) which has already been ratified by and with the advice and consent of the Senate. Nevertheless it is clear that the declaration in question here, although it is unilateral in form, involves a new inter-

<sup>4</sup> Vol. 39, No. 3 (October, 1945), p. 750.



national commitment on the part of the United States *vis-à-vis* the other parties to the Statute. In substance, therefore, as distinguished from form, this declaration, once deposited, can be said to be just as much an international agreement or compact as if it had been formally drafted in the language and form of a multilateral instrument. Assuming that no provision had been made in the Statute for the obligatory jurisdiction of the Court, it would clearly have been possible for the United States to have entered into a treaty with other States conferring such jurisdiction upon the Court with respect to the identical categories of legal disputes listed in Article 36.

The situation envisaged by the declaration procedure set forth in Article 36 is essentially similar in substance to the case where a country adheres to a treaty to which it was not originally a party. In such a case the adhering country is free to adhere or not, but, once it has done so, it is just as much bound by the international obligations set forth in the treaty as if it had been a party from the beginning. Its action in adhering is in form unilateral but in substance it becomes a party to specified international obligations *vis-à-vis* the other signatories.

Granting, then, that from the point of view of our international obligations the filing of a declaration under Article 36 of the Statute would amount to the same thing in substance as the conclusion of a formal treaty, it is by no means clear that such a declaration is a treaty within the meaning of the Constitution of the United States. If there is any merit in the purely legal and technical argument that the Constitutional provision giving the President power to make "treaties" by and with the advice and consent of the Senate does not authorize the Senate to advise and consent to "the deposit by the President of the United States of a declaration," as contemplated by the Morse resolutions, all doubt concerning the legality of our acceptance of the obligatory jurisdiction of the new Court could be removed by the passage of a joint resolution by both Houses of the Congress.

HONORÉ M. CATUDAL \*

#### THE SOVIET UNION AND THE INTERNATIONAL MONETARY FUND

The representatives of the USSR participated in the course of 1943 and 1944 in the preparatory work which preceded the International Monetary and Financial Conference in Bretton Woods. As far as is known no attempt was made to include as members of the Fund the two constituent republics of the Soviet Union (Byelorussia and Ukrainia) which were to join the United Nations Organization. The Soviet Union took part in July, 1944, with a regular delegation, in the work of the Bretton Woods Conference, and the Chairman of the Soviet Delegation, Mr. M. S. Stepanov, Deputy People's Commissar of Foreign Trade, signed the Final Act of the International Monetary Fund along with the representatives of other

\* This note represents the views of the writer and is not intended to convey the official views of any government agency.

nations July 22, 1944. To be sure, according to established international practice, the signature of the Final Act did not mean more than a simple certification of the accuracy of the record presented. The Final Act (incorporating the conclusions at which the Conference arrived) and the record of the Conference does not contain the reservations made by various delegations to the draft articles of the Agreement of the International Monetary Fund; these reservations were obviously confined to the unpublished Minutes of the Commissions. It is clear that the reservations lack any legal significance. Only the acceptance of the Agreement (without reservations) was provided for in Art. XX, Sec. 1. As far as reservations were filed to the instruments drawn up in Bretton Woods one may assume also that they did not relate to principal points of the Agreement.

The significance of the participation of the Soviet Government in the Bretton Woods arrangements cannot be exaggerated. Apart from the experience gained from personal exchange of opinions on vital economic issues in long continuous sessions, the fact that instruments were drawn up in the field of monetary coöperation which provided for concerted action of governments with fundamentally different structures, has been justifiably considered of decisive importance for future international intercourse. Indeed, those who are conscious only of the element of conflict in world affairs could not believe that such an achievement would be possible. Deep skeptics were disturbed by the fact that the International Monetary Fund Agreement was not comprehensive enough. With restrictions on the making of payments for current international transactions, whereas the topic of national restrictions imposed on the extent of international transactions (commodities and services) was tacitly assigned to a prospective international trade conference. Others saw provisions like that of Article IV, Section 5 (e) ("A member may change the par value of its currency without the concurrence of the Fund if the change does not affect the international transactions of members of the Fund") as exceptional concessions to socialistic countries. However, the prevailing majority of statesmen and scholars considered the results of the Bretton Woods Conference, especially from the point of view of collaboration within the United Nations, as a landmark in the odyssey of establishing a workable framework of economic intercourse. And in the course of 1945 the major part of the opposition to Bretton Woods faded away.

The International Monetary Fund Agreement remained open for signature to the charter members (mentioned in schedule A of the Agreement) until December 31, 1945. By such formal signature governments accepted, both on their own behalf and in respect of territories under their authority, the provisions of the Agreement without reservation. Because the Agreement was signed by December 27, 1945, by countries representing 65 per cent of the total quotas (Article XX, Section 1) the Agreement entered into force December 27, 1945. The Government of the Soviet Union had not signed the

Agreement by December 31, 1945 (nor did she enter the International Bank for Reconstruction and Development). No explanation of this omission was made public. The fact that the USSR was represented by an observer in the meeting of the Board of Governors of the International Monetary Fund in Savannah on March 7, 1946, is an indication that entrance is still being seriously considered. There is no doubt that all members of the Fund are anxious to include the Soviet Government among the Fund's leading members. It is true that among the large international public bodies the International Labor Organization is operating without Soviet participation but also this Agency is doing everything possible to remedy this regrettable situation.

There is no doubt that the Agreement for the Fund was framed in expectation that the Soviet Union would be one of the "Big Five" of the Fund. Not only were the quotas of the Fund calculated in view of Soviet participation but also the provisions with reference to permanent executive directors (Art. XII, Sect. 3 (b) (i) ), the location of depositories (Art. XIII, Sect. 2 (b) ), and other provisions, were framed with the intention of giving the Soviet Union a privileged position. By according a specific position to "the five members having the largest quotas" the tacit implication was made that the United States, the United Kingdom, the Soviet Union, China, and France, would compose this privileged group.<sup>1</sup> By the non-entrance of the Soviet Union the claims of India for a seat among the privileged members found unexpected fulfillment. Furthermore the mutual quota relations of those countries which did not have privileged memberships changed considerably because of India's elevation. This change found expression in the results of the election of five executive directors according to Art. XII, Sect. 3 (b) (iii).

After January 1, 1946, the Soviet Government became a Non-Member Country in its relation to the Fund (Art. XI). One may safely assume, however, that the restrictions on transactions with non-member countries (Art. XI, Sec. 2) will not become operative until the situation with reference to the entrance of the Soviet Union is clarified. The Agreement provided for the entrance of new members in Art. II, Sec. 2. Whereas original members (Art. II, Sec. 1) entered the Fund according to the provisions of the Agreement without adding to it or subtracting from it specific terms, new members can be admitted in accordance with such terms as may be prescribed (specifically or in the by-laws) by the Board of Governors of the Fund (Art. XII, Sec. 2 (b) (i) ). Of course, the Board of Governors may prescribe that the terms for the entrance of a new member (after December 31, 1945), may exactly coincide with the entrance terms for original members. Although the text of the Agreement does not prohibit expressly the prescribing of such terms for the entrance of new members which would

<sup>1</sup> If the Agreement had gone into force before Jan. 1, 1946, the executive direction would have been reserved for the Soviet Union until that date: Art. XX, Sec. 3 (6).

deviate in substance from the fundamental provisions of the Agreement, one may safely assume that the prescription of additional terms which would in effect amount to a "modification" of the Agreement would require a formal amending procedure according to Article XVII. To be sure, the Agreement did not intend to give new members a privilege analogous to that implied in the United States Constitution with reference to the political equality of newly entering states.

The inaugural meeting of the Board of Governors of the International Monetary Fund was called for March 7, 1946, and the following days to meet at Savannah, Georgia. In this meeting the Board of Governors decided

That membership in the International Monetary Fund is approved under Article II, Section 2 of the Articles of Agreement for all countries listed in Schedule A whose governments accept membership in accordance with the provisions of Article XX until December 31, 1946.

This resolution made it possible for the Soviet Union to accept membership under the same conditions as would have prevailed if her instrument of signature had been filed prior to December 31, 1945. Also her privileged position as a member of the "Big Five" will not be impaired by her entrance until the end of 1946.

The entrance of the Soviet Union would, of course, eliminate the designation of India as a member of the "Big Five." The Board of Governors of the Fund decided to interpret the Agreement with reference to the number of Executive Directors so that the Executive Director appointed by India (because of the absence of the Soviet Union) would hold his office until new elections make it possible to consider the regular election of an Executive Director from India.

There is no doubt that the non-entrance of the Soviet Union created an unexpected situation and that the provisions of the Agreement concerning the entrance of new members was not intended to relate to such a situation. However, the Agreement proved flexible enough to find a suitable solution.

ERVIN HEXNER \*

#### A FORM BOOK FOR STANDARD TREATY CLAUSES

Drafting technicians at the United Nations Conference on International Organization in San Francisco would indeed have welcomed the aid of an international legislative drafting bureau such as C. Wilfred Jenks described in his brilliant contribution to a recent number of this JOURNAL.<sup>1</sup> They would have been thankful for even a few copies of his proposed style manual and manual of common forms for standard articles. Various of the secre-

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<sup>1</sup> "The Need for an International Legislative Drafting Bureau," Vol. XXXIX (1945), pp. 163-179.

tarial staff assigned to the several commissions and committees at San Francisco rendered valuable service in the processes of drafting.<sup>2</sup> All provisions emanating from the committees and commissions were subjected to review by the Coördination Committee and the Advisory Committee of Jurists.<sup>3</sup> Throughout, the Conference was fortunate in having the services of William V. Whittington, of the Treaty Branch, Division of Research and Publication, Department of State, as Technical Adviser on Treaties. But no central service of the sort described by Mr. Jenks existed for the benefit of the technical committees charged with initial elaboration of the provisions of the Charter.

The situation in the meetings in London of the Executive Committee of the Preparatory Commission, of the Preparatory Commission itself, and of the General Assembly was similar.<sup>4</sup> The Secretariat of the United Nations at each stage of those proceedings had a legal section whose services were available not only to the corresponding committees on legal problems but also to other committees.<sup>5</sup> Understaffed and heavily burdened by the requirements of the legal committees, these legal sections of the Secretariat could hardly perform the role of an "International Parliamentary Counsel's Office." Plans are under way now, however, to provide for adequate services on a permanent basis by an appropriate staff at the headquarters of the United Nations.

Under the contemplated agreements for bringing certain of the "specialized agencies," such as the Food and Agriculture Organization of the United Nations, the United Nations Educational, Scientific, and Cultural Organization, and others, into relation with the United Nations, provision could be made, among those dealing with use of common technical services, for the sharing of the services of such a staff and the defrayment of an appropriate share of the expense. If the "specialized agency" should decide not to locate its headquarters at the seat of the United Nations, there still would

<sup>2</sup> For the names of the personnel referred to see *Delegates and Officials of the United Nations Conference on International Organization* (Revised to May 28, 1945), Doc. 639, G/3(2), pp. 6-11. Various of these experts will be recognized as having already achieved distinction in the field of international jurisprudence. To these should be added the names of the *Reference Specialists*, Denys P. Myers and Miss Ruth Savord.

<sup>3</sup> Same, pp. 4-6.

<sup>4</sup> Instead of a Coördination Committee, the Preparatory Commission set up a Drafting Committee consisting of delegates representing the five official languages and a small section of the Secretariat, called the Coördination and Drafting Section, to assist it; *Handbook of the Preparatory Commission of the United Nations* (Revised Edition), p. 39. Neither the Executive Committee nor the General Assembly set up by any "Coördination" or "Drafting" Committee.

<sup>5</sup> For the personnel of the several sections see the *Directory of the Delegations, Committees, and Secretariat* of the Executive Committee, pp. 19-20; *Handbook of the Preparatory Commission*, cited above, pp. 37-39; and the handbook entitled *United Nations: First Session of the General Assembly, London, 10 January 1946*, pp. 50-53. The same observation as was made in note 2, above, can be made with respect to their professional competence.

be, under Mr. Jenks' proposal, numerous services performable by the central bureau even at a distance, such as the preparation, in advance of conferences, of draft outlines of agreements, compilations of treaty provisions on the subject matter under consideration, a supply of style manuals and manuals of standard provisions, and even the loan for the task in hand of suitable drafting experts. The details of the supply of the services could for practical reasons be left to be arranged by the Secretary-General of the United Nations and the corresponding official of the "specialized agency" in agreements supplementary to the master agreement. Certainly with the prospect of two or three dozen great "specialized agencies" operating in particular fields of competence in the next several decades, every effort should be made to avoid duplication of effort and overlapping of services where possible but not to an extent which would impair the services needed currently by the "specialized agency." A reasonable balance of "local" and "centralized" services could be achieved in practice after a time. The need for such interrelationship would become greater, it would seem, as the "constitutional" order and the "legislative" order of the international community develops in the next few decades.

In the establishment of such services as Mr. Jenks suggests, it would seem desirable to secure the views not only of other experts who have served or are serving international organizations but also those who have been attached to national delegations in the framing of the Charter and in the conclusion of various of the "specialized agency" agreements. Perhaps some mode can be devised by the Secretariat of the United Nations to avail itself of the views of such national technical experts.

Among the various services and devices suggested by Mr. Jenks, the manual of standard treaty provisions is probably the one most immediately needed. The following observations, related to that sort of manual, may therefore be of interest. Technicians at San Francisco, avid for a form book, knew of the existence of none in any language. Collections of classes of treaty provisions no doubt exist in various of the foreign offices, but in 1945 they had not as yet apparently reached the printed compilation stage. A compilation was begun in the League of Nations Secretariat during the war years,<sup>6</sup> but remained uncompleted. One treaty draftsman long on the staff of the League had drawn the attention of a private research foundation to the need of such a book some years ago, but nothing had come of it. It would seem that national treaty drafting services, confronted now with the need for renegotiating many of their bilateral agreements and of participating in the drafting of multilateral agreements with staffs probably reduced as part of financial retrenchment programs, would welcome the existence of such a form book. They could to some extent probably cooperate with the United Nations Secretariat in the production of such a work. In any event, it could hardly be doubted that if such a work were produced, part of

<sup>6</sup> By H. McKinnon Wood, the writer is informed.

its cost could be defrayed by sales to national treaty-drafting services. Moreover, the widespread use of such a common book by national services could not but advance the objective of universal improved treaty technique.

It probably is true, in general, that once there has been a meeting of minds on some proposition in an international conference, the reduction of the agreement to a form of words is the less arduous task. But it frequently happens that consideration and comparison of a variety of good texts on the subject matter under discussion is productive of ideas and possibly may facilitate agreement. At any rate, in the process of reducing agreement to language, it would be a rare craftsman who could not benefit from a set of standard forms at his elbow.

Paradoxically, the absence of a good form book can operate to the disadvantage of a delegation which may possess a superlatively skillful draftsman. At the drafting committee stage, such a technician is frequently in great demand. Chairmen under pressure to meet agenda dead-lines will repeatedly appoint the same draftsman, disregarding his nationality, to such committees. His delegation is admired for possessing such talent, and it gains perhaps a tertiary diplomatic advantage from the repeated use of the same technician, but to the extent that such use deprives the delegation of his services for more immediate purposes the practice may operate to the disadvantage of the national state. Devices such as form books, though they could probably never displace talent at the table, could in the hands of the ordinary technician reduce his dependence on craftsmen of greater skill.

Sundry views of the structure and scope of such a *vade mecum*, expressed by technicians at San Francisco and London, might be considered in addition to those advanced by Mr. Jenks. Thus, with respect to languages, parallel column renderings into English and French, the two so-called "working languages" of the United Nations, might be regarded by some technicians as sufficient, but it ought to be borne in mind that among the most defectively drafted instruments in the multilateral field are many concluded under Inter-American conference auspices. If a third column is added for the Spanish, a fourth in the Russian might be added on other grounds, among them the saving of time by Russian-speaking delegations in communicating with their respective governments. Though Chinese is at present used by only one of the national delegations in the United Nations, it is one of the official languages of the organization. For reasons of consistency, the inclusion of Chinese might be urged. At any rate, the selection of the languages in which the standard provisions ought to appear is a matter on which no hasty judgment ought to be made.

If the structure of national legal form books is followed argument might in principle be made for the inclusion of annotations citing and quoting court opinions interpretative of the clauses included. Because of the diverse origins and terms of reference of the national and international tribunals which interpret international instruments, the inclusion of their interpretative

opinions might, however, be misleading. Various technicians consulted on this point at San Francisco felt strongly that no interpretative opinions should be included. The draftsman should have simply the text before him with adequate citations of the source, but nothing further.

Though much can be said in favor of including only "ideal" clauses, some concession to habit might be made by including as alternatives familiar good customary forms. There is an area in the drafting of legal instruments in which choices arising out of taste can safely be made. Clarity and precision need not be lost in preserving such liberty of choice.

Mr. Jenks' admirable suggestion of extending the practice of devising "short names" for reference to multilateral instruments should, where possible, be also applied to types of treaty clauses. The use of carefully selected captions might serve this purpose. Check-lists of clauses which should be included in different types of instruments would also be serviceable to draftsmen, particularly in the hectic last hours of a conference when those responsible for a finished product are haunted by the fear that some clause essential to the operation of the instrument has been omitted.

Finally, any group of experts charged with the responsibility of preparing such a manual of treaty clauses as Mr. Jenks has proposed will wish to consult the record of the labors of the Drafting Committee set up by the Preparatory Commission in London.<sup>7</sup>

HENRY REIFF \*

<sup>7</sup> *Provisional Agenda of the Preparatory Commission*, PC/9, November 24, 1945; Steering Committee, Second Meeting, December 1, 1945, *Journal of the Preparatory Commission*, p. 39; Steering Committee, Third Meeting, December 7, 1945, work cited p. 61; *Memorandum by the Executive Secretary Regarding the Constitution of a Drafting Committee*, PC/ST/5, November 29, 1945 and *Memorandum of the Executive Secretary: Discussion in Plenary Meetings of the Reports of Technical Committees*, PC/ST/9, December 2, 1945; first meeting of the Drafting Committee, December 10, 1945, *Journal*, pp. 79-80; and various reports of the Drafting Committee, e.g., Seventh Meeting, Committee 7 on League of Nations, December 17, 1945, PC/LN/12, and Fourth Plenary Meeting of the Preparatory Commission, December 23, 1945, *Journal*, at p. 143.

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## CHRONICLE OF INTERNATIONAL EVENTS

FOR THE PERIOD FEBRUARY 16-MAY 15, 1946

(Including earlier events not previously noted)

### WITH REFERENCES

Abbreviations: *B. I. N.*, Bulletin of International News; *C. I. E. D.*, Chronology of International Events and Documents, Royal Institute of International Affairs; *C. S. Monitor*, Christian Science Monitor; *Cmd.*, Great Britain Parliamentary Papers by Command; *Cong. Rec.*, Congressional Record; *D. S. B.*, Department of State Bulletin; *Ex. Agr. Ser.*, U. S. Executive Agreement Series; *G. B. M. S.*, Great Britain Miscellaneous Series; *G. B. T. S.*, Great Britain Treaty Series; *N. Y. T.*, New York Times; *P. A. U.*, Pan American Union Bulletin; *T. I. A. S.*, U. S. Treaties and other International Acts Series\*; *U. N. A. J.*, United Nations, General Assembly, Journal; *U. N. S. C. J.*, United Nations, Security Council, Journal; *U. S. T. S.*, U. S. Treaty Series.

#### October, 1945

- 1-April 26, 1946 ICELAND-UNITED STATES. United States proposed Oct. 1st that negotiations be undertaken for an agreement on the joint use by the United States and Iceland of "military facilities" in Iceland beyond the termination of the war. Prime Minister Thors announced April 26 that his reply of Nov. 6, 1945 refused to enter upon discussions. *N. Y. T.*, Apr. 23, 1946, p. 8; *D. S. B.*, May 5, 1946, p. 773.

#### January, 1946

- 17 GREAT BRITAIN-IRAQ. Text of correspondence exchanged at Bagdad concerning prolongation of existing arrangements regarding Iraqi foreign exchange requirements: *Iraq* No. 1, 1946, *Cmd.* 6742.
- 25 GREAT BRITAIN-UNITED STATES. Effected agreement by exchange of notes in Washington regarding penicillin. *D. S. B.*, Mar. 17, 1946, p. 451. Text: *G. B. T. S.* No. 4 (1946), *Cmd.* 6757; *T. I. A. S.*, No. 1506.

#### February, 1946

- 4-25 RADIO CONFERENCE. Second North American Regional Broadcasting Engineering Conference met in Washington to consider problems related to standard band broadcasting in the North American region as affected by the North American Regional Broadcasting Agreement expiring March 29, 1946. U. S. delegation: *D. S. B.*, Feb. 3, 1946, p. 171. Six countries signed an interim agreement. *D. S. B.*, Mar. 10, 1946, pp. 376-377.
- 6-March 2 GERMAN OCCUPATION. Secretary Byrnes' message to French Foreign Minister concerned the French attitude on the establishment of central German agencies. Mr. Bidault's reply was received March 2. Texts: *N. Y. T.*, Mar. 9, 1946, p. 4; *D. S. B.*, Mar. 17, 1946, pp. 440-443. French Cabinet approved March 1 despatch of a note inviting the U. S., Great Britain, and Russia to a conference to settle the questions of German central administration and the future status of the Ruhr and the Rhineland. *N. Y. T.*, Mar. 2, 1946, p. 3.
- 7 GREAT BRITAIN-UNITED STATES. Signed agreement in Washington regarding radio distance indicators. *D. S. B.*, Mar. 10, 1946, p. 398. Text: *United States Aviation Reports*, March, 1946, pp. 103-104.

\*This series is to combine and supersede *U. S. T. S.* and *Ex. Agr. Ser.*, but all items in these series have not yet been published.

- 14-March 20 POLISH FORCES (in exile). Warsaw radio announced Feb. 14 that the Government had handed a note to British Ambassador asking for liquidation of Polish army units under British command in Italy and Great Britain. Mr. Vishinsky of Russia, on behalf of the Yugoslav Government presented to the Security Council of the United Nations a memorandum about the forces in Italy. *C. I. E. D.*, Feb. 4/17, 1946, pp. 99 and 120. Foreign Minister Bevin of Great Britain stated that the Polish forces under British command would be disbanded as soon as practicable. *London Times*, Mar. 21, 1946, p. 8. Poles refusing to return will have the status of displaced persons. *N. Y. T.*, Mar. 20, 1946, p. 6.
- 15-May 10 PALESTINE. After meetings in Berlin, Vienna, Cairo and Jerusalem, which began Feb. 15, the Anglo-American Committee of Inquiry issued a report from Lausanne on April 30, in which immediate immigration of 100,000 Jews to Palestine was recommended. *N. Y. T.*, May 1, 1946, p. 1; *London Times*, May 1, 1946, p. 4. Excerpts from report: *D. S. B.*, May 12, 1946, pp. 784-787. Text of report: *G. B. M. S.* No. 8 (1946); *Cmd.* 6808. Arab Higher Committee's protest of May 2 warned that carrying out recommendation might cause resumption of Arabs' national struggle. *London Times*, May 3, 1946, p. 4; *N. Y. T.*, May 3, 1946, p. 1. Text of letter: pp. 1, 3. Acting Secretary of State Acheson told representatives of 5 Arab states that the United States would make no decision on the recommendations without consulting Arabs and Jews. *N. Y. T.*, May 11, 1946, p. 10.
- 17-May 6 UNITED NATIONS. Secretariat. List of Assistant Secretaries announced. *N. Y. T.*, Feb. 18, 1946, p. 4; *London Times*, Feb. 18, 1946, p. 3. Biographical sketches and photographs: *N. Y. T.*, Apr. 11, 1946, p. 4. Secretary General Lie announced 10 directors of departments: *N. Y. T.*, May 7, 1946, p. 6.
- 18 UNITED NATIONS. Commissions, etc. Composition of organs, commissions and committees: *D. S. B.*, Mar. 24, 1946, pp. 467-475.
- 18/20 U. N. E. S. C. O. Dr. Esther C. Brunauer and Howard E. Wilson were named U. S. members of the Preparatory Commission and the International Secretariat, respectively. *D. S. B.*, Mar. 3, 1946, p. 337; *N. Y. T.*, Feb. 19, 1946, p. 5; Feb. 21, p. 5.
- 19 DIPLOMATIC IMMUNITY. President Truman granted limited diplomatic immunity to representatives of 5 international organizations in the U. S.—United Nations, U.N.R.R.A., I.L.O., P.A.U. and F.A.O. *N. Y. T.*, Feb. 20, 1946, p. 2; *D. S. B.*, March 3, 1946, p. 348.
- 19 JAPANESE OCCUPATION. General MacArthur issued order decreeing that United Nations' nationals and institutions, including corporations, would be outside the jurisdiction of Japanese courts. Such nationals and Japanese involved in cases with them would be tried only by the United Nations Military Commission Provost Courts. *N. Y. T.*, Feb. 20, 1946, p. 12, *London Times*, Feb. 20, 1946, p. 3.
- 20 CANADA—COLOMBIA. Signed a most-favored nation commercial treaty at Bogotá. *N. Y. T.*, Feb. 21, 1946, p. 3. Text: Canada. *Treaty Series*, 1946, No. 7.
- 21/24 TRANSPORT CONFERENCE. European Central Inland Transport Organization opened conference in Brussels to discuss road transport. *London Times*, Feb. 22, 1946, p. 3. Adopted resolution recommending that member nations conclude an agreement providing for allocation, on a reciprocal basis, of a certain quantity of petrol for road traffic across frontiers. *London Times*, Feb. 25, 1946, p. 3.
- 21-March 12 WEST INDIAN CONFERENCE. Opened at St. Thomas, Virgin Islands on Feb. 21, under auspices of the Anglo-American Caribbean Commission, and representatives of France and the Netherlands which recently joined the Commission.

- D. S. B.*, Mar. 3, 1946, pp. 330-331; *London Times* Feb. 22, 1946, p. 3; *N. Y. T.*, Feb. 22, 1946, p. 5. Text of President Truman's message: *D. S. B.* Mar. 3, 1946, p. 332. Closed March 12. *D. S. B.*, Mar. 24, 1946, p. 476. The Anglo-American Caribbean Commission has been renamed the Caribbean Commission. Report on the Conference: *D. S. B.*, May 19, 1946, pp. 840-845.
- 22-March 31 BULGARIA. United States aide-mémoire of Feb. 22 urged inclusion of opposition parties in the Bulgarian Government. Text: *N. Y. T.*, Mar. 6, 1946, p. 2; *D. S. B.*, Mar. 17, 1946, p. 447. Bulgaria announced receipt of the note March 3. *N. Y. T.*, Mar. 4, 1946, p. 2. Moscow radio broadcast of Mar. 8 stated the U. S. note had violated the Moscow agreement on Bulgaria. Text of broadcast: *N. Y. T.*, Mar. 9, 1946, p. 2. Charge was denied in U. S. note of Mar. 10. Text: *N. Y. T.*, Mar. 11, 1946, p. 2; *D. S. B.*, Mar. 24, 1946, pp. 485-486. New Bulgarian Cabinet was announced Mar. 31. *N. Y. T.*, Apr. 1, 1946, p. 3.
- 25 AUSTRIAN OCCUPATION. The Control Council decided that the Austrian Government should be allowed to exchange diplomatic representatives with all countries which would recognize it except Germany and Japan. *C. I. E. D.*, Feb. 18/Mar. 3, 1946, p. 121.
- 25 CHINA. Agreement was signed by General George C. Marshall, who signed in his advisory capacity, by leaders of the Chinese Government forces and the Communist armies, consolidating their armies into one national defense force. *N. Y. T.*, Feb. 26, 1946, p. 1.
- 26-May 13 FAR EASTERN COMMISSION. Held organizational meeting Feb. 26 at its permanent headquarters in the former Japanese Embassy in Washington. *N. Y. T.*, Feb. 27, 1946, p. 16. Appointed committees and chairmen on Mar. 14. *N. Y. T.*, Mar. 15, 1946, p. 6. On Apr. 10 elected chairman and deputy chairman of its Committee on Disarmament of Japan. *N. Y. T.*, Apr. 11, 1946, p. 13; *D. S. B.*, Apr. 21, 1946, p. 655. Drew up on May 13 basic principles covering interim reparations removed from the home islands of Japan and the criteria required for any new Japanese constitution. *N. Y. T.*, May 14, 1946, p. 2.
- 27 MONGOLIAN PEOPLE'S REPUBLIC—SOVIET RUSSIA. Signed treaty at Moscow providing for economic and cultural collaboration. Text: *American Review on the Soviet Union* (N. Y.) May, 1946, p. 83.
- 27 MONGOLIAN PEOPLE'S REPUBLIC—SOVIET RUSSIA. Signed treaty of amity and mutual aid at Moscow. *N. Y. T.*, Feb. 28, 1946, p. 10. Text: *American Review on the Soviet Union* (N. Y.), May, 1946, p. 82.
- 27-April 10 SPAIN. French-Spanish frontier was closed Feb. 27. *London Times*, Feb. 28, 1946, p. 4. U. S. Department of State confirmed Feb. 27 it had communicated to France and Great Britain its views on the political situation in Spain. *N. Y. T.*, Feb. 28, 1946, p. 1. France, Great Britain and United States issued March 4 joint statement urging the Spanish people to oust the government of General Franco. Text, and digest of 14 documents on Spanish relations with the Axis: *N. Y. T.*, Mar. 5, 1946, p. 12. Text, and excerpts from documents: *D. S. B.*, Mar. 17, 1946, pp. 412-427. Texts of statement and 15 documents: Dept. of State. *European Series* No. 8. U. S. note, delivered to France March 9, rejected French proposal of Feb. 27 to lay the Spanish situation before the United Nations Security Council. *N. Y. T.*, March 12, 1946, p. 1. Text of note: p. 8; *D. S. B.*, Mar. 24, 1946, pp. 486-487. French reply of Mar. 12 to U. S. and Great Britain was handed to their Ambassadors in Paris. *N. Y. T.*, Mar. 13, 1946, p. 12. On March 18 the Spanish Government issued statement. *N. Y. T.*, March 19, 1946, pp. 1, 9. U. S. note of March 19 restated original stand against bringing the case

of General Franco to the United Nations Security Council as projected by France. *N. Y. T.*, Mar. 20, 1946, p. 2. French note of March 22 to Great Britain and U. S. asked joint action against Spain. Pending replies France will not bring the matter before the Security Council. *N. Y. T.*, Mar. 23, 1946, p. 3. Summary: *London Times*, Mar. 27, 1946, p. 5. U. S. sent note April 10 to France refusing to discuss at the Foreign Ministers' meeting in Paris in April the French proposal for an embargo on shipments to Spain. Great Britain also declined. *N. Y. T.*, Apr. 11, 1946, p. 9.

27-March 29 INTERNATIONAL MILITARY TRIBUNAL (Germany). Presentation of the Russian case ended Feb. 27. *N. Y. T.*, Feb. 28, 1946, p. 2. The defense of Hermann Goering, the first of the Nazi leaders, opened March 8. *London Times*, Mar. 9, 1946, p. 4. U. S. Prosecutor Robert H. Jackson announced appointment of Col. Telford Taylor as head of U. S. prosecution staff in any future trials of the Tribunal. *N. Y. T.*, Mar. 30, 1946, p. 8.

28 CHINA—FRANCE. Signed agreements by which France renounced extraterritorial privileges and China agreed to withdraw troops from Indo-China by March 31st. *N. Y. T.*, Mar. 1, 1946, pp. 1, 12. *C. I. E. D.*, Feb. 18/Mar. 3, 1946, p. 123.

28 FRANCE—GREAT BRITAIN. Signed comprehensive civil aviation agreement in London. *N. Y. T.*, Mar. 1, 1946, p. 5. Text: *G. B. T. S.* No. 7 (1946), *Cmd.* 6787.

28-March 28 AIR TRANSPORT COUNCIL. South Pacific Civil Air Conference opened at Wellington, N. Z., with representatives from the United Kingdom, Australia, Canada, New Zealand and Fiji. *London Times*, March 1, 1946, p. 3. The Conference closed March 6 after recommending establishment of a South Pacific Air Transport Council. Canada was invited to become a member. *C. I. E. D.*, Mar. 4/24, 1946, p. 170. Establishment of the Council, with headquarters in Australia was announced March 28 in London. It will act as a permanent coordinating body in British and Commonwealth air routes. *N. Y. T.*, March 29, 1946, p. 13.

#### March, 1946

1-April 5 IRAN. Russia announced that some of its forces would be withdrawn from Iran March 2d, others kept longer. Text of statement *N. Y. T.*, Mar. 2, 1946, p. 1. On Mar. 4 the Iranian Embassy in London announced protest against Soviet decision to keep troops. *N. Y. T.*, Mar. 5, 1946, p. 1. U. S. note of March 5 reminded Russia that keeping troops in Iran after March 2 was contrary to provisions of the Declaration issued at the Tehran Conference in 1943. Text: *N. Y. T.*, Mar. 8, 1946, p. 2; *D. S. B.*, Mar. 17, 1946, pp. 435-436. Second U. S. note to Russia asked explanation of reported entry of Russian reinforcements into Iran. *D. S. B.*, Mar. 24, 1946, p. 483. Text of Foreign Minister Bevin's statement of March 14 on possible replacement of British troops in Iran: *N. Y. T.*, Mar. 15, 1946, p. 4. Secretary General Lie of the United Nations announced receipt of Iranian formal notification that a dispute exists with Soviet Russia and that the question had been placed on the agenda of the Security Council for its next meeting. *N. Y. T.*, Mar. 20, 1946, p. 1. Text of note: p. 4. Text of 2d Iranian note to Mr. Lie was received Mar. 21 in Washington: *N. Y. T.*, Mar. 22, 1946, p. 3. On March 24 Russia announced withdrawal of troops would be completed within 6 weeks. Text: *N. Y. T.*, Mar. 25, 1946, p. 1; *London Times*, Mar. 25, 1946, p. 4. Joint communiqué of April 5 announced complete agreement on all matters concerning Iran and Russia, formation of a joint oil company and an approach to a settlement of the Azerbaijan problem of autonomy. *London Times*, Apr. 6, 1946, p. 4; *N. Y. T.*, Apr. 6, 1946, p. 1. Text: pp. 1, 2. Texts of notes exchanged

on oil accord: *N. Y. T.*, Apr. 8, 1946, p. 2. Chronology of the major developments in the occupation of Iran since Aug. 25, 1941: *N. Y. T.*, Apr. 4, 1946, p. 6.

- 4-11 FINLAND. Resignation announced March 4 of Field Marshal Baron Mannerheim as President. *N. Y. T.*, March 5, 1946, p. 6; *London Times*, Mar. 5, 1946, p. 3. Jülio K. Paasikivi, elected on Mar. 9, took office on Mar. 11. *N. Y. T.*, Mar. 10, 1946, p. 2; Mar. 12, p. 3.
- 4-27 AVIATION CONFERENCE. North Atlantic Regional Conference of the Provisional International Civil Aviation Organization opened on March 4 in Dublin [also designated as North Atlantic Route Service Conference]. Elected Sean Leyden as permanent chairman. Approved committees. 13 countries were entitled to vote. Observers were present from 5 countries. *N. Y. T.*, Mar. 5, 1946, p. 7. Adopted committee reports March 27, the most important being those of the Air traffic control committee and the Search and rescue committee. *N. Y. T.*, Mar. 28, 1946, p. 16.
- 5 CHURCHILL, WINSTON. Made address at Westminster College, Fulton, Mo., on postwar Anglo-American collaboration. Text: *London Times*, March 6, 1946, p. 4; *N. Y. T.*, March 6, 1946, p. 4.
- 5-May 3 MANCHURIA. U. S. Department of State released text of U. S. identic notes to China and Russia, and Chinese reply to Russian note of Jan. 21 on problems in Manchuria. Text: *D. S. B.*, Mar. 17, 1946, p. 448. U. S. sent note March 6 to Russia concerning presence of Russian army forces in Manchuria contrary to agreement. [Text not made public] *N. Y. T.*, Mar. 8, 1946, p. 2. Russian Navy publication, "Red Fleet," acknowledged an agreement with China on Feb. 26 giving permission for forces to remain. Great Britain sent note March 9 supporting the U. S. position. *London Times*, March 11, 1946, p. 4. Text: *N. Y. T.*, Apr. 9, 1946, p. 16. Text of General Marshall's statement of March 16: *N. Y. T.*, Mar. 17, 1946, p. 12. Russian note of Mar. 22 to China stated that withdrawal of Russian troops would be completed by the end of April. *N. Y. T.*, Mar. 24, 1946, p. 1. Chinese Vice-Foreign Minister agreed to the April date. *London Times*, Mar. 28, 1946, p. 3. Chinese Communist leader proclaimed war against Nationalist forces Apr. 14. *N. Y. T.*, Apr. 15, 1946, pp. 1, 6. On Apr. 25 U. S. received Russian note rejecting U. S. proposal that Manchurian industries and other Japanese external assets be used for inter-Allied reparations, and repeating declaration concerning movable assets being considered as legitimate war booty. *N. Y. T.*, Apr. 26, 1946, p. 5. Russian forces were evacuated on May 3 according to Moscow radio. *N. Y. T.*, May 22, 1946, p. 3.
- 6 CANADA—GREAT BRITAIN. Signed agreement at Ottawa, on the settlement of war claims. Text: Canada. *Treaty Series*, 1946, No. 10.
- 6 CANADA—GREAT BRITAIN. Signed financial agreement at Ottawa. Text, with exchange of notes: Canada. *Treaty Series*, 1946, No. 9.
- 6 FRANCE—FRENCH INDO-CHINA. French authorities signed an agreement at Hanoi (the capital of Tonking) with Dr. Ho Chi Minh, leader of the Viet Minh provisional government in northern Indo-China, specifying that the Viet Minh [Viet Namh] Republic is recognized as a free state forming part of the Indo-Chinese federation. *London Times*, Mar. 8, 1946, p. 3.
- 6 JAPANESE CONSTITUTION. Text of preamble, rescript and General MacArthur's statement: *N. Y. T.*, Mar. 7, 1946, p. 3. Text of draft constitution: *N. Y. T.*, Mar. 9, 1946, p. 6.
- 6 NORWAY—SWITZERLAND. Signed commercial agreement. *C. I. E. D.*, Mar. 4/24, 1946, p. 176; *N. Y. T.*, Mar. 7, 1946, p. 12.

- 6/May 4 UNITED STATES—YEMEN. United States announced membership of the Special Diplomatic Mission to the Kingdom of Yemen. *D. S. B.*, March 17, 1946, p. 448. Concluded on May 4 a provisional agreement regarding diplomatic and consular representation, juridical protection, and commerce and navigation. *N. Y. T.*, May 15, 1946, p. 8; *D. S. B.*, May 26, 1946, p. 917.
- 7 ALBANIAN CONSTITUTION. The National Assembly of Albania adopted the new constitution, establishing a People's Republic. *C. I. E. D.*, Mar. 4, 1946, p. 153.
- 7/April 23 GERMAN MERCHANT MARINE. U. S. Department of State announced that the Tripartite Merchant Marine Commission, on disposal of the German merchant fleet, had made a report following meetings of the Commission in Berlin, Sept. 1—Dec. 7, 1945. The Commission was established in accordance with decisions made at the Berlin Conference, July—Aug. 1945. Summary of report: *L. S. B.*, Mar. 17, 1946, p. 445. Figures allotting vessels on percentage basis as released by the Inter-Allied Reparations Agency: *N. Y. T.*, Apr. 25, 1946, p. 7.
- 8 SOVIET RUSSIA—UNITED STATES. Department of State announced the policy of returning to Russia only those persons holding pre-war Soviet citizenship. Text of statement: *D. S. B.*, Mar. 17, 1946, p. 442; *N. Y. T.*, March 9, 1946, p. 3.
- 8 SYRIAN RECOGNITION. Announced by Turkey. *N. Y. T.*, Mar. 9, 1946, p. 4.
- 8/April 8 LEBANESE RECOGNITION. Announced by Turkey on March 8 and by the Vatican on April 8. *N. Y. T.*, Mar. 9, 1946, p. 4; April 9, p. 4.
- 8-18 INTERNATIONAL BANK FOR RECONSTRUCTION & DEVELOPMENT and INTERNATIONAL MONETARY FUND. Preparatory conference for the purpose of setting up the Bank and Fund opened March 8 at Wilmington Island, Ga. *N. Y. T.*, Mar. 9, 1946, pp. 1, 8. U. S. delegation: *D. S. B.*, Mar. 17, 1946, p. 433. On March 11, Fred M. Vinson was elected permanent chairman of the Boards of Governors of both organizations. *N. Y. T.*, Mar. 11, 1946, p. 3. Washington was chosen permanent headquarters. *N. Y. T.*, Mar. 15, 1946, p. 32. Conference closed March 18. Members of Boards: *N. Y. T.*, Mar. 19, 1946, p. 13.
- 11 BELGIUM—GREAT BRITAIN. Signed treaty at Brussels regarding privileges and facilities for British forces in Belgium in connection with the occupation of Germany and Austria. Text: *Belgium* No. 1 (1946), *Cmd.* 6790.
- 12 GREAT BRITAIN—SWITZERLAND. Signed 3-year monetary agreement to come into force immediately. *London Times*, Mar. 13, 1946, p. 4. Text: *G. B. T. S.* No. 6 (1946), *Cmd.* 6756.
- 15-May 9 U.N.R.R.A. COUNCIL. Fourth session opened Mar. 15 at Atlantic City. U.N.R.R.A. Council. *Journal*, Mar. 16, 1946. Table showing payments made by 47 member-nations: *N. Y. T.*, Mar. 18, 1946, p. 10. Mr. Lehman's final report recommended establishment of a single international food control board to deal with world famine, to be in continuous session if necessary, as long as the emergency lasts. *N. Y. T.*, Mar. 19, 1946, pp. 1, 12. Turkey was admitted to membership in the Administration, but Albania's application was refused. *N. Y. T.*, Mar. 23, 1946, p. 4. Voted against use of local supplies by an occupying force. *N. Y. T.*, Mar. 26, 1946, p. 1. Voted March 28 to continue care of nearly a million European refugees. *N. Y. T.*, Mar. 29, 1946, p. 1. Text of resolution: p. 4. Mr. F. H. La Guardia took office Mar. 29 as Director General and the meeting recessed. *N. Y. T.*, Mar. 30, 1946, p. 1. Text of Mr. La Guardia's address: p. 5. The session reconvened in Washington May 9 and adopted a resolution calling for improved methods in international food allocation machinery. *N. Y. T.*, May 10, 1946, p. 6. Text of resolution: *D. S. B.*, May 19, 1946, pp. 857-358.

- 16/April 5 DENMARK—SOVIET RUSSIA. Russia informed Denmark March 16 of its decision to withdraw its forces from Bornholm Island, and to restore the island to full Danish control. *London Times*, Mar. 18, 1946, p. 4; *N. Y. T.*, Mar. 17, 1946, p. 1. Final withdrawal took place April 5. *N. Y. T.*, Apr. 6, 1946, p. 4.
- 18 POLAND (National Unity Govt.)—YUGOSLAVIA. Signed a 20-yr. friendship and mutual assistance pact. Text: *London Times*, Mar. 21, 1946, p. 3; *D. S. B.*, May 26, 1946, p. 919.
- 18-April 5 HEALTH CONFERENCE. Seventeen nations opened session of the International Hygiene and Health Conference in Paris on March 18 to discuss sanitary problems. The conference is working under the direction of the United Nations Economic and Social Council. *N. Y. T.*, Mar. 19, 1946, p. 2. Formation of an international medical body which would unite the International Health Office, the Health Section of the League of Nations and that of U.N.R.R.A. was to be considered. *London Times*, March 19, 1946, p. 3. The conference closed April 5. *D. S. B.*, Apr. 21, 1946, p. 655.
- 19 SOVIET RUSSIA. Nikolai Mikhailovich Shvernik was elected chairman of the Praesidium of the U.S.S.R. to replace M. I. Kalinin. *N. Y. T.*, Mar. 20, 1946, p. 5.
- 19 SOVIET RUSSIA—SWITZERLAND. Switzerland announced resumption of diplomatic relations. *N. Y. T.*, Mar. 20, 1946, p. 5; *London Times*, Mar. 21, 1946, p. 3.
- 19-20 UNITED NATIONS. Security Council. Iranian formal communication to the United Nations accused Russia of maintaining armed forces in Iran after the deadline provided by their treaty, and of interfering in its internal affairs. *N. Y. T.*, Mar. 20, 1946, p. 1. Text: p. 4. Mr. Gromyko's note to Secretary General Lie requested postponement of 16 days in the opening date of the Council's sessions, and the United States requested that the dispute be placed at the top of the agenda. *N. Y. T.*, Mar. 21, 1946, p. 1. Texts of notes: p. 2.
- 20-May 8 KOREAN OCCUPATION. Joint U. S.—Soviet Commission for Korea held first meeting in Seoul, in an effort to establish an interim provisional government for Korea. *N. Y. T.*, Mar. 21, 1946, pp. 1, 15. Chairmen to alternate, and all meetings will be carried on in both languages, as well as all documents being printed in English and Russian. *N. Y. T.*, Mar. 24, 1946, p. 8. The Commission issued a joint communiqué on March 30 emphasizing the fact that its work is still in a preliminary phase. *N. Y. T.*, Mar. 31, 1946, p. 14. Communiqué of Apr. 18 announced an agreement to consult with Korean democratic parties and organizations. Summary: *N. Y. T.*, Apr. 19, 1946, p. 11. Communiqué of Apr. 24 announced some progress, but gave no details. *N. Y. T.*, Apr. 25, 1946, p. 9. The Commission adjourned indefinitely May 8, after being unable to agree on the issue of free speech for Koreans. *N. Y. T.*, May 9, 1946, p. 3.
- 21 GREAT BRITAIN—GREECE. Signed agreement for the restoration of money and property, hitherto subjected to control under wartime regulations, and belonging to their nationals, resident in and carrying on businesses in the United Kingdom and Greece respectively. *London Times*, Mar. 22, 1946, p. 4. Text: *G. B. T. S.* No. 8 (1946), *Cmd.* 6780.
- 22 GREAT BRITAIN—TRANS-JORDAN. Signed treaty of alliance at London, establishing sovereignty of Trans-Jordan. *N. Y. T.*, Mar. 23, 1946, p. 6; *London Times*, Mar. 23, 1946, p. 4. Text: *Trans-Jordan* No. 1 (1946), *Cmd.* 6779. Summary of treaty provisions: *N. Y. T.*, Mar. 29, 1946, p. 5.
- 25-April 5 FISHERIES CONFERENCE. Twelve nations and one observer were present at the International Overfishing Conference which was held in London. Text of Final Act and Convention: *G. B. M. S.* No. 7 (1946), *Cmd.* 6791.

**25-April 13 ARAB LEAGUE.** Third meeting of the Council opened at Cairo on March 25. *N. Y. T.*, Mar. 26, 1946, p. 14. Decided March 28 to establish a bank to be financed by the League members. *N. Y. T.*, Mar. 29, 1946, p. 12. Voted April 2 to establish a repatriation fund, which would be reimbursed by the several States whose citizens were returned to their homes. *N. Y. T.*, Apr. 3, 1946, p. 3. At its final session on Apr. 13, approved definition of common nationality for citizens of all Arab states, a proposal by King Farouk of Egypt on March 22. It will be submitted for ratification to the Arab Governments. *N. Y. T.*, Apr. 14, 1946, p. 9.

**25-May 14 UNITED NATIONS. Security Council.** Opened session in New York March 25. *N. Y. T.*, Mar. 26, 1946, p. 1. Named a subcommittee to study the Russo-Iranian dispute, and to report its findings and recommendations to the Council. *N. Y. T.*, Mar. 27, 1946, pp. 1, 4. On Mar. 27 when the Council voted to continue the Iranian question on its agenda, the Russian delegate left the meeting. *N. Y. T.*, Mar. 28, 1946, pp. 1, 21. On Apr. 4, voted to adjourn discussion of the Iranian dispute until May 6. *N. Y. T.*, Apr. 5, 1946, pp. 1, 3. The Polish delegate, on April 8, charged Spain with harboring Nazis. Text of letter: *N. Y. T.*, Apr. 11, 1946, p. 2. Adopted provisional rules of procedure April 9. Text: *D. S. B.*, Apr. 21, 1946, pp. 660-634. Mr. Gromyko was named Russian permanent member of the Council on April 10. *N. Y. T.*, Apr. 11, 1946, p. 1. Alexander Parodi was named as permanent French delegate on April 12. *N. Y. T.*, Apr. 13, 1946, p. 4. On April 13 the Spanish Cabinet denied Poland's accusation and invited a United Nations commission to investigate conditions in Spain. *N. Y. T.*, Apr. 13, 1946, p. 1. Text of note: p. 6. The Iranian Government announced on April 15 that Mr. Ala had been instructed to withdraw the complaint before the Council. Text of announcement: *London Times*, Apr. 16, 1946, p. 4; *N. Y. T.*, Apr. 16, 1946, p. 12. On April 16 it was decided to refer to a committee of experts, the question of the legality of continuing on the agenda the Iranian dispute. *N. Y. T.*, Apr. 17, 1946, p. 1. Poland presented its charge against Franco Spain on April 17. *N. Y. T.*, Apr. 18, 1946, pp. 1, 13. On April 18 Mr. Hodgson of Australia proposed the appointment of a committee to study the Spanish situation. *N. Y. T.*, Apr. 19, 1946, pp. 1, 12. Text of proposal: p. 12. The Committee of Experts reported that the Iranian case may remain on the agenda until May 7, pp. 1, 15. Text: p. 15. Voted April 23 to continue the case on the agenda. Mr. Gromyko stated he would not attend any session in which it was discussed. *N. Y. T.*, Apr. 24, 1946, p. 1. On April 29 set up a 5-nation subcommittee to investigate the Spanish régime and to report by May 31. *N. Y. T.*, Apr. 30, 1946, pp. 1, 6. Text of 9-point plan of inquiry: *N. Y. T.*, May 8, 1946, p. 3. On May 6 the Iranian Ambassador reported complete withdrawal of Soviet forces from all provinces except Azerbaijan, where it had not been possible to make official observations. *N. Y. T.*, May 7, 1946, p. 1. Text of Iranian Government statement: p. 4. On May 8 adopted a resolution asking that Iran report, not later than May 20, concerning Soviet withdrawal. *N. Y. T.*, May 9, 1946, p. 1. Mr. Hasluck of Australia demanded clarification of the entire veto issue and the action to be taken when a member absents himself, p. 1. Russian forces were withdrawn from Iran May 9, according to Russian radio report of May 23. *N. Y. T.*, May 24, 1946, p. 1. Mr. Parodi replaced Mr. Bonnet of France May 13. *N. Y. T.*, May 14, 1946, p. 8. On May 14 the Committee of Experts submitted 34 rules for the Council's consideration. Brief summary: *N. Y. T.*, May 15, 1946, p. 3. The Spanish Government-in-exile submitted data to support the claim that the Franco Government is a threat to world peace, p. 4.

**27 FRANCE—UNITED STATES.** Signed air transport agreement in Paris. *N. Y. T.*,



- Mar. 28, 1946, p. 16; *D. S. B.*, Apr. 7, 1946, p. 583; *London Times*, Mar. 28, 1946, p. 4. Text: *United States Aviation Reports*, March, 1946, pp. 142-157.
- 27 GREAT BRITAIN—UNITED STATES. Signed in Washington 18,000-word memorandum embracing 9 agreements for settling lend-lease and other wartime obligations. *N. Y. T.*, Mar. 28, 1946, p. 18; *D. S. B.*, Apr. 7, 1946, pp. 580-581; *London Times*, Mar. 27, 1946, p. 3. Text: *G. B. T. S.* No. 13 (1946); *Cmd.* 6813.
- 27 GREECE—UNITED STATES. Signed air transport agreement in Athens. *D. S. B.*, Apr. 7, 1946, p. 583; *N. Y. T.*, Mar. 28, 1946, p. 16.
- 27 UNITED NATIONS. Military Staff Committee. Held first business session in New York. *N. Y. T.*, Mar. 28, 1946, p. 10. Photograph: April 11, p. 3.
- 28 GERMAN OCCUPATION. Allied Control Council released in Berlin its plan for reparations and the future level of German economy. Text: *D. S. B.*, Apr. 14, 1946, pp. 636-639.
- 28 UNITED NATIONS. Economic and Social Council. The Senate confirmed the nomination of John G. Winant to be U. S. member. *Cong. Rec.* (daily) Mar. 28, 1946, p. 2795; *D. S. B.*, Apr. 7, 1946, p. 573.
- 28-April 11 ATOMIC ENERGY. State Department Committee Report on control of atomic energy was made public. Excerpts from Report: *N. Y. T.*, Mar. 29, 1946, p. 8; *D. S. B.*, Apr. 7, 1946, pp. 555-560. Text: Dept. of State *Publication* 2498. Text of Statement of April 9 on the measure of safety afforded by denaturants of atomic explosives: *D. S. B.*, Apr. 21, 1946, p. 668. Text of Statement of Apr. 11 issued by Senate Committee in regard to S. 1717 and containing a digest of the bill: *N. Y. T.*, Apr. 12, 1946, p. 12.
- 29 AIR NAVIGATION FACILITIES. President Truman issued Executive Order 9709 (11 Fed. Reg. 3389) concerning interim arrangements for air navigation facilities abroad. Text: *D. S. B.*, Apr. 21, 1946, p. 684.
- 29 ARGENTINA—UNITED STATES. Argentine reply to U. S. Blue Book [of Feb. 12] denied that it had aided the Nazis and stated it had complied with its duties as a member of the United Nations. *N. Y. T.*, Mar. 30, 1946, pp. 1, 8. Summary: *N. Y. T.*, Apr. 18, 1946, p. 18.
- 29 GOLD COAST COLONY. Orders-in-Council came into operation establishing a new constitution, under which the Colony became the first in Africa to be granted an unofficial majority for African members of its Legislature. *C. I. E. D.*, Mar. 25/Apr. 7, 1946, p. 200.
- 29 IRAQ—TURKEY. Signed agreement at Ankara, providing for collaboration in cultural, economic and security questions. *C. I. E. D.*, Mar. 25/Apr. 7, 1946, p. 211.
- 29-April 13 U.N.R.R.A.—ARGENTINA. Argentine Foreign Office announced that an invitation to become a member of U.N.R.R.A. had been declined, and that the country had no exportable wheat surplus. *N. Y. T.*, Mar. 30, 1946, p. 5; *London Times*, Mar. 30, 1946, p. 3. On April 13 the Foreign Minister stated that 120,000 tons of wheat would be available. *C. I. E. D.*, Apr. 8/21, 1946, p. 225.
- 29-May 10 AUSTRIAN OCCUPATION. Soviet authorities at Vienna earmarked certain areas as alleged "German assets" under the "Potsdam Agreement." *N. Y. T.*, March 30, 1946, p. 6. Announcement was made Apr. 5 of withdrawal of most Russian demands for land in its occupation zone. *N. Y. T.*, Apr. 6, 1946, p. 4. At the meeting on May 10 of the Control Council, Russia agreed to reduce occupation costs and to give U.N.R.R.A. oil needed for its Austrian program. *N. Y. T.*, May 11, 1946, p. 1.

- 30-May 7 UNITED STATES—YUGOSLAVIA. American Chargé at Belgrade sent note March 30 to the Yugoslav Foreign Office, pointing out that many U. S. airmen had been enabled to return to Allied lines because of assistance rendered by General Mihailovich's forces. Testimony of these individuals could have bearing upon charges of enemy collaboration which may be brought against the General by Yugoslav authorities. Text of note: *D. S. B.*, Apr. 14, 1946, p. 634; *N. Y. T.*, Apr. 3, 1946, pp. 1, 3. Yugoslav reply of April 4 refused request to permit American officers to testify at the trial. Text: *N. Y. T.*, Apr. 6, 1946, pp. 1, 4; *London Times*, Apr. 6, 1946, p. 4; *D. S. B.*, Apr. 21, 1946, pp. 669-670. Former King Peter sent letter April 8 to Secretary Byrnes urging intervention on behalf of General Mihailovich. Text: *N. Y. T.*, Apr. 12, 1946, p. 10. U. S. Note of May 7 renewed request. Text: *D. S. B.*, May 26, 1946, p. 909.
- 31-April 11 GREEK ELECTIONS. Elections were held March 31. Text of joint Anglo-American-French statement: *D. S. B.*, Apr. 7, 1946, p. 582. The Allied Mission for Observing the Greek Elections signed a unanimous report at Athens on April 10. Summary of report: *D. S. B.*, Apr. 21, 1946, pp. 671-673. Text: Dept. of State *Publication* 2522; *Greece* No. 3 (1946), *Cmd.* 6812. Personnel of U. S. group: *D. S. B.*, Jan. 27, 1946, pp. 129-130. Statement of Apr. 11, issued by the Mission, attested to a fair election. Text: *N. Y. T.*, Apr. 12, 1946, p. 10.
- April, 1946
- 1 AMERICAN REPUBLICS. Under date of April 1 the United States sent a memorandum to the other Republics, except Argentina, on the situation in the latter country. The document advocated the inclusion of Argentina in any plans for hemispheric unity and defense. Text: *D. S. B.*, Apr. 21, 1946, pp. 666-667.
- 1 IRAQ-YEMEN. Signed extradition and trade agreements at Cairo. *London Times*, Apr. 3, 1946, p. 3.
- 1/3 EGYPT—GREAT BRITAIN. Text of correspondence exchanged at Cairo concerning the prolongation of existing arrangements regarding Egyptian foreign exchange requirements: *Egypt* No. 2 (1946), *Cmd.* 6792.
- 1-16 LABOR CONFERENCE OF AMERICAN STATES. Third regional conference of American states members of the I. L. O. met at Mexico City. U. S. delegation: *D. S. B.*, Apr. 7, 1946, p. 566. Adopted 27 resolutions. *N. Y. T.*, Apr. 17, 1946, p. 18; *D. S. B.*, Apr. 28, 1946, p. 711.
- 2 CANADA—UNITED STATES. Signed convention at Washington providing for the development, protection and conservation of the Great Lakes fisheries. Texts of Convention and Schedules: *Cong. Rec.* (daily) Apr. 22, 1946, pp. 4169-4171; Canada. *Treaty Series*, 1946, No. 13.
- 3-6 FOOD CONFERENCE. Emergency conference on European cereal supplies opened in London Apr. 3 with representatives from 17 nations and from several international organizations concerned with food. List of countries and organizations present: *London Times*, Apr. 4, 1946, p. 4. Russia and Yugoslavia rejected invitations. *N. Y. T.*, Apr. 2, 1946, p. 4. The conference closed Apr. 6. *C. I. E. D.*, Mar. 25/Apr. 7, 1946, p. 217.
- 3-18 INTERNATIONAL COURT OF JUSTICE. Thirteen judges of the Court met in private for their first session in the Peace Palace at The Hague. *London Times*, Apr. 4, 1946, p. 4; *N. Y. T.*, Apr. 4, 1946, p. 2. At the session of April 6 José Gustavo Guerrero of El Salvador was elected President, Jules Basdevant Vice President and Edvard Hambro, Jr., Registrar. *N. Y. T.*, Apr. 6, 1946, p. 18; *C. S. Monitor*, Apr. 6, 1946, p. 2. Its first regular sitting was held April 18. *N. Y. T.*, Apr. 19, 1946, p. 16; *D. S. B.*, May 5, 1946, p. 757.

- 4 BRAZIL. Foreign Minister issued memorandum stating that Brazil would continue friendly relations with Argentina, and had no wish to exclude that country from any mutual defense treaty for the Western Hemisphere. The memorandum is in the nature of a reply to the U. S. Blue Book of Feb. 12. Text: *N. Y. T.*, Apr. 5, 1946, p. 12.
- 4/6 ALBANIA—GREAT BRITAIN. Great Britain announced that because of the unfriendly attitude of the Albanian Government, the British Ambassador-designate would not proceed to Tirana, nor would an Albanian envoy be received. *London Times*, Apr. 5, 1946, p. 4; *N. Y. T.*, Apr. 5, 1946, p. 5. A broadcast of Apr. 6 from Tirana stated that the British Government was misinformed and proposed friendship. *N. Y. T.*, Apr. 7, 1946, p. 17.
- 4/May 7 INTERNATIONAL BANK FOR RECONSTRUCTION & DEVELOPMENT. Denmark became the 38th member on April 4. *N. Y. T.*, Apr. 5, 1946, p. 12. Executive Directors held first meeting on May 7. Members: *D. S. B.*, May 19, 1946, p. 856.
- 5 BELGIUM—UNITED STATES. Signed air transport services agreement at Brussels. *D. S. B.*, Apr. 14, 1946, p. 633. Text is substantially that of the air transport agreement concluded by the U. S. and the United Kingdom on Feb. 11, 1946 which was published in the Bulletin of April 7. Exceptions: *D. S. B.*, Apr. 21, 1946, p. 683. Text: *United States Aviation Reports*, March, 1946, pp. 158-170.
- 5 CZECHOSLOVAKIA—POLAND (National Unity Govt.). Announcement was made in Warsaw of Polish refusal to surrender to Czechoslovakia any part of the territory newly acquired from Germany. *London Times*, Apr. 6, 1946, p. 3.
- 5 FRANCE—GERMANY. After a Cabinet meeting the French Government announced confirmation of the policy previously laid down for western Germany—(1) Ruhr should be separated and placed under international government, (2) the Rhineland should be given an autonomous status within Germany, (3) the Saar should be recognized as an area where France had special and far-reaching economic rights and interests. *C. I. E. D.*, Mar. 25/Apr. 7, 1946, p. 197.
- 5 GREAT BRITAIN—IRELAND. Signed an air transport agreement in London. *London Times*, Apr. 6, 1946, p. 2. Text: *Cmd.* 6793.
- 5 INTERNATIONAL COURT OF JUSTICE—UNITED STATES. In a letter to Raymond Swing, Secretary of State Byrnes announced that the Department of State favored U. S. acceptance of compulsory jurisdiction of the Court and stated that President Truman also favored it. Text of letter: *D. S. B.*, Apr. 14, 1946, p. 633. Partial text: *N. Y. T.*, Apr. 6, 1946, p. 3.
- 5 POLAND (National Unity Govt.)—SPAIN (in exile). Announcement of Polish Government's decision to establish diplomatic relations with the Government headed by José Giral. *N. Y. T.*, Apr. 6, 1946, p. 2.
- 5 RUMANIA—SPAIN. Diplomatic relations were broken off by Rumania. *C. I. E. D.*, Mar. 25/Apr. 7, 1946, p. 209; *N. Y. T.*, Apr. 6, 1946, p. 2.
- 5/21 ALLIED COUNCIL FOR JAPAN. Met in Tokyo for the first time with British, French, Chinese, Russian and American members. Members and text of MacArthur's address: *N. Y. T.*, Apr. 5, 1946, p. 15. General MacArthur announced that George Atcheson, Jr., would become American member and chairman of the Council. *N. Y. T.*, Apr. 22, 1946, p. 7.
- 7/8 REPARATIONS (Hungarian). Announcement from Prague of an agreement between Hungary, Russia, Czechoslovakia and Yugoslavia on reparations from Hungary. *N. Y. T.*, Apr. 8, 1946, p. 4. Premier Nagy announced extension from 6 to 8 years of the period in which Hungary is required to pay reparations to Russia. *N. Y. T.*, Apr. 19, 1946, pp. 1, 17.

- 8 GREAT BRITAIN—IRAQ. Text of correspondence exchanged at Bagdad concerning the prolongation of existing arrangements regarding Iraqi exchange requirements: *Iraq* No. 2 (1946), *Cm.d.* 6803.
- 8 HAITIAN RECOGNITION. Announced by Panama and the United States. Chile and Honduras had previously granted recognition. *N. Y. T.*, Apr. 9, 1946, p. 14; *D. S. B.*, Apr. 21, 1946, p. 682.
- 8-18 LEAGUE OF NATIONS. ASSEMBLY. 21st and final session opened at Geneva on Apr. 8. Dr. Carl Hambro of Norway presided. Austrian application to be admitted was received and the 20th session, adjourned Dec. 14, 1939, was declared closed. *London Times*, Apr. 9, 1946, p. 4. *N. Y. T.*, Apr. 9, 1946, p. 3. Brief summary of Lord Cecil's remarks; *London Times*, Apr. 10, 1946, p. 3. Subcommittee decided to reject Austria's application on the ground it had ceased to be a member in 1938, although the German annexation was never recognized. *N. Y. T.*, Apr. 11, 1946, p. 2. Voted to transfer to the United Nations custody of the original texts of international agreements deposited with the League or contracted with it. *London Times*, Apr. 11, 1946, p. 3. Discussed the future of mandates. *London Times*, Apr. 12, 1946, p. 4. On Apr. 12 invited Austria to send an observer to this final Assembly. *N. Y. T.*, Apr. 12, 1946, p. 6; *London Times*, Apr. 13, 1946, p. 3. At final session on Apr. 18 delegates from 34 nations voted to disband the League and to turn over to the United Nations its assets valued at more than \$11,000,000. *N. Y. T.*, Apr. 19, 1946, pp. 1, 16.
- 8-May 4 REFUGEES & DISPLACED PERSONS. United Nations Special Committee on Refugees and Displaced Persons opened meetings in London Apr. 8. Hector McNeil was elected chairman. Geo. Warren was the U. S. representative. *N. Y. T.*, Apr. 9, 1946, p. 3. Members of the Committee: *D. S. B.*, Apr. 21, 1946, p. 664. Brazil offered Apr. 16 to receive a large number of European refugees. *N. Y. T.*, Apr. 17, 1946, p. 15. Voted May 2 to recommend creation of an agency outside the United Nations framework to handle resettlement of displaced persons. *D. S. B.*, May 19, 1946, p. 865; *London Times*, May 3, 1946, p. 3. Agreed May 4 to appoint a subcommittee to study "outstanding points on the speedy repatriation of refugees and displaced persons of European origin." *N. Y. T.*, May 5, 1946, p. 34.
- 9 CANADA—FRANCE. Signed financial agreement at Ottawa, extending to France a credit of \$242,500,000. *N. Y. T.*, Apr. 10, 1946, p. 7; *London Times*, Apr. 10, 1946, p. 4. Text: Canada. *Treaty Series*, 1946, No. 14.
- 10 ALLIED CONTROL COUNCIL FOR GERMANY. Russia announced appointment of General Vassily D. Sokolovsky to succeed Marshal Zhukov as member of the Council. *N. Y. T.*, Apr. 11, 1946, p. 14; *London Times*, Apr. 11, 1946, p. 4.
- 10 AUSTRALIA—SIAM. Signed at Bangkok a 15-point agreement, ending the state of war. *London Times*, Apr. 13, 1946, p. 3.
- 10 JAPANESE ELECTIONS. First elections were held since the end of the war. Results: *N. Y. T.*, Apr. 13, 1946, p. 12.
- 11 EGYPT—YEMEN. Signed treaty of friendship at Cairo, providing for an exchange of diplomatic personnel. *N. Y. T.*, Apr. 12, 1946, p. 5.
- 12 INDONESIA. Joint communiqué by British and Dutch Governments announced agreement had been reached on measures for liquidation of the war and gradual withdrawal of British troops in Indonesia and their replacement by Dutch troops. *N. Y. T.*, Apr. 13, 1946, p. 12.

- 16 GREAT BRITAIN—PORTUGAL. Signed financial agreement granting to Portugal a £5,000,000 credit. *N. Y. T.*, Apr. 17, 1946, p. 5. Text: *G. B. T. S.* No. 9 (1946), *Cmd.* 6798.
- 16-29 ATOMIC ENERGY. Members of the United Nations Atomic Energy Commission appointed up to April 16: *N. Y. T.*, Apr. 17, 1946, p. 7. Dr. Pedro Leao Velloso of Brazil was named April 23. *N. Y. T.*, Apr. 24, 1946, p. 6. Russia appointed Mr. Gromyko on April 29. *N. Y. T.*, Apr. 30, 1946, p. 1.
- 17 BELGIUM—GREAT BRITAIN. Signed cultural relations agreement at Brussels. *London Times*, Apr. 18, 1946, p. 3.
- 17/May 15 JAPANESE OCCUPATION. General MacArthur's statement, presented to the Allied Council for Japan, indicated its functions are "exclusively advisory and consultative." A request for advance notice of a week on directives was declined by General MacArthur. *N. Y. T.*, Apr. 18, 1946, p. 4. On May 15 the American Chairman of the Council stated that the United States did not favor communism in the United States or in Japan. *N. Y. T.*, May 16, 1946, p. 15. Text of remarks: p. 15.
- 18 PERMANENT COURT OF INTERNATIONAL JUSTICE. Dissolved by vote of the final Assembly of the League of Nations. *N. Y. T.*, Apr. 19, 1946, p. 16.
- 18 YUGOSLAV RECOGNITION. Secretary of State Byrnes announced U. S. recognition of Marshal Tito's government, with reservation. *N. Y. T.*, Apr. 19, 1946, pp. 1, 8; *D. S. B.*, Apr. 28, 1946, p. 728.
- 19/May 5 FRENCH CONSTITUTION. The Constituent Assembly adopted the new Constitution by 309-249 vote. *N. Y. T.*, Apr. 20, 1946, p. 1. English translation of text: *N. Y. T.*, Apr. 23, 1946, p. 12. The proposed Constitution was rejected by the electorate on May 5. *N. Y. T.*, May 6, 1946, p. 1.
- 20 CANADA—FRANCE. Announced conclusion of an agreement for releasing to their French owners properties in Canada that had been under the control of the Canadian custodian since the fall of France in 1940. *London Times*, Apr. 22, 1946, p. 3.
- 22 STONE, HARLAN FISKE. Chief Justice of the United States died, aged 73 years. *N. Y. T.*, April 23, 1946, pp. 1, 18.
- 23-May 23 BRITISH COMMONWEALTH CONFERENCE. Foreign Ministers of the Dominions opened meetings April 23 in London, with discussions of world peace treaties, and world politics. *London Times*, Apr. 24, 1946, p. 4; *N. Y. T.*, Apr. 24, 1946, p. 4. South Pacific defense, common defense needs, coöperation in the field of economic and welfare development in Pacific areas were other subjects under consideration. *London Times*, Apr. 25, 1946, p. 4; May 4, p. 4; *N. Y. T.*, Apr. 25, 1946, p. 3. Outline plan for defense needs: *London Times*, Apr. 27, 1946, p. 4. The conference closed May 23. *N. Y. T.*, May 24, 1946, p. 1.
- 24 AVIATION CONFERENCE. European Route Service Conference of the Provisional International Civil Aviation Organization opened in Paris. Twenty-nine delegations and organizations were represented. This is the second of eight area conferences contemplated. *N. Y. T.*, Apr. 26, 1946, p. 8. U. S. delegation: *D. S. B.*, Apr. 28, 1946, p. 713.
- 24 CREDITS—CZECHOSLOVAKIA & LUXEMBOURG. U. S. Treasury Department announced unfreezing of assets of Czechoslovakia and Luxembourg. *N. Y. T.*, Apr. 26, 1946, p. 15.
- 24 POLAND (National Unity Govt.)—UNITED STATES. Effected by exchange of notes at Washington an agreement for a loan of \$90,000,000 to Poland in return for as-

- surances of free elections in Poland, and non-discriminatory principles in economic relations between the two countries. *C. S. Monitor*, Apr. 25, 1946, p. 4; *N. Y. T.*, Apr. 25, 1946, pp. 1, 4. Texts of notes: p. 4; *D. S. B.*, May 5, 1946, pp. 761-762, 773.
- 25 CANADA—FRANCE. Announced that Canada had granted a \$240,000,000 loan to France for purchases to be made in Canada. *London Times*, Apr. 26, 1946, p. 3.
- 25 INTER-PARLIAMENTARY CONFERENCE. Opened at Copenhagen with delegates present from 16 countries. U. S. and Russia were not represented. *N. Y. T.*, Apr. 26, 1946, p. 3.
- 25-May 16 COUNCIL OF FOREIGN MINISTERS. Secretary Byrnes, Secretary Bevin, Foreign Minister Bidault and Foreign Minister Molotov opened meetings in Paris on April 25. Agreed that all nations should participate in discussions on all peace treaties. Only signatories to an armistice could vote on the peace treaty to replace that armistice. *N. Y. T.*, Apr. 26, 1946, pp. 1, 2. Agreed Apr. 26 on machinery for studying the question of Italian reparations. *N. Y. T.*, Apr. 27, 1946, pp. 1, 2. U. S. delegation: *D. S. B.*, Apr. 28, 1946, p. 711. Agreed Apr. 27 to limit strictly the future size of the Italian fleet. *N. Y. T.*, Apr. 28, 1946, p. 1. Mr. Bevin proposed Apr. 29 that Libya be made an independent state. Mr. Molotov suggested trusteeships for the Italian colonies with each of the Big-4 controlling one. Mr. Byrnes proposed a 25-year 4-power treaty with Germany and suggested a similar treaty with Japan. *N. Y. T.*, Apr. 30, 1946, p. 1. Text of proposed German treaty: p. 2; *D. S. B.*, May 12, 1946, pp. 815-816. Agreed Apr. 30 that no major frontier changes in the South Tyrol would be considered. *N. Y. T.*, May 1, 1946, pp. 1, 4. Mr. Byrnes proposed reduction of Allied forces in Austria, but Mr. Molotov, presiding, ruled that the matter of Austrian occupation could not be considered in connection with the Italian peace treaty. *N. Y. T.*, May 2, 1946, p. 1. Mr. Byrnes demanded May 2 a revision of armistice terms for Axis partners and warned that the United States did not intend to pay out money for relief, so that the receiver might then pay reparations. *N. Y. T.*, May 3, 1946, pp. 1, 4. Decided Pelagosa Island in the Adriatic should go to Yugoslavia, and that Pianosa should remain Italian. *London Times*, May 3, 1946, p. 4. Italian and Yugoslav leaders presented their claims to the Istrian peninsula on May 3. *N. Y. T.*, May 4, 1946, pp. 1, 6. Memorandum was announced May 6 in which Italy set forth the monetary value of her contribution to the Allied war effort, and stated her inability to pay reparations. *N. Y. T.*, May 7, 1946, p. 4. Mr. Byrnes proposed on May 8 that a 21-nation peace conference should assemble in June. *N. Y. T.*, May 9, 1946, pp. 1, 10. *London Times*, May 9, 1946, p. 4. Awarded to Rumania all of Transylvania which had been in Hungary's possession since Hitler's Diktat of 1940. *N. Y. T.*, May 8, 1946, p. 1; *London Times*, May 8, 1946, p. 4. Agreed May 10 on Italian administration of its former colonies under a United Nations trusteeship, and on the establishment of a war crimes commission for Italy. *N. Y. T.*, May 11, 1946, pp. 1, 18. Recessed May 16 to June 15, after initialing a revised armistice for Italy, and voting to investigate the progress of German disarmament. *N. Y. T.*, May 17, 1946, p. 1; *London Times*, May 17, 1946, p. 4. Texts of Mr. Byrnes' report and Mr. Molotov's statement: *N. Y. T.*, May 21, 1946, p. 4; May 28, p. 16.
- 26 BULGARIA—SPAIN. Diplomatic relations were broken off by Bulgaria. *N. Y. T.*, Apr. 27, 1946, p. 3.
- 29 FRANCE—GREAT BRITAIN. Signed agreement at London, supplementary to the Anglo-French financial agreement of March 27, 1945. Text: *G. B. T. S.* No. 12 (1946), *Cmd.* 6809.

- 29 GERMAN OCCUPATION. Allied Control Council approved Law No. 25, banning German science from research in any military fields. Applied nuclear physics, including atomic experimentation, were specifically forbidden. *N. Y. T.*, Apr. 30, 1946, pp. 1, 3.
- 29/May 13 UNITED NATIONS. Economic and Social Council. Four of the six Commissions held their first meetings in New York. *N. Y. T.*, Apr. 30, 1946, pp. 8, 9. Subcommittee on the Status of Women of the Commission on Human Rights adopted May 13 a full report covering a policy program and composition of a permanent Commission on the Status of Women. *N. Y. T.*, May 14, 1946, p. 10.
- 29-MAY 13 INTERNATIONAL MILITARY TRIBUNAL (Far East). International Prosecutor Joseph B. Keenan read 55-count indictment April 29 at session in Tokyo at the trial of 28 Japanese leaders charged with war crimes. *N. Y. T.*, Apr. 29, 1946, p. 1. List of defendants: p. 11. 26 of the accused were arraigned May 3. *N. Y. T.*, May 3, 1946, pp. 1, 10; *London Times*, May 4, 1946, p. 3. Photograph of members of the Tribunal: *N. Y. T.*, May 1, 1946, p. 8. On May 6 27 prisoners pleaded not guilty. The trial will open June 3. *N. Y. T.*, May 7, 1946, p. 3. Defense lawyer contended May 13 that the Japanese surrender had not been "unconditional." *N. Y. T.*, May 13, 1946, p. 16.
- May, 1946
- 1 CHINA. Nanking became again officially the capital. *N. Y. T.*, May 2, 1946, p. 10.
- 1 NETHERLANDS—UNITED STATES. Signed agreement in Washington for a 200-million dollar loan to the Netherlands. *London Times*, May 3, 1946, p. 3.
- 1 PROPERTY (German & Japanese). Argentine Embassy in Washington announced that the Farrell Government would proceed to liquidate by means of auctions German and Japanese assets. *N. Y. T.*, May 2, 1946, p. 11.
- 2-3 INDONESIA. Dutch Minister of Overseas Territories announced a preliminary draft agreement providing for an Indonesian Republic as part of a Federated Commonwealth of Indonesia. *N. Y. T.*, May 3, 1946, p. 10; *London Times*, May 3, 1946, p. 3. Text of announcement: *Netherlands News Letter* (N. Y.) May 10, 1946, No. 4. The Report of the Dutch Parliamentary commission which has been studying the situation in the Netherlands East Indies was published May 3. *London Times*, May 4, 1946, p. 3.
- 3 SYRIA & THE LEBANON. Great Britain and France gave formal notice to the United Nations Security Council that all their troops will have been evacuated from Syria and Lebanon by Aug. 31, except for a few French officers and technicians to supervise transport. *N. Y. T.*, May 4, 1946, p. 1.
- 5-12 INDIA. Tripartite conference of Hindu and Moslem leaders and members of the British Cabinet Mission held meetings at Simla to discuss plans for granting greater independence to India. *N. Y. T.*, May 6, 1946, p. 1. Text of two formal communiqués announcing end of negotiations: *N. Y. T.*, May 13, 1946, pp. 1, 5; *London Times*, May 13, 1946, p. 4. Principal documents in the Simla Conference correspondence which were released May 18: India Information Services [*Press release*] (Washington) May 20, 1946.
- 6 GREAT BRITAIN—UNITED STATES. Exchanged notes regarding the conclusion of a formal agreement covering use of bases in the Caribbean area and Bermuda. *D. S. B.*, May 19, 1946, p. 864.
- 6 INTER-AMERICAN MILITARY COÖPERATION. President Truman transmitted a bill to Congress under which the United States would assist other American Republics in the training, organization and equipment of their armed forces. *N. Y. T.*, May

- 7, 1946, p. 1. Text of message: p. 2. Texts: *Cong. Rec.* (daily) May 6, 1946, pp. 4611-4613.
- 6 INTERNATIONAL MONETARY FUND. Held first meeting in Washington, and elected Camille Gutt of Belgium as managing director. *N. Y. T.*, May 7, 1946, p. 29.
- 7 TURKEY—UNITED STATES. Signed agreement at Ankara providing for the final settlement of Turkey's lend-lease account. Summary of terms: *D. S. B.*, May 19, 1946, p. 868.
- 7-22 RADAR CONFERENCE. Conference on the application of radar and other radio devices to aid surface navigation opened at London May 7, with representatives present from 22 countries. *N. Y. T.*, May 8, 1946, p. 11; *London Times*, May 8, 1946, p. 2. Closed May 22. *C. S. Monitor*, May 22, 1946, p. 2.
- 9-10 ITALY. King Victor Emanuel III abdicated in favor of his son, after a reign of nearly 46 years. *N. Y. T.*, May 10, 1946, p. 1; *London Times*, May 10, 1946, p. 4. King Humbert II in a proclamation issued May 10 stated that the election of June 2 would determine the future form of the State. [He will not take the oath of office as King unless the monarchy is confirmed by the election.] *N. Y. T.*, May 11, 1946, p. 12.
- 11 PACIFIC ISLANDS. Announcement that U. S. had made known its desire to obtain sovereignty over the British islands in the Pacific, namely: Canton (at present jointly controlled), Christmas and Funafuti. *N. Y. T.*, May 12, 1946, p. 1. Map: p. 25.

#### MULTIPARTITE CONVENTIONS

##### AIR SERVICES TRANSIT AGREEMENT. Chicago, Dec. 7, 1944.

###### Acceptances:

- Philippine Islands (with reservation).  
Venezuela. *D. S. B.*, Apr. 28, 1946, p. 715.

##### AIR TRANSPORT AGREEMENT. Chicago, Dec. 7, 1944.

###### Acceptances:

- Dominican Republic. Jan. 25, 1946. *D. S. B.*, Mar. 10, 1946, p. 377.  
Greece (with reservation) Feb. 28, 1946. *D. S. B.*, Apr. 28, 1946, p. 715; *U. S. Aviation Reports*, 1946, Supplement, p. 2.  
Venezuela. Mar. 28, 1946. *D. S. B.*, Apr. 23, 1946, p. 715; *U. S. Aviation Reports*, 1946, Supplement, p. 2.  
Article IV, sect. 3 came into force with respect to China, Feb. 20, 1946. *U. S. Aviation Reports*, 1946, Supplement, p. 2.

##### AVIATION. Interim Agreement. Chicago, Dec. 7, 1944.

###### Acceptances:

- Dominican Republic. Jan. 25, 1946. *D. S. B.*, Mar. 10, 1946, p. 377.  
Philippine Islands (with reservation). *D. S. B.*, Apr. 28, 1946, p. 715.  
Venezuela. *D. S. B.*, Apr. 28, 1946, p. 715.  
Reservation withdrawn:  
United Kingdom, respecting Denmark. *D. S. B.*, Apr. 28, 1946, p. 715.

##### AVIATION CONVENTION. Chicago, Dec. 7, 1944.

###### Ratifications deposited:

- Canada. Feb. 13, 1946.  
China. Feb. 20, 1946.  
Dominican Republic. Jan. 25, 1946. *D. S. B.*, Mar. 10, 1946, p. 377.  
Peru. Apr. 8, 1946. *D. S. B.*, Apr. 28, 1946, p. 715.



INTERNATIONAL BANK FOR RECONSTRUCTION & DEVELOPMENT. Washington, Dec. 27, 1945. Status of signatures and deposit of ratifications, as of Mar. 22, 1946: *D. S. B.*, March 31, 1946, p. 528. Text: *T. I. A. S.* No. 1502.

INTERNATIONAL MONETARY FUND. Washington, Dec. 27, 1945. Status of signatures and deposit of ratifications, as of Mar. 22, 1946: *D. S. B.*, Mar. 31, 1946, p. 528. Text: *T. I. A. S.* No. 1501.

PRIVILEGES AND IMMUNITIES, UNITED NATIONS. London, Feb. 13, 1946. Draft convention approved by the General Assembly of the United Nations. Text, with certain resolutions: *G. B. M. S.* No. 6 (1946), *Cmd.* 6753.

SANITARY CONVENTION. Paris, June 21, 1926. Amendment, Washington, Jan. 5, 1945. Accession: Belgium (effective Jan. 25, 1946). *D. S. B.*, Mar. 17, 1946, p. 451.

SANITARY CONVENTION. Paris, June 21, 1926. Modification, Paris, Oct. 31, 1938. Ratification deposited: Brazil. July 19, 1945. *D. S. B.*, Feb. 24, 1946, p. 299.

SANITARY CONVENTION FOR AIR NAVIGATION. The Hague, April 12, 1933. Amendment. Washington, Jan. 5, 1945. Accession: Belgium (effective Jan. 25, 1946). *D. S. B.*, Mar. 17, 1946, p. 451; *U. S. Aviation Reports*, 1946, Supplement, p. 3.

SANITARY CONVENTION FOR AIR NAVIGATION. The Hague, April 12, 1933. Amendment, Washington, Jan. 5, 1945. Protocol, Washington, April 23, 1946. Signatures: New Zealand. Apr. 23, 1946. Belgium (with reservation). Apr. 24, 1946. Canada. Apr. 25, 1946. Nicaragua. Apr. 26, 1946. Great Britain and Northern Ireland. Apr. 29, 1946. United States (with reservation), Greece, China, Luxembourg, Ecuador, Australia (with reservation), Haiti, France. April 30, 1946. Text: *Cong. Rec.* (daily) May 29, 1946, pp. 6030-6031; *D. S. B.*, May 19, 1946, pp. 869-870. Came into force between certain countries April 30, 1946: p. 869.

SANITARY CONVENTION. Paris, June 21, 1926. Amendment, Washington, Jan. 5, 1945. Protocol, Washington, April 23, 1946. Signatures: New Zealand. Apr. 23, 1946. Belgium (with reservation). Apr. 24, 1946. Canada. Apr. 25, 1946. Nicaragua. Apr. 26, 1946. Great Britain and Northern Ireland. Apr. 29, 1946. United States (with reservation), Greece, China, Luxembourg, Ecuador, Australia (with reservation), Haiti, France. Apr. 30, 1946. Text: *Cong. Rec.* (daily) May 29, 1946, pp. 6029-6030; *D. S. B.*, May 19, 1946, pp. 869-870. Came into force between certain states on Apr. 30, 1946: p. 869.

SUGAR PRODUCTION AND MARKETING. Protocol, London, Aug. 31, 1945. Promulgation: United States. May 7, 1946. Ratification: United States. Apr. 29, 1946.

Ratification deposited: United States. May 1, 1946. *D. S. B.*, May 19, 1946, p. 867.  
Signatures and Text: *Cong. Rec.* (daily) Apr. 17, 1946, pp. 3945-3946.

TELECOMMUNICATIONS. Bermuda, December 4, 1945. Came into force between all signatories following recent acceptances by Australia and the United Kingdom. *D. S. B.*, Apr. 28, 1946, p. 714.

TRADE MARKS REGISTRATION. Madrid, Apr. 14, 1891. Revision, London, June 2, 1934.  
Adhesion: Luxembourg (effective March 1, 1946). *D. S. B.*, March 31, 1946, p. 514.

U. N. E. S. C. O. London, Nov. 16, 1945.

Acceptance deposited: Great Britain. Feb. 20, 1946, *D. S. B.*, March 31, 1946, p. 508.

U. N. R. R. A. Washington, Nov. 9, 1943

Ratification:

Uruguay. Aug. 15, 1945.

Ratification deposited:

Uruguay. Jan. 8, 1946. *D. S. B.*, Feb. 24, 1946, p. 281.

UNIVERSAL POSTAL CONVENTION. Buenos Aires, May 23, 1939.

Adherence: Czechoslovakia (effective June 28, 1945). *D. S. B.*, March 3, 1946, p. 350.

WAR CRIMES. London, August 8, 1945.

Accessions:

India (effective Dec. 22, 1945).

Uruguay (effective Dec. 11, 1945). *D. S. B.*, June 2, 1946, p. 954.

DOROTHY R. DART

## JUDICIAL DECISIONS

### JOYCE v. DIRECTOR OF PUBLIC PROSECUTIONS \*

HOUSE OF LORDS

[February 1, 1946]<sup>1</sup>

Held, (1) that an alien who had resided in this country could be guilty of treason in respect of an act committed outside the realm; that the appellant while in the realm owed allegiance to the Crown; that by the receipt of the passport he extended the duty of allegiance beyond the moment when he left the shores of this country; and that so long as he held the passport he was, within the meaning of the statute of 1351, a person who, if he adhered to the King's enemies in the realm or elsewhere, committed an act of treason; (2) that the Courts had jurisdiction to try the appellant; (3) that from the summing-up the jury could not have failed to appreciate that it was for them to consider whether the passport remained at all times in the possession of the appellant; (4) that as the appellant had admittedly adhered to the King's enemies outside the realm he had been rightly convicted of treason.

THE LORD CHANCELLOR.—My Lords, on November 7, 1945, the Court of Criminal Appeal dismissed the appeal of the appellant, William Joyce, who had on September 19, 1945, been convicted of high treason at the Central Criminal Court and duly sentenced to death. The Attorney-General certified under section 1 (6) of the Criminal Appeal Act, 1907, that the decision of the Court of Criminal Appeal involved a point of law of exceptional public importance and that in his opinion it was desirable in the public interest that a further appeal should be brought. Hence this appeal is brought to your Lordships' House. And, though in accordance with the usual practice the certificate of the Attorney-General does not specify the point of law raised in the appeal, it is clear that the question for your Lordships' determination is whether an alien who has been resident within the realm can be held guilty and convicted in this country for high treason in respect of acts committed by him outside the realm. This is, in truth, a question of law of far-reaching importance.

The appellant was charged at the Central Criminal Court on three counts, on the third of which only he was convicted. That count was as follows:  
Statement of offence.

High treason by adhering to the King's enemies elsewhere than in the King's realm, to wit, in the German realm, contrary to the Treason Act, 1351.

Particulars of offence.

William Joyce, on September 18, 1939, and on divers other days thereafter and between that day and July 2, 1940, being then—to wit, on the several days—a person owing allegiance to our Lord the King, and whilst on the said several days an open and public war was being prosecuted and carried

\* *The Times Law Reports*, Vol. 62, No. 10, p. 208.

<sup>1</sup> Decision was reported on December 18, 1945; this JOURNAL, Vol. 40, No. 1 (January, 1946), p. 210, and note.

on by the German realm and its subjects against our Lord the King and his subjects; then and on the said several days traitorously contriving and intending to aid and assist the said enemies of our Lord the King against our Lord the King and his subjects did traitorously adhere to and aid and comfort the said enemies in parts beyond the seas without the realm of England, to wit, in the realm of Germany by broadcasting to the subjects of our Lord the King propaganda on behalf of the said enemies of our Lord the King.

The first and second counts, on which the appellant was found not guilty, were based on the assumption that he was at all material times a British subject. This assumption was proved to be incorrect; therefore on these counts the appellant was rightly acquitted.

The material facts are few. The appellant was born in the United States of America in 1906, the son of a naturalized American citizen who had previously been a British subject by birth. He thereby became himself a natural born American citizen. At about three years of age he was brought to Ireland, where he stayed until about 1921, when he came to England. He stayed in England until 1939. He was then 33 years of age. He was brought up and educated within the King's Dominions, and he settled there. On July 4, 1933, he applied for a British passport, describing himself as a British subject by birth, born in Galway. He asked for the passport for the purpose of holiday touring in Belgium, France, Germany, Switzerland, Italy, and Austria. He was granted the passport for a period of five years. The document was not produced, but its contents were duly proved. In it he was described as a British subject. On September 26, 1938, he applied for a renewal of the passport for a period of one year. He again declared that he was a British subject and had not lost that national status. His application was granted. On August 24, 1939, he again applied for a renewal of his passport for a further period of one year, repeating the same declaration. His application was granted, the passport, as appears from the endorsement on the declaration, being extended to July 1, 1940.

On some day after August 24, 1939, the appellant left the realm. The exact date of his departure was not proved. On his arrest in the year 1945 there was found on his person a "work book" issued by the German State on October 4, 1939, from which it appeared that he had been employed by the German Radio Company of Berlin as an announcer of English news from September 18, 1939. In this document his nationality was stated to be "Great Britain" and his special qualification "English." It was proved to the satisfaction of the jury that he had at the dates alleged in the indictment broadcast propaganda on behalf of the enemy. He was found guilty accordingly. From this verdict an appeal was brought to the Court of Criminal Appeal, and I think it right to set out the grounds of that appeal. They were as follows:

1. The Court wrongly assumed jurisdiction to try an alien for an offence against British law committed in a foreign country.
2. The Judge was

wrong in law and misdirected the jury in directing them that the appellant owed allegiance to his Majesty the King during the period from September 18, 1939, to July 2, 1940. 3. That there was no evidence that the renewal of the appellant's passport afforded him or was capable of affording him any protection, or that the appellant ever availed himself or had any intention of availing himself of any such protection. 4. If (contrary to the appellant's contention) there were any such evidence, the issue was one for the jury and the Judge failed to direct them thereon.

The Court of Criminal Appeal, as I have already said, dismissed the appeal, and it will be convenient if I deal with the grounds of appeal in the same order as did that Court, first considering the important question of law raised in the second ground. The House is called on in the year 1945 to consider the scope and effect of a statute of the year 1351, the 25th year of the reign of Edward III. That statute, as has been commonly said, and as appears from its terms, was itself declaratory of the common law. Its language differs little from the statement in Bracton: see 2 Bract., p. 258, cited in Stephen's History of the Criminal Law (vol. 2, p. 243). It is proper to set out the material parts. It runs thus: "Whereas divers opinions have been before this time in what case treason shall be said and in what not, the King at the request of the Lords and Commons hath made a declaration in the manner as hereafter followeth: that is to say (amongst other things) if a man do levy war against our Lord the King in his realm or be adherent to the King's enemies in his realm, giving them aid and comfort in the realm or elsewhere" then (I depart from the text and use modern terms) he shall be guilty of treason. It is not denied that the appellant has adhered to the King's enemies giving them aid and comfort elsewhere than in the realm. On this part of the case the single question is whether, having done so, he can be, and in the circumstances of the case is, guilty of treason.

Your Lordships will observe that the statute is wide enough in its terms to cover any man anywhere, "*if a man do levy war*," etc. Yet it is clear that some limitation must be placed on the generality of the language, for the context in the preamble poses the question "in what case treason shall be said and in what not." It is necessary then to prove not only that an act was done but that, being done, it was a treasonable act. This must depend on one thing only—namely, the relation in which the actor stands to the King to whose enemies he adheres. An act that is in one man treasonable may not be so in another.

In the long discussion which your Lordships have heard on this part of the case attention has necessarily been concentrated on the question of allegiance. The question whether a man can be guilty of treason to the King has been treated as identical with the question whether he owes allegiance to the King. An act, it is said, which is treasonable if the actor owes allegiance, is not treasonable if he does not. As a generalization, this is undoubtedly true and is supported by the language of the indictment, but

it leaves undecided the question by whom allegiance is owed, and I shall ask your Lordships to look somewhat more deeply into the principle on which this statement is founded, for it is by the application of the principle to changing circumstances that our law has developed. It is not for his Majesty's Judges to create new offences or to extend any penal law, and particularly the law of high treason, but new conditions may demand a reconsideration of the scope of the principle. It is not an extension of a penal law to apply its principle to circumstances unforeseen at the time of its enactment, so long as the case is fairly brought within its language.

I have said that the question for consideration is bound up with the question of allegiance. Allegiance is owed to their Sovereign Lord the King by his natural born subjects; so it is by those who, being aliens, become his subjects by denization or naturalization (I will call them all "naturalized subjects"); so it is by those who, being aliens, reside within the King's realm. Whether you look to the feudal law for the origin of this conception, or find it in the elementary necessities of any political society, it is clear that fundamentally it recognizes the need of the man for protection and of the Sovereign Lord for service. *Protectio trahit subjectionem et subjectio protectionem*. All who were brought within the King's protection were *ad fidem regis*; all owed him allegiance. The topic is discussed with much learning in *Calvin's case* ((1608) 7 Co. Rep. 1a).

The natural born subject owes allegiance from his birth, the naturalized subject from his naturalization, the alien from the day when he comes within the realm. By what means and when can they cast off allegiance? The natural born subject cannot at common law at any time cast it off. *Nemo potest exuere patriam* is a fundamental maxim of the law from which relief was given only by recent statutes. Nor can the naturalized subjects at common law. It is with regard to the alien resident within the realm that the controversy in this case arises. Admittedly he owes allegiance while he is so resident, but it is argued that his allegiance extends no further.

Numerous authorities were cited by counsel for the appellant in which it is stated without any qualification or extension that an alien owes allegiance so long as he is within the realm, and it has been argued with great force that the physical presence of the alien actor within the realm is necessary to make his act treasonable. It is implicit in this argument that during absence from the realm, however brief, an alien ordinarily resident within the realm cannot commit treason; that he cannot in any circumstances by giving aid and comfort to the King's enemies outside the realm be guilty of a treasonable act. In my opinion this which is the necessary and logical statement of the appellant's case is not only at variance with the principle of the law, but is inconsistent with authority which your Lordships cannot disregard.

I refer first to authority. It is said in *Foster's Crown Cases* (3rd ed., p. 183): "Local allegiance is founded in the protection a foreigner enjoyeth

for his person, his family or effects, during his residence here; and it ceaseth whenever he withdraweth with his family and effects." And then (at p. 185) comes the statement of law on which the passage I have cited is clearly founded. "Section 4. And if such alien, seeking the protection of the Crown, and having a family and effects here, should, during a war with his native country, go thither, and there adhere to the King's enemies for purposes of hostility, he might be dealt with as a traitor. For he came and settled here under the protection of the Crown; and, though his person was removed for a time, his effects and family continued still under the same protection. This rule was laid down by all the Judges assembled at the Queen's Command January 12, 1707."

The author has a side note against the last line of this passage "MSS. Tracey, Price, Dod and Denton." These manuscripts have not been traced, but their authenticity is not questioned. It is indeed impossible to suppose that Sir Michael Foster could have incorporated such a statement except on the surest grounds, and it is to be noted that he accepts equally the fact of the Judges' resolution and the validity of its content. This statement has been repeated without challenge by numerous authors of the highest authority—for example, Hawkins' *Pleas of the Crown* ((1824) vol. I, p. 8, n. (2)). East's *Pleas of the Crown* ((1803) vol. I, p. 52), Chitty on the *Prerogatives of the Crown* ((1820) pp. 12, 13). It may be said that the language of some of these writers is not that of enthusiastic support, but neither in the textbooks written by the great masters of this branch of the law, or in any judicial utterance, has the statement been challenged. Moreover, it has been repeated without any criticism in our own times by Sir William Holdsworth, whose authority on such a matter is unequalled: see his article in *Halsbury's Laws of England* (2nd ed., vol. 6, "Constitutional Law," p. 416; note (t)). Your Lordships can give no weight to the fact that in such cases as *Johnstone v. Pedlar* (37 *The Times* L.R. 870; [1921] 2 A.C. 262) the local allegiance of an alien is stated without qualification to be coterminous with his residence within the realm. The qualification which we are now discussing was not relevant to the issue nor brought to the mind of the Court. Nor was the Judges' resolution referred to, nor the meaning of "residence" discussed.

In my view, therefore, it is the law that in the case supposed in the resolution of 1707 an alien may be guilty of treason for an act committed outside the realm. The reason which appears in the resolution is illuminating. The principle governing the rule is established by the exception: "though his person was removed for a time his family and effects continued under the same protection" that is, the protection of the Crown. The vicarious protection still afforded to the family, which he had left behind in this country, required of him a continuance of his fidelity. It is thus not true to say that an alien can never in law be guilty of treason to the Sovereign of this realm in respect of an act committed outside the realm.

Here no question arises of a vicarious protection. There is no evidence that the appellant left a family or effects behind him when he left this realm. I do not for this purpose regard parents or brothers or sisters as a family. But though there was no continuing protection for his family or effects, of him, too, it must be asked, whether there was not such protection still afforded by the Sovereign as to require of him the continuance of his allegiance. The principle which runs through feudal law, and what I may perhaps call constitutional law, requires on the one hand protection, on the other fidelity: a duty of the Sovereign Lord to protect, a duty of the liege or subject to be faithful. Treason, *trahison*, is the betrayal of a trust; to be faithful to the trust is the counterpart of the duty to protect. It serves to illustrate the principle which I have stated that an open enemy who is an alien, notwithstanding his presence in the realm, is not within the protection, nor therefore within the allegiance, of the Crown. He does not owe allegiance because, although he is within the realm, he is not under the Sovereign's protection.

The question, then, is how this principle is to be applied to the circumstances of the present case. I have already stated the material facts with regard to the appellant's residence in this country, his applications for a passport and the grant of such passport to him, and I need not restate them.

I do not think it necessary in this case to determine what for the purpose of the doctrine, whether stated with or without qualifications, constitutes for an alien "residence" within the realm. It would, I think, be strangely inconsistent with the robust and vigorous common sense of the common law to suppose that an alien quitting his residence in this country, and temporarily on the high seas beyond territorial waters, or at some even distant spot now brought within speedy reach, and there adhering and giving aid to the King's enemies, could do so with impunity. In the present case the appellant had long resided here and appears to have had many ties with this country, but I make no assumption one way or another about his intention to return, and I do not attach any importance to the fact that the original passport application and, therefore, presumably the renewals also were for "holiday touring." The material facts are these, that being for long resident here and owing allegiance he applied for and obtained a passport and, leaving the realm, adhered to the King's enemies. It does not matter that he made false representations as to his status, asserting that he was a British subject by birth, a statement that he was afterwards at pains to disprove. It may be that, when he first made the statement, he thought it was true. Of this there is no evidence. The essential fact is that he got the passport, and I now examine its effect.

The actual passport issued to the appellant has not been produced, but its contents have been duly proved. The terms of a passport are familiar. It is thus described by Lord Alverstone, C. J., in *Rez v. Brailsford* (21 *The Times* L.R. 727, at p. 729; [1905] 2 K.B. 730, at p. 745): "It is a document



issued in the name of the Sovereign on the responsibility of a Minister of the Crown to a named individual, intended to be presented to the Governments of foreign nations and to be used for that individual's protection as a British subject in foreign countries." By its terms it requests and requires in the name of his Majesty all those whom it may concern to allow the bearer to pass freely without let or hindrance and to afford him every assistance and protection of which he may stand in need. It is, I think, true that the possession of a passport by a British subject does not increase the Sovereign's duty of protection, though it will make his path easier. For him it serves as a voucher and means of identification. But the possession of a passport by one who is not a British subject gives him rights, and imposes on the Sovereign obligations, which would otherwise not be given or imposed. It is immaterial that he has obtained it by misrepresentation and that he is not in law a British subject. By his own act he has maintained the bond which while he was within the realm bound him to his Sovereign. The question is not whether he obtained citizenship by obtaining the passport, and whether by its receipt he extended his duty of allegiance beyond the moment when he left the shores of this country. As one owing allegiance to the King he sought and obtained the protection of the King for himself while abroad.

Your Lordships were pressed by counsel for the appellant with a distinction between the protection of the law and the protection of the Sovereign, and he cited many passages from the books in which the protection of the law was referred to as the counterpart of the duty of allegiance. On this he based the argument that, since the protection of the law could not be given outside the realm to an alien, he could not outside the realm owe any duty. This argument, in my opinion, has no substance. In the first place reference is made as often to the protection of the Crown or Sovereign or Lord or Government as to the protection of the law, sometimes also to protection of the Crown and the law. In the second place it is historically false to suppose that in olden days the alien within the realm looked to the law for protection except in so far as it was part of the law that the King could by the exercise of his prerogative protect him. It was to the King that the alien looked and to his dispensing power under the prerogative. It is not necessary to trace the gradual process by which the civic rights and duties of a resident alien became assimilated to those of the natural born subject; they have, in fact, been assimilated, but to this day there will be found some difference. It is sufficient to say that, at the time when the common law established between Sovereign Lord and resident alien the reciprocal duties of protection and allegiance, it was to the personal power of the Sovereign rather than to the law of England that the alien looked. It is not, therefore, an answer to the Sovereign's claim to fidelity from an alien without the realm who holds a British passport that there cannot be extended to him the protection of the law.

What is this protection on which the claim to fidelity is founded? To me

it appears that the Crown in issuing a passport is assuming an onerous burden, and the holder of a passport is acquiring substantial privileges. A well-known writer on international law said (See Oppenheim's International Law, 4th ed., vol. I, p. 556): "By a universally recognized customary rule of the law of nations every State holds the right of protection over its citizens abroad." This rule thus recognized may be asserted by the holder of a passport which is for him the outward title of his rights. It is true that the measure in which the State will exercise its right lies in its discretion. But with the issue of the passport the first step is taken. Armed with that document the holder may demand of foreign Governments that he be treated as a British subject, and even in the territory of a hostile State may claim the intervention of the protecting Power. I would make it clear that it is no part of the case for the Crown that the appellant is debarred from alleging that he is not a British subject. The contention is a different one: it is that by the holding of a passport he asserts and maintains the relation in which he formerly stood, claiming the continued protection of the Crown and thereby pledging the continuance of his fidelity.

In these circumstances I am clearly of opinion that so long as he holds the passport he is within the meaning of the statute a man who, if he is adherent to the King's enemies in the realm or elsewhere, commits an act of treason.

There is one other aspect of this part of the case with which I must deal. It is said that there is nothing to prevent an alien from withdrawing from his allegiance when he leaves the realm. I do not dissent from this as a general proposition. It is possible that he may do so even though he has obtained a passport. But that is a hypothetical case. Here there was no suggestion that the appellant had surrendered his passport or taken any other overt step to withdraw from his allegiance, unless indeed reliance is placed on the act of treason itself as a withdrawal. That, in my opinion, he cannot do. For such an act is not inconsistent with his still availing himself of the passport in other countries than Germany and possibly even in Germany itself. It is not to be assumed that the British authorities could immediately advise their representatives abroad or other foreign Governments that the appellant, though the holder of a British passport, was not entitled to the protection which it appeared to afford. Moreover, the special value to the enemy of the appellant's services as a broadcaster was that he could be represented as speaking as a British subject, and his German work book showed that it was in this character that he was employed, for which his passport was doubtless accepted as the voucher.

The second point of appeal (the first in formal order) was that in any case no English Court has jurisdiction to try an alien for a crime committed abroad, and your Lordships heard an exhaustive argument on the construction of penal statutes. There is, I think, a short answer to this point. The statute in question deals with the crime of treason committed within or,

as was held in *Rex v. Casement* (32 *The Times* L.R. 667; [1917] 1 K.B. 98), without the realm. It is general in its terms and I see no reason for limiting its scope except in the way which I indicated earlier in this opinion—namely, that, since it is declaratory of the crime of treason, it can apply only to those who are capable of committing that crime. No principle of comity demands that a State should ignore the crime of treason committed against it outside its territory. On the contrary, a proper regard for its own security requires that all those who commit that crime, whether they commit it within or without the realm, should be amenable to its laws. I share to the full the difficulty experienced by the Court of Criminal Appeal in understanding the grounds on which this submission is based, so soon as it has been held that an alien can commit, and that the appellant did commit, a treasonable act outside the realm. I concur in the conclusion and reasons of that Court on this point.

Finally (and these are the 3rd and 4th grounds of appeal to the Court of Criminal Appeal), it was urged on behalf of the appellant that there was no evidence that the renewal of his passport afforded him or was capable of affording him any protection, or that he ever availed himself, or had any intention of availing himself, of any such protection, and that if there was any such evidence the issue was one for the jury and the Judge failed to direct them thereon.

On these points too, which are eminently matters for the Court of Criminal Appeal, I agree with the observations of that Court. The document speaks for itself. It was capable of affording the appellant protection. He applied for it and obtained it, and it was available for his use. Before this House the argument took a slightly different turn. For it was urged that there was no direct evidence that the passport at any material time remained in the physical possession of the appellant, and that on this matter the jury had not been properly directed by the Judge in that he assumed to determine as a matter of law a question of fact which it was for them to determine. This point does not, in this form at least, appear to have been taken before the Court of Criminal Appeal and your Lordships have not the advantage of knowing the views of the experienced Judges of that Court on it. Nor, though the importance of keeping separate the several functions of Judge and jury in a criminal trial is unquestionable, can I think that this is a question with which your Lordships would have had to deal in this case, if no other issue had been involved. For it is clear that here no question of principle is involved. The narrow point appears to be whether in the course of this protracted and undeniably difficult case the Judge removed from the jury and himself decided a question of fact which it was for them to decide. This is a matter which can only be determined by a close scrutiny of the whole of the proceedings.

This is a task which in the circumstances of this case your Lordships have thought fit to undertake. I do not propose to examine in detail the course

of the trial and the summing up of the Judge, though I may perhaps be permitted to say that it was distinguished by conspicuous care and ability on his part. But having read the whole of the proceedings I have come to the clear conclusion that the Judge's summing up is not open to the charge of misdirection. It may well be that there are passages in it which are open to criticism. But the summing up must be viewed as a whole, and on this view of it I am satisfied that the jury cannot have failed to appreciate and did appreciate that it was for them to consider whether the passport remained at all material times in the possession of the appellant. On this question no evidence could be given by the Crown, and for obvious reasons no evidence was given by the appellant. It has not been suggested that the inference could not fairly be drawn from the proved facts if the jury thought fit to draw it, and I think that they understood this and did draw the inference when they returned the general verdict of "Guilty."

This point, therefore, also fails.

My Lords, I am asked by my noble and learned friend Lord Simonds to say that he concurs in the opinion which I have just read.

LORD MACMILLAN.—My Lords, I have had the advantage of reading in print the opinion which has just been delivered by the Lord Chancellor. I am in entire agreement with him.

LORD WRIGHT.—I also have had the same advantage. I fully agree with and concur in the opinion which has just been delivered by the Lord Chancellor.

LORD PORTER.—My Lords, I have already stated that I agree with your Lordships in thinking that the renewal of William Joyce's passport, obtained on August 24, 1939, was evidence from which a jury might have inferred that he retained that document for use on and after September 18, 1939, when he was proved first to have adhered to the enemy, and therefore I can deal with this part of his appeal very shortly. It is undisputed law that a British subject always, and an alien while resident in this country, owes allegiance to the British Crown and, therefore, can be guilty of treason. The question, however, remains whether an alien who has been resident here, but leaves the country, can, while abroad, commit an act of treason.

The allegiance which he owes while resident in this country is recognized in authoritative textbooks and the relevant cases to be owed because, as Hale's *Pleas of the Crown* ((1800) vol. 1, p. 58) says, "the subject hath his protection from the King and his laws." If, then, he has protection he owes allegiance, but the quality of the protection required has still to be determined. On behalf of the appellant it was strenuously contended that unless the alien was enjoying the protection of British law he owed no allegiance. I think that this is to narrow the obligation too much. Historically the protection of the Crown through its dispensing power was afforded to the alien in this country earlier than the legal protection which came later. Therefore any protection, whether legal or administrative, would in my view be enough to require a corresponding duty of allegiance.

It was said in the second place, however, that in no case could an alien, however long he had been resident here, commit an act of treason while he was abroad. This argument again seems to me to limit unduly the extent of his obligation. It is in contradiction of the resolution of the Judges in 1707, whereby it was declared that if an alien who has been resident here goes abroad himself, but leaves his family and effects here under the same protection, the duty (that is, of allegiance) still continues. Thus resolution has been criticized as being merely the opinion of the Judges in consultation with prosecuting counsel, and not given as a decision in any case. The criticism is true, but the resolution has been repeated in textbook after textbook of high authority, and, though not authoritative as a legal decision, it still has the weight of its repetition by great lawyers and the fact that it is nowhere challenged. Foster, Hale, East, Hawkins, Chitty and Bacon all set it out. Blackstone alone omits it, but Blackstone was giving a general view of the laws of England, and an omission to set out a particular extension of the general rule is not necessarily a denial of its existence. Equally the fact that many cases also state only the general rule in cases where no more is required is not a denial of the existence of certain modifications or extensions of it.

It is true that even in the case with which the resolution deals the alien, though absent himself, is vicariously protected by the laws of this country in the person of his family and effects, but it is still no more than protection. Does, then, the possession of a passport afford any such protection as that contemplated by the rule? I think it does. Even after war is declared some protection could be afforded to holders of British passports through the protecting power; and, again, it would be useful and afford protection in neutral countries. "It will be well to consider what a passport really is," said Lord Alverstone, C. J., in *Rex v. Brailsford* (21 *The Times* L.R. 727, at p. 729; [1905] 2 K.B. 730, at p. 745). "It is a document issued in the name of the Sovereign on the responsibility of a Minister of the Crown to a named individual, intended to be presented to the Governments of foreign nations and to be used for that individual's protection as a British subject in foreign countries." And the late Sir William Malkin in the *Law Quarterly Review* ((1933) vol. 49, p. 493) speaks of "the extensive, though perhaps somewhat ill-defined, branch of international law which may be called . . . the diplomatic protection of citizens abroad."

It must be remembered that the matter to be determined is not whether the appellant took on himself a new allegiance, but whether he continued an allegiance which he had owed for some 30 years, and a lesser amount of evidence may be required in the latter than in the former case. I cannot think that such a resident can in war-time pass to and fro from this country to a foreign jurisdiction and be permitted by our laws to adhere to the enemy there without being amenable to the law of treason. I agree with your Lordships, also, in thinking that if an alien is under British protection he occupies the same position when abroad as he would occupy if he were a

British subject. Each of them owes allegiance, and in so doing each is subject to the jurisdiction of the British Crown. "The law of nations does not prevent a State from exercising jurisdiction within its own territory over its subject travelling or residing abroad, since they remain under its personal supremacy": Oppenheim's International Law (5th ed., vol. 1, p. 266). Moreover, in *Rex v. Casement* (32 *The Times* L.R. 667; [1917] 1 K.B. 98) the point was directly decided in the case of a British subject who committed the act of adhering to the King's enemies abroad, and the decision was not seriously controverted before your Lordships.

But, my Lords, though the renewing of a passport might in a proper case lead to the conclusion that the possessor, though absent from the country, continued to owe allegiance to the British Crown, yet in my view the question whether that duty was still in existence depends on the circumstances of the individual case and is a matter for the jury to determine. In the present case, as I understand him, the Judge ruled that in law the duty of allegiance continued until the protection given by the passport came to an end—that is, in a year's time—or at any rate until after the first act of adhering to the enemy, which I take to be the date of the appellant's employment as a broadcaster by the German State on September 18, 1939.

The Court of Criminal Appeal took, I think, the same view, but since your Lordships, as I understand, think otherwise, I must set out the facts as I see them. The appellant, admittedly an American subject, but resident within this realm for some 30 years, applied for and obtained a passport as a British subject in 1933. This document continued to be effective for five years, and was renewed in 1938 and again on August 24, 1939. Extensions are normally granted for one year, and that given to the appellant followed the normal course. It would, I think, not be an unnatural inference that he used it in leaving England and entering Germany, but in fact nothing further was proved as to the appellant's movements, save that his appointment as broadcaster by the German State, dated September 18, 1939, was found in his possession when he was captured, and that at any rate by December 10 he had given his first broadcast. Nothing is known as to the passport after its issue, and it has not since been found.

For the purpose of establishing what the Judge's ruling was, I think it necessary to quote his own words to the representatives of the Crown and of the prisoner before they addressed the jury. They are as follows: "I shall direct the jury on count 3" (the only material count) "that on August 24, 1939, when the passport was applied for, the prisoner beyond a shadow of doubt owed allegiance to the Crown of this country and that on the evidence given, if they accept it, nothing happened at the material time thereafter to put an end to the allegiance that he then owed. It will remain for the jury, and for the jury alone, as to whether or not at the relevant dates he adhered to the King's enemies with intent to assist the King's enemies. If both or either of you desire to address the jury on that issue, of course, now is your opportunity."

After that ruling both counsel proceeded to address the jury, the defense submitting that the appellant had not adhered to the King's enemies, the Attorney-General that he had. No other topic was touched on by either of them, and in particular no argument was addressed to the question whether the appellant still had the passport in his possession and retained it for use, or whether he still owed allegiance to the British Crown. After counsel's address to the jury the Judge summed up, and again I think I must quote some passages from his observations. One such is:

"Under that count (that is, count 3) there are two matters which have got to be established by the prosecution beyond all reasonable doubt. . . . The first thing that the prosecution have to establish is that at the material time the prisoner, William Joyce, was a person owing allegiance to our Lord the King. Now, [in] my view, I have already intimated . . . as a matter of law, is, if you as a jury accept the facts which have been proved in this case beyond contradiction—of course you are entitled to disbelieve anything if you wish—if you accept the facts which have been proved and not denied in this case, then at the time in question, as a matter of law, this man William Joyce did owe allegiance to our Lord the King, notwithstanding the fact that he was not a British subject at the material time. Now, members of the jury, although that is a matter for me entirely and not for you, I think it will be convenient if I explain quite shortly the reasons by which I have arrived at that view, partly for your assistance, explanation and perhaps for consideration hereafter in the event of this case possibly going to a higher Court." Again, he said: "None the less I think it is the law that if a man who owes allegiance by having made his home here, having come to live here permanently, thereby acquiring allegiance, as he undoubtedly does, if he then steps out of this realm armed with the protection which is normally afforded to a British subject—improperly obtained, it may be, but none the less obtained . . . using and availing himself of the protection of the Crown in an executive capacity which covers him while he is abroad, then in my view he has not thereby divested himself of the allegiance which he already owed."

Later he said: "So between August 24 and September 18, 1939, armed with a British passport, he had somehow entered Germany. Now, members of the jury, thereafter up until July 2, 1940, when his passport ran out, he remained under such protection as that passport could afford him during his stay in Europe." He further said: "I do not think I am in any way extending the principles of the law in saying that a man who in this way adopts and uses the protection of the Sovereign, to whom he has already acquired an allegiance, remains under that allegiance and is guilty of treason if he adheres to the King's enemies. Members of the jury, I accordingly pass from that aspect of the matter; that is my responsibility. I may be wrong; if I am I can be corrected. My duty is to tell you what I believe to be the law on the subject, and that you have to accept from me, provided you believe those facts about the passport, going abroad and so forth. If you

do not believe that, you are entitled to reject it and say so, because you are not bound to believe everything; but if you accept the uncontradicted evidence that has been given, then in my view that shows that this man at the material time owed allegiance to the British Crown. Now if that is so, then the matter passes into your hands, and from now onwards I am dealing with matters which are your concern and your concern alone, with which I have got nothing to do; they are matters of fact, and the onus of proving those facts is upon the prosecution from first to last, and it never shifts. Now what have they got to prove? They have got to prove that during this period, as I have already indicated, this man adhered to the King's enemies without the realm—namely, in Germany."

The Judge then referred to a broadcast, of which there was uncontradicted evidence that it had been made before December 10, 1939; to the prisoner's engagement as a German broadcaster to Britain; and to the prisoner's statement, which was put in evidence by the Crown and from which I need only quote the words: "Realizing, however, that at this critical juncture I had declined to serve Britain, I drew the logical conclusion that I should have no moral right to return to that country of my own free will and that it would be best to apply for German citizenship and make my permanent home in Germany." After reading the statement the judge added: "I think that is the whole of the very short material upon which you have to come to the conclusion as to whether or not it is proved to your satisfaction beyond all reasonable doubt that during the period in question this man adhered to the King's enemies, comforted and aided them with intent to assist them, and that he did so voluntarily. Those are the matters which you have to consider."

I think that I have quoted all the material passages from the summing up, and I cannot read the words of the Judge as doing other than ruling that in law the appellant continued to owe allegiance to his Majesty on September 18, 1939, on December 10, 1939, and indeed until July 2, 1940, and leaving to the jury only the question whether during this period the appellant adhered to the King's enemies. The passage in the summing up containing the words, "provided you believe those facts about the passport, going abroad and so forth," in my opinion merely instructed the jury that they had to be satisfied that the accused man did obtain a renewal of his passport, did go abroad, and did make a statement, but that, if they were so satisfied, then in law the prisoner continued to owe allegiance at all material times after he left this country. If it means more than this, I should regard it as a totally inadequate direction of what must be proved to show that the allegiance continued after he left this country. But I do not think that it does mean more than I have indicated.

As I have stated, the renewal of the passport on August 24, 1939, was, in my view, evidence from which a jury might infer the continuance of the duty of allegiance. What the prosecution have to show is that that duty



continued at least until September 18. The Judge, as I see it, regarded the renewal as proving conclusively that the duty continued until the passport ceased to be valid, unless some action on the part of the Crown or the appellant was proved which would put an end to its protection.

The Court of Criminal Appeal, in my opinion, took the same view. Their words were: "We have to look at the evidence in this case, and on that evidence to decide whether the trial Judge was right or wrong in holding as a matter of law that on September 18, 1939, and between that date and July 2, 1940, this appellant did owe allegiance to the King. Now we agree with Mr. Justice Tucker, that the proper way of approaching that question is to see whether anything had happened between August 24 and September 18 to divest the appellant of that duty of allegiance which he unquestionably owed at the earlier of those two dates."

The ruling, as I see it, can only mean that the appellant's duty of allegiance remained in force until July 2, 1940, unless it was shown by him or on his behalf that something had occurred to put an end to that duty. It put the onus on him to show some action terminating that obligation. The passport was never found again, and he may have used it only to gain admittance to Germany and may then have discarded it. Indeed, his statement, if believed, indicates that this was his object, and the mere fact that the renewal was for a year proves nothing, since, as was proved in evidence, that is the normal period of extension. There is no evidence that he kept it for use on or after September 18. If I thought that the obtaining of the passport on August 24, 1939, proved in law that the appellant retained it for use at least until September 18, 1939, unless he was shown to have withdrawn his allegiance, I should accept this ruling. But I do not think it correct. It could only be supported on the ground that allegiance continues until the appellant shows that it is terminated.

The Attorney-General supported this contention by a reference to Archbold's Criminal Pleading and Practice ((1943), at p. 330), where it is stated that if a matter be within the knowledge of the accused and unknown to the Crown the onus of proof is cast on the former. For this proposition *Rex v. Turner* ((1816) 5 M. & S. 206) is said to be an authority. But that case has been explained as dependent on the special provisions of the game laws and as being, therefore, not of general application. The true principle is, I think, set out in Phipson on Evidence (8th ed., p. 34) and Best on Evidence (12th ed., p. 252), and is explained by Mr. Justice Holroyd (himself a party to the judgment in *Rex v. Turner* (*supra*)) in *Rex v. Burdett* ((1820) 4 B. & Ald. 95, at p. 140): The rule in question, he said, "is not allowed to supply the want of necessary proof, whether direct or presumptive, against a defendant of the crime with which he is charged, but when such proof has been given it is a rule to be applied in considering the weight of evidence against him, whether direct or presumptive, when it is unopposed, un rebutted, or not weakened by contrary evidence which it would

be in the defendant's power to produce, if the fact directly or presumptively proved were not true."

If this be the true principle, the failure of the prisoner to give evidence as to his dealing with the passport goes to increase the weight of evidence against him, but does not make the evidence of his applying for and receiving it proof conclusive in law that he continued to retain it for use or at all. That he received it may be some proof to go to the jury that he retained it, but it is no more; it is not a matter on which a Court is entitled to rule that a jury must draw the inference that he retained his allegiance. Indeed, at one point in his argument the Attorney-General used language which, in my view, accepted this as the true principle when he said: "I put the passport merely as evidence of the existence of protection. If he" (that is, the accused) "discarded it on his return that might make a difference." To this observation I would add that the renewal of the passport was at best but some evidence from which a jury might infer that the duty of allegiance was still in existence. Unless, however, the accused man continued to retain it for use as a potential protection, the duty of allegiance would cease, and it was for the jury to pronounce on this matter.

I do not understand your Lordships to rely on the proviso to Section 4 of the Criminal Appeal Act, 1907, nor do I think it could be said that no substantial miscarriage of justice had occurred if I am right in considering that the matter should have been left to the jury. The test has been laid down by your Lordships' House to be whether a reasonable jury properly directed must have come to the same conclusion. In the present case a reasonable jury properly directed might well have considered that the allegiance had been terminated. Against the mere receipt of the passport there has to be set the fact that its possession was at least desirable if not necessary to enable the accused man to proceed to Germany from this country; the fact that it was not found in his possession again, or anything further known of it; his statement as to his intention of becoming naturalized in Germany; and his acceptance of a post from the German State. At any rate these were matters for a jury properly directed to consider. They were not directed on them, and as I have stated in my view they were told that the matter was one of law and not for them.

The question of the extent to which an alien long resident in this country continues to owe allegiance after he has left it, and whether the request for and acceptance of a passport makes the duty of allegiance still due until the protection of that passport ceases by effluxion of time, or at least for some period after its issue, is, and has been certified to be, a point of law of exceptional public importance. One matter to be decided in solving that question is the boundary line between the functions of a Judge and those of a jury. Apart from this, the principle that questions which are rightly for the jury should be left to them, and that a proper direction should be given is, as I think, also of great public importance. The one matter concerns this

country only in the exigencies of war, though then no doubt it is of vital importance; the other is a necessary element in the true administration of the law in all times of peace and war. If the safety of the realm in war time requires action outside the ordinary rule of law, it can be secured by appropriate measures such as a Defence of the Realm Act, but the protection of subject or foreigner afforded through trial by jury, and the due submission to the jury of matters proper for their consideration, is important always, but never more important than when the charge of treason is in question.

For these reasons I would myself have allowed the appeal.

## BOOK REVIEWS AND NOTES

*Traité de Droit International Privé Français. Tome III: Conflits de Lois, d'Autorités et de Juridictions.* By J. P. Niboyet. Paris: Sirey; 1944. Pp. 679.

A period of war, invasion, and occupation is scarcely favorable for the elaboration of a work requiring much scientific research and profound intellectual effort. It is therefore all the more creditable that Professor Niboyet has been able during such a period to complete the third volume of his comprehensive treatise on French private international law. The first two volumes, already reviewed in this JOURNAL (Vol. 33 (1939), p. 619) received the Travers Prize of the *Académie des Sciences Morales et Politiques* in 1941. The third volume contains internal evidence that the war has exerted a deep if not a preponderant influence upon the author in his quest for the correct principles for French courts to apply in the solution of conflicts of law. He regards the subject as one of purely domestic law whereas his eminent predecessor, Pillet, regarded it as governed, at least in theory, by a universal system derived from the principle of the equality of all states. Both jurists emphasize the influence of international politics upon the conflict of laws. However, Pillet believed that the law of a foreign state is applied in a proper case not in derogation of the sovereignty or interest of the local state, but that this course is required in order to accord the maximum respect to all states constituting the international community (p. 158). One who well remembers Pillet's lectures at the University of Paris will think of him as *par excellence* the "One World" jurist of his times. Niboyet, on the other hand, believes the present epoch to be one of nationalism applied to every aspect of life (p. 163). From this he derives the general rule that French law must apply to all transactions which take place in France, with a few justified exceptions. Certain grand principles should suffice to establish what these exceptions should be (p. 204). "It is not a matter of awaiting the result of any laboratory experiment but of being guided by a principle of political sagacity" (p. 205).

This volume does not assume to set forth the positive law of France except when necessary to illustrate the author's viewpoint. It is not for the reviewer to argue what is best for France. The positive law is to be dealt with in a subsequent volume. One of the unsatisfactory points of French law in the author's view is the application of the national law of the individual to determine personal status. English and American readers will not disapprove of the author's preference for domiciliary law. His proposal to accept it as a uniform principle was rejected by the Institute of International Law at Oslo in 1932, due doubtless to the fact that so many jurists of European and Latin American countries hail from jurisdictions where the principle of national law prevails. Again there is much to be said for the

author's preference for the *lex rei sitae* in determining the transfer of personal property. This is not the rule for transfers of personal property by inheritance in France or in Anglo-American jurisdictions. He rightly points out that it would solve conflicts of jurisdiction as well as of law (p. 209).

The author's views are well worthy of consideration by those interested in the comparative study of this complicated field of law. We must excuse his juristic isolationism by reason of France's bitter political experiences. The very forms of law have been employed by certain foreign countries merely as a hollow pretext for every kind of spoliation and tyranny. A reversion to local law in France under these circumstances is understandable even where the result is far from satisfactory from the viewpoint of a scientific jurisprudence.

ARTHUR K. KUHN

*Of the Board of Editors*

*Le Problème du Droit International Américain.* By M. M. L. Savelberg. The Hague: A. A. M. Stols; 1946. Pp. xx, 361.

In the book under review a Dutch author, writing in French, reports a careful investigation into the problem of the existence or non-existence of an "American international law." He understands this phrase as "a veritable complex of norms, distinct from those in force in the general international community," but in force among the American Republics, or, perhaps also, between these Republics and third States.

The problem, according to the author, cannot be solved, as is often attempted, by deducing the non-existence of regional law from the alleged oecumenical unity of international law. This starting-point leads him to consider first the nature and bases of international law. Surveying various modern doctrines, he adheres to the sociological doctrine of Georges Scelle.

The problem must be solved inductively, according to the author, by analyzing the norms of the so-called American International Law and comparing them with general international law. But he limits himself to the seven codification Conventions of Havana of 1928. He is a strong believer in a progressive codification of international law and foresees victory for this cause, notwithstanding the meager results of the Codification Conference at The Hague of 1930. The second chapter carefully traces the development of American efforts at codification from Bolivar's time to 1928. The following chapters give a detailed analysis of these Conventions on the situation of aliens, treaties, diplomatic agents, consuls, maritime neutrality, asylum, and civil war.

The result of this analysis is his finding that an "American international law" does not exist. With this result this reviewer entirely agrees, but not with the method and other findings of the author. The basis of investigation, the seven Havana Conventions, is too narrow. Pan American developments since 1928 are not taken into consideration. The author further

minimizes basic differences, such as the denial by Latin America of the international minimum standard in the treatment of aliens, with all its consequences, not even mentioned in the book, such as the Calvo clause, the narrow definition of denial of justice, the practical exclusion of the right of diplomatic protection of citizens abroad. These differences are far-reaching, but they are not "American"; they are, at the best, Latin American, as the United States is opposed to these doctrines. This reviewer has also serious doubts concerning the truth of the author's assertion that, in consequence of certain incidents in the Spanish Civil War, the institution of diplomatic asylum—not recognized by this country—has been revived in the general international community.

The author finally rewrites these Conventions, so as to save them as a basis for future world-wide codification. In this respect the author overestimates the importance of these Conventions; looking primarily at the differences between them and general international law, he is not critical enough toward their intrinsic shortcomings. And while this reviewer agrees that neutrality remains an important part of international law, the rewriting in 1946 of the Havana Convention of 1928 on maritime neutrality with only minor changes, without considering the practice of this War and the present chaotic status of the international law of neutrality, seems hardly worth while.

Notwithstanding these criticisms, the book, making use of all the literature, albeit—a consequence of present conditions in Europe—only down to 1940, is a careful, learned, impartial, and strictly juridical analysis of those parts of international law, with which these seven Conventions deal.

JOSEF L. KUNZ

*Of the Board of Editors*

*La Guerre-Crime et Les Criminels de Guerre.* By Vespasien V. Pella, Paris: Pedone; 1946. Pp. 208. Annexes.

This lavishly printed book is the first on the subject to be published in Europe, except for Fritz Bauer's *Die Kriegsverbrecher vor Gericht* (Zuerich, 1945). Mr. Pella is well known to criminologists and internationalists alike by his abundant publications (a list of which can be found on pp. 16-18 of this work), all of which center around the problem of international penal law, admittedly a legal term in need of clarification. The Nuremberg Trial is frequently quoted and adduced with two intentions in the mind of the author: to prove that developments had forced the statesmen to accept as an *ad hoc* expedient a tribunal which should have existed before the war as a permanent institution ready to be put into action whenever the necessity arose. Second, that all the difficulties confronting the Nuremberg Trial could have been avoided had there been more imagination on the part of statesmen during the Long Truce.

It is difficult to agree with the implicit assumption of the author of the thesis that an International Criminal Court would have survived the war

untouched. Why should this Court have fared better than the Permanent Court of International Justice or the League of Nations? Nor can it be said that the author has valid grounds for his idea that the world is now, or was before the war, ready for criminal jurisdiction. How little prepared the world was for such ideas is proven by the case of the Court established by the League of Nations following the assassination of King Alexander of Yugoslavia and the French Prime Minister Bartou. The convention establishing this Court, concluded in Geneva, November 16, 1937, was signed by thirteen countries, and no enthusiasm was shown for its ratification or for adherence on the part of non-signatories, with the result that the Convention never came into force. Nothing, finally, is more treacherous than the application to international relations of analogies taken from national penal law (pp. 124-128). Still nobody will deny the pertinence of the basic problems discussed by the author in this book. Its chief value, however, is that it summarizes all the efforts which have been made by numerous international organizations to protect peace by international criminal law and to create a permanent court of international penal justice, a code of international criminal law, both substantive and procedural. In addition, it offers bibliographies on special problems of international criminal law, as, for instance, the problem of the responsibility of legal persons (p. 56, note 1; p. 64, note 1; pp. 66-67, note b), the problem of the non-retroactivity of penal legislation (p. 81, note 1; p. 88, notes 1, 2; pp. 102-103, note 1), the war crimes problem in the wake of World War I (p. 77, note 2; p. 85, note 1). Anyone wishing to study these problems will find these references, while not complete, extremely useful. Especially if and when we reach the stage of discussion of the problem of international criminal jurisdiction in terms of long-range international policy.

Of the annexes to this book, the following are of interest to the American reader:

1. Draft of a Statute for the Creation of a Criminal Chamber in the Permanent Court of International Justice, drafted by Professor Pella and adopted by the International Association of Penal Law in Paris, January 16, 1928, containing no fewer than 70 articles.
2. The outline of a World Penal Code, again drafted by Professor Pella, to serve as a basis for the works of the Inter-Parliamentary Union of the International Law Association and of the International Association of Penal Law, dated Bucharest, March 15, 1935.
3. Convention for the Creation of an International Penal Court signed under the auspices of the League of Nations, Geneva, November 16, 1937.

It is a pity that the author himself and the publisher of the *Revue Sottile* (pp. 7-13) thought it necessary to introduce the author at great length. His name is well known without this introduction.

JACOB ROBINSON

*New York City*

*The British Year Book of International Law* 1944. London: Oxford University Press; 1944. Pp. viii, 272. Index.

The reappearance of *The British Year Book of International Law*, publication of which was suspended after 1939, is most welcome to international lawyers. Although the volume for 1944 is no larger than a single issue of the *American Journal of International Law*, the attainment of more stable conditions will no doubt permit the expansion of its valuable offerings. (Is it too much to hope that it may eventually be transformed into a Quarterly Journal?) The selection of Professor H. Lauterpacht of Cambridge University as the Editor of the *British Year Book* was a fortunate choice, the wisdom of which is evinced in the excellence of the contributions to this twenty-first volume of the series.

Professor Lauterpacht himself is the author of an article on "The Law of Nations and the Punishment of War Crimes," and is probably the author of the valuable unsigned article on "Implied Recognition." Professor H. C. Gutteridge contributes a thoughtful article on "Comparative Law and the Law of Nations." Dr. F. A. Mann writes suggestively on "The Law Governing State Contracts." Mr. W. E. Beckett discusses "Consular Immunities" and their juridical basis. Mr. J. Mervyn Jones makes a valuable contribution to the law of treaties in his "International Agreements Other Than 'Inter-State Treaties'—Modern Developments." Dr. C. J. Colombos writes of "The Unification of Maritime Law in Time of Peace." Professor J. L. Brierly discusses, with his usual perspicacity, "Vital Interests and the Law."

The volume also includes notes on current topics, a useful digest of decisions of English courts involving points of public or private international law decided from 1939 to 1943, with a special section relating to trading with the enemy, and over two score book reviews.

HERBERT W. BRIGGS

#### *Of the Board of Editors*

*Annual Survey of American Law*. Vols. 1-3, 1942-1944. By various authors. New York: New York University School of Law; 1945. Pp. lxiii, 944; lvii, 962; lxxxi, 1252. Appendices. Indexes. \$5.00 per volume.

These volumes, produced under the direction of Dean Arthur T. Vanderbilt, of the New York University School of Law, and an Editorial Committee consisting of Professor Alison Reppy, Assistant Dean Frederick J. de Sloovere (until his death last summer), Professor Laurence P. Simpson, and Law Librarian Fred B. Rothman, present in orderly fashion as the foreword of the first volume says they were intended to do, the significant trends in the more important branches of American law during the first three years of the new era which, according to Dean Vanderbilt, began with the attack on Pearl Harbor. The editors and the authors (31 in the first volume, 26 in the



second, and 39 in the third) have performed a service of great value to lawyers, students of the social sciences, and all laymen who desire to gain a comprehensive view of the growth of the law as a whole. The survey for 1945 has been sent to the press, and the series is to be kept current.

The capital importance of international law in the new era in American life is reflected in the fact that one of these volumes is, pursuant to the unanimous vote of the contributors, dedicated to Judge Manley O. Hudson, "in recognition of his outstanding service in arousing the American bar to a realization of its responsibility for international organization of world peace." It is further evidenced by the fact that the first chapter in each of the volumes (29 pages for 1942, 31 pages for 1943, and 39 pages for 1944) is devoted to "International Law and Relations," with a competent summary of the principal developments and adequate references to the principal publications in the field during the year covered. International law and the international aspects of problems that are primarily domestic are also discussed in the chapters entitled "War Powers and Their Administration," by Dean Vanderbilt; "Transportation Law" and "Aviation" by Arnold W. Knauth, Lecturer on Air Law and Admiralty; "Communications," by Messrs. Ashby, Gibbons, Shoen, and Brockett, who are not connected with the Law School; and "Jurisprudence," by Assistant Dean de Sloovere.

Each of the volumes contains a table of contents; a table of cases; a table of statutes, rules, executive and administrative orders; and a topical index. A table of the numerous books and articles cited was presumably considered to be unnecessary, though it would have been appreciated by readers.

The specialist in international law or international relations will find none of his problems worked out for him in these volumes. He may, however, feel confident that most of the new materials pertinent to those problems have been noted, and he should feel grateful to the editors and authors for having given him, in brief compass, the background of significant developments in domestic law which he cannot afford to ignore or underestimate.

EDGAR TURLINGTON

*Of the Board of Editors*

*Annuaire Suisse de Droit International.* Société Suisse de Droit International. Volume I, 1944, Zurich: Editions Polygraphiques; 1945. Pp. 314.

In the thirtieth year of its existence the Swiss Society for International Law has inaugurated a new project the first volume of which has belatedly reached our shores. There is no need to say how welcome this book is to every internationalist, coming, as it does, from one of the few spots on the European continent where the general legal structure and the respect for international law survived the ravages of war.

It consists of two sections: Articles and Documents, the latter being a general title for acts emanating from the Swiss Government (administration, legislative bodies, and courts) and the international unions (we might

be tempted to say "the specialized agencies") domiciled on Swiss soil. The first section contains only two articles. Max Huber, first President of the Permanent Court of International Justice and President of the International Red Cross from 1928 to 1944, contributes an article on "The Principles of International Law of the Red Cross, Its Mission and Problems" (in German) which meets our highest expectations from a man of his caliber; who combines the analytical power of a great jurist with the wisdom of an experienced statesman and the warm heart of a sincere humanitarian. The following works on the Red Cross were published by Max Huber during the recent war: *Red Cross: Principles and Problems*, Zurich, 1941 (in German); *Good Samaritan*, 1943 (in German; English translation, London, 1945, Gollancz); *The International Committee of the Red Cross: Its Mission, Difficulties and Possibilities*, 1944 (in German). But it can be said without exaggeration that, by the wealth of material used, the sharpness of analytical judgment, and the balanced suggestions for the future, this article is bound to become a classic in this marginal field of international law. It is indeed impossible to try to condense this already extremely condensed article. Suffice it to say that in the space of 47 pages the following problems are discussed in a way which certainly tempts the reader to continue his studies but at the same time gives him a feeling of satisfaction that all the essentials of the problem have been discussed masterfully and convincingly: Red Cross and International Law; The Positive International Law; Red Cross and the Evolution of International Law; Violations of Law and the Protection of Law; The Legal Status of the Red Cross; Independence, Neutrality, Depolitization and Humanitarianism of the Red Cross.

The second article, "Military Occupation and Private Rights" (in French) by Georges Sauser-Hall, deals with a subject already thoroughly discussed in numerous studies and monographs and, while written competently, does not contain much that is new. Of considerable interest are the references to quasi-scientific attempts by German writers to justify Nazi methods of occupation (Waltzog, pp. 63, 64, 65, 66; Best, pp. 67, 69, 77; Seyss-Inquart, pp. 81, 82, 83, 84; Stueckart, Hoehn and Schneider, p. 83; and Kroiss, p. 89), judicious comparisons of military occupation and *de facto* government (pp. 70-73), and a survey of the Swiss "jurisprudence" on the effects of the measures of occupation authorities abroad. It is interesting to note that cantonal courts have in two cases resisted the attempts to get recognition for unlawful acts of the occupying authority; as against this, however, the Federal Court, in the case of *Olga Moser vs. Elsa Joegle* (pp. 176-183), took the opposite view, which is sharply and convincingly attacked by Sauser-Hall (pp. 120-124).

The documentary part deals with public international law—acts of the Swiss Government (Professor D. Schindler); private international law—law reports (Professor G. Sauser-Hall); international commercial and clearing law covering legislation, law court reports (through an oversight of the

editors, the case *Rheinisch-Westfaelische Elektrizitaetswerk A.G. vs. Anglo-Continental Treuhand A.G.* is dealt with twice and independently, once on pp. 168-175, and the second time on pp. 200-202) and literature (Professor M. Gutzwiller); international law of civil procedure (Professor H. Fritzsche); international administrative law (Dr. H. Marti), international taxation law (Dr. J. Henggeler). Documents of the International Committee of the Red Cross and of some international offices conclude the volume. In addition, references to literature are to be found in the surveys as well as a general survey of the literature of international law in 1942 and 1943 (pp. 137-139).

May this reviewer be allowed, in conclusion, to express the wish that our Swiss colleagues would undertake to prepare, for the benefit of the internationalists in the former belligerent countries, a detailed survey of the development of international law (treaties, legislation, administrative orders, court reports, literature) in Switzerland during the war (1939-1945).

JACOB ROBINSON

*New York City*

*La Solidaridad Americana.* By Simon Planas-Suarez. Caracas: Tipografia Garrido; 1945. Pp. 495. Index.

In 1935 the well-known Venezuelan international lawyer Planas-Suarez published a book warning the Americas to quit the League of Nations and to rally around Pan-America. The League, he said, a wholly European affair, created to uphold the unholy Paris Peace Treaties, is a corpse.

In the book under review, published ten years later, he comes to the conclusion that Pan-America is merely an ocean of words, an occasion for high-sounding ideological phrases, that American solidarity is a sentimental pseudo-solidarity which does not exist in fact, that the Inter-American System is, since the Rio Meeting of 1942, in a disastrous state of confusion and discord, so that its complete destruction in the future can be predicted.

The book is not a book, but a reprint of articles (with some additions), written between Pearl Harbor and 1945, giving in hundreds of pages an endless repetition of two ideas.

The first idea is that after decades of merely ideological phrases, Pan-Americanism reached a climax at the Havana Consultative Meeting of 1940 in Declaration XV, which laid down that aggression by a non-American State against one American Republic constituted an aggression against all of them and bound them to mutual assistance. This Declaration, according to the author, created an unconditional alliance without reservations and was strictly binding in law. Pearl Harbor constituted the *casus foederis*; all the Americas were automatically at war; only the carrying out of the mutual assistance was a matter for consultation.

The second idea is that the Rio de Janeiro meeting of 1942 was an anticlimax. Its Resolution I, recommending the breaking off of diplomatic

relations with the Axis, destroyed American solidarity. It was legally in contradiction with the obligation created by Declaration XV of 1940. It was illogical, because ten American Republics were already at war. It showed the Americas divided and unwilling to fulfill their obligations. Instead of taking a correct and vigorous majority decision, it disguised the lack of solidarity by a meaningless unanimity. It was further illegal for the American Republics to take such measures as they did against citizens of the axis on the basis of a mere breach of diplomatic relations, creating a dangerous precedent against them. The fault lay not only with Argentina, but with all the 21 Republics. Resolution I of 1942, a mere recommendation, leaving everything to the discretion of the respective governments, was not legally binding and Argentina could, therefore, not be accused of a violation of this Resolution.

The author's whole reasoning is based on the hypothesis that Declaration XV of 1940 created a strictly legally binding obligation. But, he argues, it was only legally binding because it had been ratified by all the 21 Congresses and made a Statute. Has Declaration XV of 1940 been so ratified by all the 21 American Republics? We doubt it; the author merely asserts it; he does not prove it.

The crux of the whole book lies, therefore, in the juridical nature and legal validity of Pan American resolutions. At the Mexico City Conference of 1945 Venezuela proposed that the Inter-American Juridical Committee study this problem but the resulting Resolution XXIV watered this proposal down to a mere study of the nomenclature of the different compromises contained in the Final Acts. This basic question of the Inter-American System, never yet authoritatively decided or fully studied, continues thus to remain in its present status of ambiguity.

JOSEF L. KUNZ

*Of the Board of Editors*

*The Headquarters of International Institutions. A Study of Their Location and Status.* By C. Wilfred Jenks. London: Royal Institute of International Affairs; 1945. Pp. 102. Appendices. \$1.50.

This study is doubtless being widely read in various countries today. It should be, for it states problems of which the average citizen, and even experts, are largely unaware.

Mr. Jenks is convinced, to begin with, that there should be a central headquarters for all international organizations (with a few possible exceptions). The location of this headquarters will be determined mostly by political considerations; it should not be in a place subject to the influence of a great Power: it should be in a democracy, and where there is little social and economic disturbance; it should have good press and communications; there should be social life, such as would not be found in a remote island

so that it would not be an ingrowing bureaucracy; factors such as climate, finance, and living standards should be considered.

A chapter is devoted to the requirements of functional independence—freedom for meetings, communications and broadcasting, immunities and physical protection, and so on; the possibilities of these are compared as between status within a national territory and status as an independent international headquarters. The latter status, as a new idea, is developed in three chapters. Something like a District of Columbia is favored. The difficulties are great; Mr. Jenks summarizes them by saying that “an internationalized area not recognized as a state would have to make its own way in the world, whereas an internationalized area recognized as a state would inherit all the rights and facilities enjoyed by existing states” (p. 75). Two final chapters outline a procedure for establishment and a legal regime.

CLYDE EAGLETON

*Of the Board of Editors*

*The Internal Administration of an International Secretariat.* By Chester Purves. London: Royal Institute of International Affairs; 1945. Pp. 78. 4/6.

This interesting little pamphlet supplements an earlier study published by the Royal Institute entitled “The International Secretariat of the Future”; it may also be regarded as supplementing the larger work by Ranshofen-Wertheimer. It suggests that the internal administration of a secretariat should be put under a non-political and technically qualified Director. It is packed with interesting and practical discussion of such matters as recruitment, health and efficiency, diplomatic status, staff regulations, conferences. All these discussions should be of great usefulness to the Secretary-General of the United Nations; and the suggestion in the last chapter of a unified international civil service would extend this usefulness to the various specialized agencies now being set up in connection with the United Nations.

CLYDE EAGLETON

*Of the Board of Editors*

## NOTES

*L'Influence du Régime National-Socialiste sur le Droit Privé Allemand* By H. Rheinstrom. Montréal: Editions Bernard Valiquette; n.d. (1945?). Pp. 64. This study, finished in May, 1939, indicates the changes which the National-Socialist regime introduced up to that time into the system of German private law. The author describes the by now well known National-Socialist concept of law and then shows to what extent the previously existing legal rules belonging to the different branches of private law were modified in accordance with this concept. He observes that the traditional division of the German legal system into private and public law (the one regulating the relations of individuals with one another, the other concerned

with the organisation of the state and the relations of individuals with the state), tended to disappear because the totalitarian state did not respect any private sphere of liberty, the existence of which the concept of private law presupposed. The changes in the legal situation were brought about by partial revision of the existing legal codes, dating from the end of the last century, by new enactments concerning particular matters, and by judicial interpretation of the old rules in the light of National-Socialist principles. Since modifications of the existing legal order through the first two methods left the greater part of the rules of private law intact, the third method became of particular importance. The courts, guided by a newly developed legal doctrine, fulfilled the task of adapting the unabrogated provisions, which were generally conceived in a liberal, individualistic spirit, to the anti-liberal, collectivistic tendencies of the Hitler dictatorship.

WALTER SCHIFFER

*Institute for Advanced Study, Princeton*

*The Mandates System: Origins, Principles, Application.* Geneva: League of Nations; 1945 (League document 1945. VI. A. 1). Pp. 120. \$1.00. Secretary-General Lester, in a Preface to this document, says that it seemed desirable that "a detailed study should be made of certain aspects of this first experiment in international collaboration and supervision in the colonial sphere." It would appear to be a summary, rather than a detailed study, but a useful summary. It covers the origin of the mandates system and its principles; the supervision of mandatory administration by the League of Nations; the moral, social and material welfare of the natives, based upon the "questionnaires" and annual reports; and, occupying about half the book, statistics as to population. An Annex contains the "General Conditions Which Must be Fulfilled before the Mandates Regime Can Be Brought to an End in respect of a Country Placed under that Regime."

CLYDE EAGLETON

*Of the Board of Editors*

*Charter of the United Nations: Commentary and Documents.* By Leland M. Goodrich and Edvard Hambro. Boston: World Peace Foundation; 1946. Pp. xiv, 400. Documents. \$2.50. The authors of this commentary on the Charter of the United Nations disclaim any intention of writing a scholarly commentary comparable, for example, to that of Schücking and Wehberg on the Covenant of the League of Nations. Their hope, inspired by their participation in the work of the San Francisco Conference, was to assemble documents and prepare a commentary which would be "of some assistance to the student and layman desiring a better understanding of the Charter as drafted at San Francisco." The volume seems admirably designed to fulfil this purpose.

Part I provides background information on the failure of the League experiment; the war-time United Nations; the Dumbarton Oaks Proposals; the organization, procedure, and documentation of the San Francisco United Nations Conference on International Organization; and concludes with a discussion, in general terms, of the form, character, content, and interpretation of the United Nations Charter. An appendix to the volume contains the texts of pertinent documents.

The major portion of the volume consists of a textual critique of the Charter, article by article, phrase by phrase. Since the book went to press before any information was available on the actual practice of organs of the United

Nations in interpreting the Charter, the critique is limited to the authors' views of the meaning of the words as employed in the various provisions of the Charter. In assigning particular meaning to the provisions of the Charter the authors have applied both logicogrammatical and historical methods of interpretation. Effort is made to show, where possible, the intentions of the drafters of each provision. The records of the San Francisco Conference have been examined with great industry and care, and are frequently quoted *in extenso*.

A problem which arises in peculiar degree from a study of the documentation of the San Francisco Conference is the weight to be attributed to the *travaux préparatoires*. The Statement on withdrawal and the statement interpreting the phrase "sovereign equality," both of which were approved by the Conference, are only two examples of a practice of adopting "approved" interpretations which would seem to require more detailed study.

The definitive interpretation of the provisions of the Charter must await the evolution of a "jurisprudence" based on the practice of the organs of the United Nations. In the meantime Messrs. Goodrich and Hambro have performed an extremely useful service which will be of great value to college students and intelligent laymen.

HERBERT W. BRIGGS

*Of the Board of Editors*

*Consular Relations Between the United States and the Papal States.* By Leo Francis Stock. Washington: American Catholic Historical Association; 1945. Pp. xl, 467; Appendix. Index. \$5. This book is a compilation of the official correspondence exchanged between our State Department and American consuls in the Papal States from March 1799 to July 1876. The documents are arranged chronologically, and explanatory footnotes are given, with ample biographical references.

There is an Introduction by the compiler which summarizes quite clearly American consular relations with the Papal Government during this period. The volume bears every evidence of thorough preparation and research, a high level of scholarship, and excellent presentation.

The reports of the consuls are very instructive on social conditions in the Papal States and the long train of events which culminated in the political unification of Italy under the leadership of Cavour, Garibaldi, and Mazzini. They also throw considerable light on almost every aspect of consular practice, and consuls, lawyers, and students of this special department of international law would do well to consult this compilation for valuable instruction and precedents.

The volume is a timely and useful contribution to the documentary history of consular law.

J. IRIZARRY Y PUENTE

*New York City*

*The United States and Britain.* By Crane Brinton. Cambridge: Harvard University Press, 1945. Pp. xii, 305. Appendices. Index. \$2.50. This book performs a public service. In summary form, and with scholarship without pedantry, it aims to tell average Americans what Britain is, what makes her tick, and what the problems of American-British relations are. These latter are regarded as difficult but not insoluble, given the mutual understanding Professor Brinton hopes to promote. Sumner Welles, editor of the American Foreign Policy Library contributes an introduction.

Beginning with a survey of modern Britain the author follows with a sketch of Britain and Eire in the war. Then comes a sixteen page vignette of the history of Anglo-American relations, which introduces the long section on problems of the present and future. The economic problem is posed by the opposing texts "Export or die," and "Import or fight another world war." Difficulties of the transition from war to peace are summarized, and monetary, trade, commercial aviation, oil, and cartel problems receive a judicious review. The conclusion is that we "cannot have an expanding world trade in the midst of international anarchy" (p. 187). America and Britain can contribute to the diminution of this anarchy by adjusting their differences over: air and naval bases; enemy-held bases and trusteeship; competing spheres of interest in the Middle East, the Far East, and Latin America; the treatment of Japan, Europe and Germany; and the tendency of public opinion in each country to criticize, without understanding, what the other regards as its domestic affairs. The underlying attitudes in each country have a chapter to themselves.

Professor Brinton sees hope in partnership to build up the United Nations, in mutually avoiding criticism based on ignorance, and in working together as separate communities without forming a bloc. The two countries "must try to settle between themselves such questions as those of the Atlantic and Pacific bases—though even here they would be wise to make the final settlement a genuinely international one, for the security of the world is at stake. They should try to settle multilaterally, and in the framework of the United Nations, such multilateral problems as those of international trade, money, and investment. They should work together, *but not as one*, however agreeable that slogan may sound in Anglo-American gatherings . . ." (p. 268). Sound advice indeed; but difficult to follow; for it requires each people to revise its deepest ways of thinking about the other.

Professor Brinton's appendices are fascinating reading. Examples: 40,863 university students enrolled in 1943-44; two thirds of all incomes below 3 pounds per week, amounting to only  $\frac{2}{5}$  of the national income;  $\frac{2}{3}$  of the national wealth owned by 1.6 per cent of the people; Commonwealth dead in the war 522,233. There is a very useful descriptive list of suggested reading.

No doubt this book will receive a wide reading among students. One wishes that our press and radio could find a little space and time for such a humane spirit illuminating such important facts.

LLEWELLYN PFANKUCHEN

*The Balance of Tomorrow.* By Robert Strausz-Hupé. New York: Putnam's; 1945. Pp. viii, 302. Tables. Charts. Index. \$3.50. "The Balance of Tomorrow" is an attempt to apply relatively new techniques of analysis of international relations to current and future problems of American foreign policy. It will thus be of interest to different types of readers. The political scientist, interested in the development of sound methodology in the field of international relations, may consider the book as an experiment worthy of attention. The more general reader, perhaps uninitiated in recent developments among professional academic writers on world affairs, may be a bit baffled and will probably feel that the author takes many pages to arrive on the more familiar ground of prediction and prescription of policy.

To some people in this country, including, alas, some professional students of international affairs, the very mention of "power" and "power politics" has a connotation of evil. They will find little in this volume to please them.



Nevertheless, it may be hoped that some will read it. The reader who is interested in the measurement of the relative power of nation-states will find many sections of this book most helpful.

Strausz-Hupé concentrates on an analysis of the factors of population, raw materials, and "organization" among the major units of national power. In each case the analysis points towards a conclusion as to the relative power position of the United States in the period between 1945 and 1970. It is probable that most readers will find the sections on population and organization the most informative. The raw materials section covers, obviously, much more familiar ground; here, however, the author contributes a stimulating synthesis of new material regarding the Soviet, India, and the "Yellow Sea Area." In connection with the latter region, it is necessary to note a rather startling factual error, when the author states, on page 134, that copper does not occur in Japan.

In the section subtitled "population and power," one finds a highly readable survey of the trends in population in the major countries of the world. Strausz-Hupé utilizes, of course, the recent studies of authorities on demography such as Frank Notestein; he combines analyses of the experts' findings with interesting examples of the fashion by which various states, such as Britain, are attempting to grapple with the problem of declining population. His analysis of our own position, projected through the coming twenty-five years, and his recommendations regarding our immigration policies, are arresting and should command the attention of many people other than the political scientists.

The final chapters, entitled "American Power in Transition" and "Alliances and the Balance of Power," respectively, provide a closely-reasoned, highly provocative study both of our present power position and of the alternatives of our future foreign policy. This section is tantalizingly brief. In particular the advocacy of "federation by consent"—both regional and world—demands more complete treatment. The reader is left with the concept to develop as he will, in his own mind. Nonetheless, he may be certain that Strausz-Hupé's own fully-developed ideas on the subject would be worth knowing.

WILLIAM G. FLETCHER

*Written in Darkness.* By Anne Somerhausen. New York: Knopf; 1946. Pp. viii, 340. \$3.00. All of Anne Somerhausen's many American friends will seize upon this volume eagerly in order to learn how she and Marc and their children fared during the desperate time of Nazi occupation of Belgium in the years 1940-1945. All students of international law and international relations should seize upon it also as a vivid record of life under military occupation and for the data which it gives concerning the machinations of the occupant, the behavior of the population of the occupied territory, and the general situation produced by such a conflict of forces. The former will not be disappointed: they will hear Anne speaking as it were *viva voce*, in her characteristic sensitive, intelligent, and wise fashion, concerning human relations and public international affairs; they will have some news of Marc's heroic and competent behavior as a soldier and a prisoner of war in Germany for five long years. The latter will be provided with unusually rich information on life under the military occupant, specifically the Nazi occupant. No more striking volume of its kind has come out of the war.

P. B. P.

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WILBUR S. FINCH

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**INTER-AMERICAN JURIDICAL COMMITTEE**  
**DRAFT DECLARATION OF THE INTERNATIONAL RIGHTS AND DUTIES**  
**OF MAN AND ACCOMPANYING REPORT \***

*December 31, 1945*

**DRAFT DECLARATION OF THE INTERNATIONAL  
RIGHTS AND DUTIES OF MAN**

**Article I**

**RIGHT TO LIFE**

Every person has the right to life. This right extends to the right to life from the moment of conception; to the right to life of incurables, imbeciles and the insane. It includes the right to sustenance and support in the case of those unable to support themselves by their own efforts; and it implies a duty of the state to see to it that such support is made available.

The right to life may be denied by the state only on the ground of conviction of the gravest of crimes, to which the death penalty has been attached.

**Article II**

**RIGHT TO PERSONAL LIBERTY**

Every person has the right to personal liberty.

The right to personal liberty includes the right to freedom of movement from one part of the territory of the state to another, and the right to leave the state itself. It includes also freedom to establish a residence in any part of the territory, subject only to the restrictions that may be imposed by general laws looking to the public order and security of the state.

The right to personal liberty includes the inviolability of the domicile of the individual and of his personal correspondence.

The state may restrict this right only to the extent necessary to protect the public health, safety, morals and general welfare, in accordance with subsequent provisions of this Declaration.

The right of the state to call upon the services of the individual in time of emergency or to meet the necessities of national defense shall not be regarded as a limitation upon the fundamental right to personal liberty, but merely as a temporary restriction operating during the existence of the national need.

No person shall be imprisoned or held in servitude in consequence of the mere breach of contractual obligations.

**Article III**

**RIGHT TO FREEDOM OF SPEECH AND OF EXPRESSION**

Every person has the right to freedom of speech and of expression.

This right includes freedom to form and to hold opinions and to give ex-

\* Text provided by the Pan-American Union.

pression to them in private and in public, and to publish them in written or printed form.

The right to freedom of speech and of expression extends to the use of whatever means of communication are available: freedom to use the postal service, the public utilities of telegraph, telephone and radio communication; freedom to use the graphic arts, the theater, the cinema and other agencies for the dissemination of ideas.

The right to freedom of speech and of expression includes freedom of access to the sources of information, both domestic and foreign.

The right to freedom of speech and of expression includes the special and highly privileged right to freedom of the press.

The only limitations which the state may impose upon this freedom are those prescribed by general laws looking to the protection of the public peace against slanderous or libellous defamation of others, and against indecent language or publications, and language or publications directly provocative of violence among the people.

Censorship of the press is prohibited, whether by direct or indirect means, and all limitations imposed in the interest of public order shall only be applied subsequently to the publication of the material alleged to be of the offensive character described in the law. Censorship of the cinema may be in advance of publication, taking into account the particular form of publication and the necessity of protecting the public against matters offensive to accepted standards of conduct. The state may not retain a monopoly of radio broadcasting so as to deny to the individual the opportunity for the free expression of opinion through that instrumentality of communication.

#### Article IV

##### RIGHT TO FREEDOM OF RELIGIOUS WORSHIP

Every person has the right to freedom of religious belief and worship.

This right includes freedom of religious worship in public as well as in private; freedom of religious worship by groups as well as by individuals; freedom to maintain churches and other places of public worship and to assemble in them without restraint; freedom of parents to educate children in their particular religious belief; freedom of religious propaganda in spoken or written form.

The only restrictions which the state may place upon the right of freedom of religious worship are those called for by the requirements of public health, safety and good morals; and all such restrictions must be in accordance with general laws and administered without discrimination.

A distinction is recognized between strictly religious activities and other activities of an economic or financial character associated with the maintenance of religious worship but not forming an essential part of it. These economic or financial activities may be regulated by the state in accordance with the general laws governing such activities.



## Article V

## RIGHT TO FREEDOM OF ASSEMBLY

Every person has the right to assemble peaceably with others as a means of giving expression to views upon matters of common interest.

The state has the duty to permit the use of public places for purposes of general assembly. It has the right to be informed of meetings to be held in public places, to designate convenient localities, and to impose conditions upon the use of such places in the interest of the public order and safety. Similar conditions may be imposed upon assemblies in public and in private buildings. But the conditions imposed by the state upon the holding of public meetings must not be such as to impair substantially the right itself to hold such meetings; and no conditions shall be required for the assembly of small groups of persons whether in public or in private places.

The right of assembly includes the right to hold public parades, subject to the same restrictions to which assemblies are subject.

## Article VI

## RIGHT TO FREEDOM OF ASSOCIATION

Every person has the right to associate with other persons for the protection and promotion of legitimate interests.

The state has the right to adopt regulations governing the activities of associations, provided they are applied without discrimination against a particular group, and provided they do not impair substantially the right of association.

## Article VII

## RIGHT TO PETITION THE GOVERNMENT

Every person has the right, whether exercised by individual action or in conjunction with others, to petition the government for redress of grievances or to petition in respect to any other matter of public or private interest.

The publication of such petitions shall not be made a ground for penalizing in any way, directly or indirectly, the person or persons making the petition.

## Article VIII

## RIGHT TO OWN PROPERTY

Every person has the right to own property.

The state has the duty to coöperate in assisting the individual to attain a minimum standard of private ownership of property based upon the essential material needs of a decent life, looking to the maintenance of the dignity of the human person and the sanctity of home life.

The state may determine by general laws the limitations which may be

placed upon the ownership of property, looking to the maintenance of social justice and to the promotion of the common interest of the community.

The right of private property includes the right to the free disposal of property, subject, however, to limitations imposed by the state in the interest of maintaining the family patrimony.

The right of private property is subject to the right of the state to expropriate property in pursuance of public policy, just compensation being made to the owner.

### Article IX

#### RIGHT TO A NATIONALITY

Every person has the right to a nationality.

No state may refuse to grant its nationality to persons born upon its soil of parents who are legitimately present in the country.

No person may be deprived of his nationality of birth unless by his own free choice he acquires another nationality.

Every person has the right to renounce the nationality of his birth, or a previously acquired nationality, upon acquiring the nationality of another state.

### Article X

#### RIGHT TO FREEDOM OF FAMILY RELATIONS

Every person has the right to be free from interference in his family relations.

It is the duty of the state to respect and to protect the reciprocal rights of husband and wife in their mutual relations.

Parents have a primary right of control over their children during minority, and they have a primary obligation to maintain and support them.

It is the duty of the state to assist parents in the maintenance of adequate standards of child welfare within the family circle, and to promote as far as possible the ownership of individual homes as a means of fostering better family relations.

The state may restrict the control of parents over their children only to the extent that the parents themselves are unable to perform their duties towards their children or actually fail to do so. Where necessary, the state must itself provide for their protection and support.

### Article XI

#### RIGHT TO BE FREE FROM ARBITRARY ARREST

Every person accused of crime shall have the right not to be arrested except upon warrant duly issued in accordance with the law, unless the person is arrested *flagrante delicto*. He shall have the right to a prompt trial and to proper treatment during the time he is in custody.

## Article XII

## RIGHT TO A FAIR TRIAL

Every person accused of crime shall have the right to a fair public hearing of the case, to be confronted with witnesses, and to be judged by established tribunals and according to the law in force at the time the act was committed. No fines shall be imposed except in accordance with the provisions of general laws; and no cruel or unusual punishments.

## Article XIII

## RIGHT TO PARTICIPATE IN ELECTIONS

Every person, national of the state, has the right to participate in the election of the legislative and executive officers of the government in accordance with the provisions of the national constitution. The practical exercise of this right may, however, be conditioned by the duty of the person to show that he is competent to understand the principles upon which the constitution is based. The constitution of the state shall provide for a government of the people, by the people and for the people.

This right presupposes the right to form political parties.

No person shall be denied the right to hold public office, or to be appointed to any of the public services of the state of which he is a national, upon grounds of race or religion or sex or any other arbitrary discrimination; and the administration of the public services of the state shall, in respect to appointments and terms and conditions of service, be without favor or discrimination.

## Article XIV

## RIGHT TO WORK

Every person has the right to work as a means of supporting himself and of contributing to the support of his family.

This right includes the right to choose freely a vocation, in so far as the opportunities of work available make this possible, as well as the right to transfer from one employment to another and to move from one place of employment to another. Associated with the right to work is the right to form labor and professional unions.

Every person has the duty to work as a contribution to the general welfare of the state.

The state has the duty to assist the individual in the exercise of his right to work when his own efforts are not adequate to secure employment; it must make every effort to promote stability of employment and to insure proper conditions of labor, and it must fix minimum standards of just compensation.

The state has the right, in time of emergency, to call upon the services of the individual in cases where such services are necessary to meet an urgent public need.

## Article XV

## RIGHT TO SHARE IN BENEFITS OF SCIENCE

Every person has the right to share in the benefits accruing from the discoveries and inventions of science, under conditions which permit a fair return to the industry and skill of those responsible for the discovery or invention.

The state has the duty to encourage the development of the arts and sciences, but it must see to it that the laws for the protection of trademarks, patents and copyrights are not used for the establishment of monopolies which might prevent all persons from sharing in the benefits of science. It is the duty of the state to protect the citizen against the use of scientific discoveries in a manner to create fear and unrest among the people.

## Article XVI

## RIGHT TO SOCIAL SECURITY

Every person has the right to social security.

The state has the duty to assist all persons to attain social security. To this end the state must promote measures of public health and safety and must establish systems of social insurance and agencies of social cooperation in accordance with which all persons may be assured an adequate standard of living and may be protected against the contingencies of unemployment, accident, disability and ill-health and the eventuality of old age.

Every person has the duty to cooperate with the state according to his powers in the maintenance and administration of the measures taken to promote his own social security.

## Article XVII

## RIGHT TO EDUCATION

Every person has the right to education.

The right of children to education is paramount.

The state has the duty to assist the individual in the exercise of the right to education, in accordance with the resources of the state. The opportunities of education must be open to all upon equal terms in accordance with their natural capacities and their desire to take advantage of the facilities available.

The state has the right to fix general standards to which educational institutions must conform, provided that these standards are in accord with other fundamental rights and are the same for public and for private schools.

The right to education involves the right to teach, subject to the restrictions which accompany the right to education.

## Article XVIII

## RIGHT TO EQUALITY BEFORE THE LAW

All persons shall be equal before the law in respect to the enjoyment of their fundamental rights. There shall be no privileged classes of any kind whatsoever.

It is the duty of the state to respect the fundamental rights of all persons within its jurisdiction and to protect them in the enjoyment of their rights against interference by other persons.

In all proceedings in relation to fundamental rights the state must act in accordance with due process of law and must assure to every person the equal protection of the law.

All restrictions imposed upon fundamental rights must be such only as are required by the maintenance of public order; and they must be general in character and applicable to all persons within the same class.

## Article XIX

## RIGHTS AND DUTIES CORRELATIVE

Rights and duties are correlative; and the duty to respect the rights of others operates at all times as a restriction upon the arbitrary exercise of rights.

## Article XX

## INCORPORATION OF DECLARATION INTO MUNICIPAL LAW

The provisions of this Declaration shall be a part of the law of each individual state, to be respected and enforced by the administrative and judicial authorities in the same manner as all other laws of the state.

The provisions of this Declaration shall not be abrogated or modified except in accordance with the terms of an inter-American agreement or an agreement of the United Nations binding upon the American States.

## Article XXI

## PROCEDURE IN CASES INVOLVING ALIENS

In the case of aliens alleging violation of the foregoing fundamental rights by the state in which they are resident, the complaint shall be decided first by the courts of the state itself; and in cases in which a denial of justice is alleged by the state of which the alien is a national, the case, failing diplomatic settlement, shall be submitted to an International Court, the statute of which shall be included as an integral part of the instrument in which the present Declaration is to be adopted.

RIO DE JANEIRO, December 31, 1945

FRANCISCO CAMPOS  
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## REPORT TO ACCOMPANY THE DRAFT DECLARATION OF THE INTERNATIONAL RIGHTS AND DUTIES OF MAN

I. CIRCUMSTANCES UNDER WHICH THE JURIDICAL COMMITTEE HAS UNDERTAKEN THE PREPARATION OF A DECLARATION OF THE INTERNATIONAL RIGHTS AND DUTIES OF MAN.

1. The Inter-American Conference on Problems of War and Peace, by Resolution XL of the Final Act of the Conference,\* proclaimed the adherence of the American Republics to the principles established by international law for safeguarding the essential rights of man and declared their support of a system of international protection of these rights. At the same time the Conference requested the Inter-American Juridical Committee to prepare a draft Declaration of the International Rights and Duties of Man, to be submitted through the Pan American Union to the American Governments for such comments as they might deem pertinent, in order that the Committee might prepare a final draft of the document for formal adoption as an inter-American convention.

2. By Resolution IX of the same Conference, dealing with the reorganization of the inter-American system, the Governing Board of the Pan American Union was called upon to prepare a draft charter for the improvement and the strengthening of the Pan American system. The draft charter is to proclaim the adherence of the American Republics to certain fundamental principles of international law to be set forth in a Declaration of the Rights and Duties of States and in a Declaration of the International Rights and Duties of Man, to be attached as an annex to the charter. Provision was further made that the text of the second Declaration should be the text prepared by the Inter-American Juridical Committee in fulfillment of the request contained in Resolution XL. The date of December 31 was fixed for the submission of the draft charter to the American Governments.

II. BACKGROUND OF THE DEMAND FOR THE ADOPTION OF A DECLARATION OF THE INTERNATIONAL RIGHTS AND DUTIES OF MAN.

1. Prior to the recent war international law left to each State complete control over the relations between the State and its citizen body. The right of humanitarian intervention was recognized by international law in broad terms; but this was limited to extreme cases in which a government might treat a religious or racial minority with such cruelty as to shock the conscience of the world. Such interventions, which took place but rarely, were based upon the vindication of the moral obligations of civilized people, and they did not involve any relation between the offensive acts and the maintenance of peace.

2. With the outbreak of the recent war, however, it came to be realized that totalitarian governments which denied to their peoples the traditional

\* It seems that this and the following section should be numbered VII and VIII.—Ed.

rights of freedom of speech and of the press and of assembly were in themselves a menace to the peace of the nations. For the denial of these rights made it possible for a government to instill into its people false ideas of the policies of other states and to create sentiments of hatred which formed the psychological basis of future aggression. In its Preliminary Recommendation on Post-War Problems, submitted to the American Governments on September 6, 1942, the Juridical Committee, in commenting upon the factors which contributed to the breakdown of international law and order in 1939, pointed out the ways in which a fanatical spirit of nationalism was able to make its propaganda of racial supremacy effective by shutting off the sources of public information through a rigorous censorship of the press and a government monopoly of broadcasting. "Thus the very wells of thought were poisoned", said the Committee, "and political leaders who were promoting false theories of nationalism were able to strengthen their hold upon the loyalty of the people thus deceived as to the true attitude of other countries." In reference to the social factors contributing to the breakdown of law and order, the Committee pointed out the relation between economic insecurity and the susceptibility of a people to propaganda in favor of the use of force as a means of remedying a desperate situation when other less drastic remedies appeared inadequate.

3. The Atlantic Charter, signed on August 14, 1941, by President Roosevelt and Prime Minister Churchill, made reference only to the economic aspect of the problem of human rights. The fifth of the principles set forth in the Charter expresses the desire "to bring about the fullest collaboration between all nations in the economic field with the object of securing, for all, improved labor standards, economic advancement, and social security." The sixth principle looks forward to the establishment of a peace which will assure that all men in all lands may live out their lives in "freedom from fear and want."

4. The Declaration by United Nations, signed on January 1, 1942, announced that the Governments signatory of the Declaration had subscribed to the Atlantic Charter as "a common program of purposes and principles", and that they were convinced that victory over their enemies was essential to defend life, liberty and religious freedom "and to preserve human rights and justice in their own lands as well as in other lands." The Declaration thus proclaimed that the protection of human rights in all countries was one of the results which it was hoped might be obtained from victory over the Axis Powers.

5. The protection of the fundamental rights of men in every land may thus be regarded from two distinct points of view. In the first place it is an essential condition of friendly coöperation between nations. A people denied the fundamental right of freedom of speech and of the press and of access to the sources of information cannot coöperate effectively with the peoples of other states because they have no direct contacts with them, no way of ob-

taining an unbiased understanding of their points of view, no assurance that the policies ascribed to them represent their true attitudes.

In the second place the protection of the fundamental rights of man within each state is part of the larger objective of developing the individual human being as a free, self-reliant and responsible member of the international community. The conception of the state as a coöperative commonwealth, in which the resources of the community must be used to raise the standard of living and to provide a decent subsistence for all of its members has come to dominate modern political thought. Until recent years it was believed that the democratic state adequately fulfilled its purpose if it left to its citizens the freedom necessary for each individual to take advantage of the opportunities of earning a livelihood which appeared to be available to all where no restraints were put by the state. But the growth of modern industrialism, accompanied by higher conceptions of social obligation, has made the earlier doctrines of extreme individualism no longer applicable. At the same time the organization of the economic life of the state has been found to be necessary to secure equality of opportunity for all and to bring the rewards of labor more into conformity with the contribution of labor to the national welfare.

In addition to the recognition of the changed conditions of modern economic and social life, the conception of democracy has been extended to include a recognition of the moral worth of the individual human being and a realization that man cannot attain his full moral stature under conditions of malnutrition, disease, bad housing and sanitation, and other hurtful surroundings. Respect by man for the rights of other men can only be expected when the individual himself is in possession of the essential conditions of a decent life. Mutual coöperation by the peoples of the world in the attainment of peace and justice will in the future be dependent in large part upon the development within each separate national community of a citizen body characterized by the personal dignity and moral responsibility of each individual member of the group.

The full text of the Resolution is as follows:

#### INTERNATIONAL PROTECTION OF THE ESSENTIAL RIGHTS OF MAN

##### *Whereas:*

The Declaration of the United Nations has proclaimed the need for establishing international protection of the essential rights of man;

In order to make such protection effective it is necessary to define these rights, as well as the correlative duties, in a declaration to be adopted as a convention by the States;

International protection of the essential rights of man would eliminate the misuse of diplomatic protection of citizens abroad, the exercise of which has more than once led to the violation of the principles of non-intervention and of equality between nationals and aliens, with respect to the essential rights of man,

The Inter-American Conference on Problems of War and Peace

##### *Resolves:*

1. To proclaim the adherence of the American Republics to the principles established by



international law for safeguarding the essential rights of man, and to declare their support of a system of international protection of these rights.

2. To request the Inter-American Juridical Committee to prepare a draft Declaration of the International Rights and Duties of Man, which shall be submitted, through the Pan American Union, to all the Governments of the Continent, which in turn shall submit, within a maximum period of six months, the comments they deem pertinent, in order that the Committee may prepare a final draft of such inter-American instrument.

3. To request the Governing Board of the Pan American Union, after the Committee has prepared this draft and others entrusted to it by this Conference, to convoke the International Conference of American Jurists in order that the Declaration may be adopted as a convention by the States of the Continent.

### III. SPECIFIC MEASURES LOOKING TO THE INTERNATIONAL PROMOTION OF FUNDAMENTAL HUMAN RIGHTS.

1. In the fall of 1944, delegates of the United States, Great Britain, the Soviet Union and China, having in mind the fulfillment of the pledges of the Moscow Conference of November, 1943, met in Washington and formulated the Dumbarton Oaks Proposals for the establishment of a general international organization for the maintenance of peace and security. Provision was made in Chapter IX of the Proposals, dealing with arrangements for international economic and social cooperation, that the Organization "should facilitate solutions of international economic, social and other humanitarian problems and promote respect for human rights and fundamental freedoms."

2. The submission of the Dumbarton Oaks Proposals to the American Governments for their observations brought forth a number of suggestions looking to the formulation of a specific declaration of rights and duties after the manner of the traditional constitutional guarantees. The Government of Mexico recommended that the Proposals should be amended so as "to incorporate essential human rights in a Declaration of the International Rights and Duties of Man, which, together with a similar declaration of the rights and duties of states, should appear as an annex to the Charter." On its part the Juridical Committee, in its Preliminary Comments and Recommendations upon the Dumbarton Oaks Proposals, suggested that a specific obligation should be imposed upon each state to keep open the channels of communication and information with other countries in order to promote mutual understanding. This obligation would be one element of an "international bill of rights", which the Committee believed it desirable to include in the Charter.

3. The Conference on Problems of War and Peace, which met in Mexico City on February 21, 1945, gave an additional impulse to the demand for the international protection of human rights and the formulation of a specific declaration setting forth the rights to be protected and the duties accompanying them. Projects were presented by a number of the delegations to the Conference. The Project (No. 24) presented by the Cuban Delegation recited the principles upon which a declaration of the rights of man should

be based, followed by an enumeration of the substantive rights of person and property both of citizens and of aliens which should be recognized, as well as their procedural rights in cases coming before the national courts. A separate project (No. 27) presented by the same delegation was directed towards the special protection which should be given to the Jews, proposing the creation of a free and democratic state within fixed boundaries.

The project (No. 30) presented by the Mexican Delegation was preceded by an elaborate exposition of motives giving the philosophical and historical background of the problem, followed by a resolution calling upon the Inter-American Juridical Committee to formulate a draft of the proposed Declaration of the International Rights and Duties of Man for submission to the American Governments. A special feature of the Mexican project was the suggestion that the Declaration, "by establishing a minimum standard of civilized justice," might do away with the necessity of the diplomatic protection of citizens abroad which had led frequently to the violation of the principle of non-intervention. To this end the project recommended the creation of an inter-American organ which would have the special duty of watching over the regulation and practical application of the principles which were to be proclaimed in the declaration.

The Uruguayan Delegation presented a project (No. 83) characterized by the prominence given to economic rights and social security. A project of the Brazilian Delegation (No. 136), without making specific reference to a declaration of human rights, put stress upon the necessity of raising the standard of living and improving the economic and social condition of the people.

As has been pointed out above, the Resolution (XL) adopted by the Conference on the basis of these several projects, leaves to the Juridical Committee the formulation of the draft of the proposed declaration.

4. The provisions of the Charter of the United Nations looking to the promotion of fundamental rights enlarge upon those of the Dumbarton Oaks Proposals, reflecting the widespread conviction of the close relation between the protection of fundamental rights and the objective of international peace and justice. The preamble of the Charter, declared to be an integral part of it, proclaims the determination of the peoples of the United Nations "to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small." Chapter I includes among the "Purposes" of the United Nations to achieve international coöperation "in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion." Chapter IV gives to the General Assembly, among other powers, that of making recommendations for the purpose of "assisting in the realization of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion." Chapter IX, dealing with economic and social coöperation, proclaims the

obligation of the United Nations to promote "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion." Chapter X, dealing with the Economic and Social Council, provides that the Council may "make recommendations for the purpose of promoting respect for, and observance of, human rights and fundamental freedoms for all," and that to that end among others it may prepare draft conventions for submission to the General Assembly and may call international conferences. The Council is instructed "to set up commissions in economic and social fields and for the promotion of human rights."

These several amendments to the Dumbarton Oaks Proposals were in large part the result of the efforts of delegations representing the American States. A joint amendment to the Purposes of the Organization was introduced by the delegations of Brazil, the Dominican Republic, Ecuador and Mexico. The delegations of Cuba and of Panama both proposed the immediate adoption of a formal Declaration of the Rights and Duties of the Individual. The Uruguayan Delegation proposed that the essential human liberties and rights should be defined in a special "Charter of Mankind," to be formulated by a Technical and Juridical Commission and to be submitted to the consideration of the Assembly within a period of six months. The chairman of the United States Delegation, although holding that it was not feasible to formulate an enumeration of human rights at the Conference, expressed the belief that the commission on human rights of the Economic and Social Council should promptly undertake to prepare an international bill of rights which could be accepted by all the member nations as an integral part of their own systems of law.

The reiterated emphasis thus put in the Charter upon the promotion of respect for the fundamental rights of man clearly indicates an intention on the part of the signatory powers not to rest content with the mere proclamation of general principles, but to bring about the practical application of the principles in the relations of the states. The report of the sixth meeting of the Committee in charge of arrangements for social and economic co-operation indicates that it was the general opinion of the members of the Committee, in line with the position taken by a number of the American delegations, that the Assembly of the Organization, when it was constituted, should be called upon to draft a formal declaration of human rights.

#### IV. DECLARATIONS PREVIOUSLY ELABORATED BY PRIVATE ASSOCIATIONS

1. The Institut de Droit International, at its session of October 12, 1929, held at Briarcliff Manor, New York, adopted a "Declaration of the International Rights of Man." The preamble of the Declaration recites "that the juridical conscience of the civilized world demands the recognition for the individual of rights preserved from all infringement on the part of the State"; and it proclaims "the equal right of every individual to life, liberty

and property" and the full and entire protection of the right without discrimination, the right to the free practice of religion, the right to the free use by the individual of the language of his choice, the right of nationals to be admitted to educational institutions and to the exercise of professions and of economic activities, and the right to retain nationality.

Progressive as was the proposal however, the Declaration adopted by the Institute of International Law failed to attain practical results. The nations were not yet ready in 1929 to take collective action in the matter. It required the experience of the series of acts of aggression by totalitarian governments to bring about a realization by democratic governments that the adoption of a declaration of the rights of man was not merely an ideal of humanitarian conduct but a necessary condition of international peace.

2. In 1943 the American Law Institute appointed a committee of lawyers and political scientists representing the principal cultures of the world to draft a statement of the rights believed to be essential to make the freedom of the individual effective. The draft prepared by the committee consists of a series of eighteen articles dealing in turn with freedom of religion, freedom of opinion, freedom of speech, freedom of assembly, freedom to form associations, freedom from wrongful interference, fair trial, freedom from arbitrary detention, retroactive laws, property rights, education, work, conditions of work, food and housing, social security, participation in government, equal protection, and limitations on the exercise of rights. A preamble preceding the statement declares that "upon the freedom of the individual depends the welfare of the people, the safety of the state and the peace of the world," and that it is the function of the state to promote conditions under which the individual can be most free. The list of fundamental freedoms thus includes not only the traditional rights of man against interference by the state, but the newer rights arising from the changed conditions of economic life and the necessity of affirmative action on the part of the state to enable the individual to be free in a highly industrialized and interdependent economic society.

3. After several years of study the Commission to Study the Organization of Peace, which had been established immediately after the outbreak of war in Europe, presented its report dealing with the "International Safeguard of Human Rights," constituting Part III of the Fourth Report of the Commission. In this report the Commission deals first with the significance of human rights in international organization, with the proposed United Nations Conference on Human Rights, with existing international measures for safeguarding human rights, and with the methods of making international standards effective. The report advocated the creation by the United Nations of a special Commission on Human Rights vested with powers of investigation and advice, whose function it would be to develop standards of human rights and measures for their effective safeguard. The Commission would be a quasi-autonomous body of experts, with its own permanent secre-

tariat, submitting recommendations to the general international organization but not dominated by it. At the same time the report recognizes that the protection of human rights is to be effected with due regard for and utilization of the legal system and habit of each country. The Commission on Human Rights would be the "bridge" between international standards and agencies on the one hand and the legal system of each nation on the other. The report expresses the belief that "national legal machinery can be an effective means for carrying out a nation's international duties and for vindicating rights which may accrue to an individual under international law."

4. The General Conference of the International Labor Organization, meeting in its twenty-sixth session in Philadelphia, adopted on May 10, 1944, a declaration of aims and purposes under the name of the "Philadelphia Charter." The Conference reaffirmed the fundamental principles upon which the Organization was based, that labor is not a commodity, that freedom of expression and association are essential to sustained progress, that poverty anywhere constitutes a danger to prosperity everywhere, and that the war against want calls for both national action and international cooperation. On the basis of the principle of its Constitution, that lasting peace can be established only if it is based on social justice, the Conference affirmed that: "All human beings irrespective of race, creed or sex, have the right to pursue their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity." The attainment of these ends must be the central aim of national and of international policy, and all specific measures, particularly those of an economic and financial character, must be judged in the light of this fundamental objective.

#### V. SCOPE OF AN "INTERNATIONAL BILL OF RIGHTS."

1. In the light of the various documents, both public and private, to which reference has been made, it is clear that the rights to be included in the proposed "Declaration of the International Rights and Duties of Man" must be not only the traditional political rights already recognized in the national constitutions of the great majority of states but the newer economic and social rights of a positive character which have come to be recognized within recent years as a necessary inference from the conception of the democratic state as a cooperative commonwealth seeking the general welfare of all its members.

2. The traditional political rights of man must be reexamined so as to take into account the changed conditions of the present day and to permit the formulation of these fundamental rights in more specific terms than has hitherto been attempted. The great historical proclamations of human rights, the English Magna Charta, the American Declaration of Independence, the French Declaration of the Rights of Man and of Citizen,

which have become part of the inheritance of the civilized world, have lost none of their theoretical value; they are landmarks in the development of democratic government. The principles they set forth were incorporated into the earliest constitutions of the Latin American states. But the rights they proclaimed were necessarily formulated in broad terms, applicable to the conditions of the times. The guarantees of human rights contained in the later constitutions of the American States in like manner reflect the circumstances which called them forth and the ideals that prevailed at the particular epoch. The Juridical Committee has sought to interpret these provisions so as to bring them as far as possible into harmony and, while preserving their substance, to adapt them to present needs and thus give them renewed vitality.

In view of the widespread denial of these political rights by totalitarian governments of recent years it may be well to restate the basic theory underlying them. The state is not an end in itself, it is only a means to an end; it is not in itself a source of rights but the means by which the inherent rights of the individual person may be made practically effective. Man is, indeed, by his very nature a social being; he finds in the state the opportunity for the development of his moral and material interests; but he does not thereby endow the state with a mystical personality of its own which justifies it in promoting its own power and prestige at the expense of the rights which are fundamental to the maintenance of the dignity and worth of the individual man himself. As expressed in the Declaration of the Social Principles of America, adopted by the Conference on Problems of War and Peace at Mexico City, "man must be the center of interest of all efforts of peoples and governments." Not only, therefore, are particular governments bound to respect the fundamental rights of man, but the state itself is without authority to override them. The individual man is the ultimate basis of law, and he may claim his essential rights against the state itself as well as against the particular officers of the government.

3. The theory underlying the newer body of economic and social rights is the broad principle of distributive justice. A generation or more ago states had but a limited understanding of the obligations of the community to promote the welfare of its individual citizens. The rights of the individual were rights against the interference of the state, not rights to the active assistance of the state. But within more recent years it has come to be understood that the individual can not always by his own efforts attain the standard of living adequate to the development of his human personality. The complicated economic life of modern states has made the old doctrine of *laissez faire* no longer adequate. At the same time the concept of the democratic state as a coöperative commonwealth whose objective is the general welfare of all of its members has come to be more clearly understood. The relation between spiritual development and standards of material welfare has come to be more generally recognized. The Charter of the United

Nations expresses the determination to promote social progress and better standards of life in larger freedom. Thus the fundamental rights of the individual may be regarded as growing with the growth of civilization, taking on new forms with the newer ideals of social justice.

#### VI. ANALYSIS OF DETAILED RIGHTS AND DUTIES.

There is no uniformity in the various classifications of fundamental rights that have been followed in the constitutions of states or in the draft declarations submitted by private associations or individual writers. While it would appear desirable to list the various rights in the order of their importance, this cannot be done in any rigid way in view of the fact it would be difficult to obtain agreement upon the relative importance of particular rights; and at the same time the exercise of one right is as a rule associated in practice with the exercise of another right. It is, however, feasible to distinguish between the older body of political rights, directed against the interference of the state with the liberty of the individual, and the newer body of economic and social rights which call for affirmative action on the part of the state. Moreover, the older body of political rights permits a distinction between the normal rights of the individual to the enjoyment of certain freedoms and the special rights of persons accused of crime. The fundamental right of equality before the law is put at the end because it is a right which qualifies all other rights.\*

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#### VI†. POLITICAL IDEALS AND PRACTICAL POSSIBILITIES.

1. All of the great declarations of human rights, from the Declaration of Independence of the United States down to the Atlantic Charter, including the bills of rights incorporated into the Constitutions of the other American Republics, are to a greater or less extent idealistic in character, that is, they set up a standard which the state must regard as its ultimate objective and which it must seek to attain by the means available to it.

It would seem that there should be no substantial obstacles to putting into effect the political rights of the individual. For these are largely a matter of non-interference on the part of the government with the normal activities of the people. It is true that the state must intervene to protect the rights of one individual in relation to another and to insure the fulfillment of the duties accompanying rights; but this need not call for any effort on the part of the state which is not already within its reach.

On the other hand the newer economic and social rights of man call for the active coöperation of the state in bringing its material resources to the aid of those who are unable to enjoy their rights by their own unaided efforts.

\* At this point follow detailed comments on the twenty-one articles of the Draft Declaration.

† It seems that this and the following section should be numbered vii and viii.—Ed.

Here the coöperation of the state will obviously depend not merely upon the extent of its material resources but upon its ability to organize its resources and to distribute its aid effectively among its people in accordance with the degree of their need. It is not to be expected, therefore, that the objective proclaimed by a declaration of rights and duties can be attained by the mere passage of social legislation of the most advanced character. Time will be required in all cases, more time in some cases than in others, before the ideal of social justice can be reached. Each state can only keep before it the ideal and take such measures as are practically available to it.

2. It is contemplated that in respect to the economic and social rights of man and the corresponding duties imposed upon the state that international coöperation will come to the aid of those states which are unable to raise the social conditions of their peoples up to the level contemplated. Provision for such international coöperation is made in inter-American agreements as well as in the Charter of the United Nations. Human rights and fundamental freedoms are said in the Charter to be a matter of common concern to the Organization and an objective to be attained by the action of the entire body. To a certain extent, as yet undetermined, international coöperation must seek to overcome the disparities between states in the same way in which the individual state itself must seek to overcome the disparities between its citizens. Here also progress towards the ideal must of necessity be by degrees, and the attainment of the objective must be conditioned by what is practically feasible under the circumstances.

#### VII. ADMINISTRATION OF AN INTERNATIONAL STANDARD OF FUNDAMENTAL RIGHTS.

1. While a literal interpretation of the mandate given to the Juridical Committee by Resolution XL of the Mexico City Conference might suggest that the function of the Committee was limited to the draft of a Declaration of the International Rights and Duties of Man without reference to the part which the Declaration is to play in the inter-American system, the Juridical Committee is of the opinion that the administrative aspects of the problem of protecting human rights come properly within its competence, thus leading it to consider the ways and means by which the Declaration may be made practically effective.

As pointed out above, Resolution IX of the Mexico City Conference, makes provision for the preparation of a draft charter for the reorganization, consolidation and strengthening of the Pan American system. The Resolution prescribes that this charter shall first of all proclaim the recognition by the American Republics of international law as the rule of their conduct, together with a pledge to observe the standards set forth in a Declaration of the Rights and Duties of States and in a Declaration of the International Rights and Duties of Man which the Juridical Committee has been instructed to prepare. The two Declarations are to appear as an annex to



the charter, so that, without amending the charter, the Declarations may be revised from time to time according to need.

For this reason the Juridical Committee comes to the conclusion that it is appropriate to include in its report a consideration of the administration of the international standard of the fundamental rights and duties of man. This aspect of the problem is, indeed, the most difficult of all.

The American Republics have indicated in the above Resolution that the principles of the proposed Declaration are to become "the effective rule of their conduct." Does this imply anything more than that the principles are to be incorporated into the domestic law of the individual state and that they are to be administered upon the same basis as the enactments of national legislatures? The Declaration is referred to in the Resolution as a "definition of the fundamental principles of international law." Resolution XL, which deals specifically with the proposed Declaration, proclaims the adherence of the American Republics to the principles established by international law for safeguarding the essential rights of man and declares their support of a system of international protection of these rights. What meaning is to be ascribed to the words "international protection"? Does the phrase imply that a violation of the principles set forth in the Declaration becomes a matter of concern for the inter-American community as a whole?

Throughout their growth and development during the past three hundred years or more, the rules of international law have been put into effect by the action of the individual state. The international community has never been organized to the extent of creating executive agencies for the enforcement of its rules. The Charter of the United Nations does, indeed, single out one vital principle of law; the principle that force shall not be used in the settlement of international disputes, and it establishes a central agency for the enforcement of that principle. The other rules of law, however, continue to be left for execution to the individual states, and upon each of them individually falls the obligation to give effect to the rules by the adoption of such domestic legislation as may be necessary to accomplish the purpose.

While the rules of international law constitute a direct obligation for all states, yet the relation of these rules to the domestic law of the individual state is a matter for separate adjustment by each state in accordance with its national constitution. In some states international law becomes automatically part of the law of the land, so that the national courts must give effect to it in the same manner in which they give effect to the acts of the national legislature. In other states a special act of the national legislature may be necessary to bring the rule of international law into effect. In either case, however, the rule of international law, once it has come into effect, is of paramount obligation, and no state may plead the provisions of its national constitution or laws as an excuse for failure to carry it out. Attention may be called here to Resolution XIII of the Conference on Problems of

War and Peace, in which the need is proclaimed for all states to strive toward the incorporation of the essential principles of international law into their constitutions and other municipal law.

3.\* It is clear that the enforcement of the provisions of a Declaration of the International Rights and Duties of Man must form a very intimate part of the national legislation and administration of each separate state. Under present conditions it is agreed that the obligations assumed under such a Declaration must be carried out by the organs of each separate state acting in pursuance of its own constitution. In order to insure the more effective enforcement of the Declaration in accordance with the provisions of domestic law, the Juridical Committee suggests that an article be added to the convention contemplated in Resolution XL of the Mexico City Conference more or less to the following effect:

The provisions of this Declaration shall be a part of the law of each individual state, to be respected and enforced by the administrative and judicial authorities in the same manner as all other laws of the state.

The provisions of this Declaration shall not be abrogated or modified except in accordance with the terms of an inter-American agreement or an agreement of the United Nations binding upon the American States.

4. While the primary responsibility for the fulfillment of the obligations of the Declaration of the International Rights and Duties of Man must fall upon each individual state in relation to its own people, the Juridical Committee is of the opinion that the conventional form to be given to the Declaration, in accordance with the terms of Resolution XL, justifies the creation of an Inter-American body with advisory functions in respect to the protection of fundamental rights within each state. The Juridical Committee ventures to suggest that this body be designated as the Inter-American Consultative Commission on the Rights of Man, and that it be constituted as a subsidiary of the Inter-American Economic and Social Council created by the Conference on Problems of War and Peace, to which is to be entrusted the task of carrying out the recommendations of the International Conferences of American States. The commission might be composed of a small body of members, appointed by States designated for that purpose by the Governing Board of the Pan American Union at the suggestion of the Economic and Social Council.

The function of this Consultative Commission on the Rights of Man would be the promotion of respect for human rights and fundamental freedoms in accordance with the provisions of the Declaration to be adopted by the American States. It would serve as a central agency for the study of the practical problems involved in the protection of human rights. It should be competent to submit recommendations on the basis of reports sent to it by the Economic and Social Council or on the basis of its own direct investigations. The recommendations of the Commission should be submitted not

\*Sub-item 2 missing in the original.—Ed.

to particular governments but to the American Governments as a body through the intermediation of the Economic and Social Council. Only with the consent of the Council should the Commission address itself to a particular government in connection with a specific case.

A special function of the Consultative Commission would be to maintain contact with the Commission on Human Rights to be established by the Economic and Social Council of the United Nations. The American States are at the same time members of the inter-American regional system and members of the larger Organization of the United Nations, so that it will be necessary to coördinate the work of their respective Commissions on Human Rights and prevent conflicts both in respect to the principles to be applied and the measures for the promotion of rights. It is possible that the Declaration of Rights adopted by the American States may include a more comprehensive protection than the other members of the United Nations are as yet ready to put into effect; but that possibility should not prevent the independent adoption of an inter-American declaration. The prior adoption of an inter-American declaration might, on the other hand, serve as a model for the international declaration and thus facilitate the promotion of "human rights and fundamental freedoms" in accordance with the terms of the Charter.

5. The Juridical Committee has not found it desirable to enter into the question of the measures to be taken to assure the fulfillment by each state of the obligations contained in the Declaration. As has been observed above, the instrument embodying the Declaration will be part of the municipal law of each state, to be put into effect by the executive and judicial agencies of the state. In cases involving nationals the decision of the highest court of the state to which appeal may be taken under the constitution would normally be final. The possibility of grave and persistent violations of the Declaration by a particular government is, however, not to be dismissed; and it is obvious that if such violations of fundamental rights were systematic in character, indicating a fixed policy on the part of the legislative or administrative officers, rendering recourse to the courts ineffectual and making popular resistance impossible, they could not be overlooked by the other members of the community without bringing the whole inter-American system into disrepute. Such an extreme situation, if unhappily it should arise, would be beyond the competence here assigned to the Commission on Human Rights. The American States have accepted the principle of common consultation in the presence of threats to the peace; and it would be for them to determine whether the violations of the Declaration were of such a character as to disturb their friendly relations and to *amount in fact* to a threat to the peace, and hence to justify recourse to the procedure accepted for such situations.

6. The Juridical Committee has given the most careful consideration to the difficult question of the inclusion of aliens in the broad term "persons".

On the one hand it is clear that the primary purpose of the proposed Declaration of the International Rights and Duties of Man is to protect the rights of persons within the jurisdiction of the state of which they are nationals. The vast majority of the population of a state are nationals of the state; and the significant feature of the Declaration is that it is now attempted for the first time to extend the protection of international law to nationals of the individual state. As has been explained earlier in the report, this objective is based partly upon the necessity of protecting the international community against the evil effects of totalitarian government seeking to dominate the minds as well as the bodies of the individual citizens, and partly upon the humanitarian idealism which has accompanied the recognition of the need of a more closely organized international community.

But the very fact that the protection of man as man is contemplated in the Declaration makes it impossible to limit the Declaration to citizens or nationals of the different states. With the exception of special political rights, aliens resident in the state must be equally entitled to enjoy the "human rights and fundamental freedoms", the promotion of which is made one of the purposes of the Charter of the United Nations. To set aside "aliens" as a separate class, entitled to special rights different from those of nationals of the state, would be to deny the "human" character of the rights laid down for nationals and the "fundamental" and "essential" character of the freedoms proclaimed in behalf of nationals themselves.

The inclusion of aliens in the term "persons" raises, however, the issue of the effect of the adoption of the Declaration upon the practice of the diplomatic protection of citizens abroad. For many years this practice has been a source of controversy and friction within the inter-American community. If, now, the Declaration is to define more specifically the rights of aliens and to extend them perhaps into new fields, it becomes imperative to confront the problem of the diplomatic protection of aliens and seek a constructive solution for it. The Juridical Committee recognizes the obligation thus imposed upon it, and it is of the opinion that the present draft Declaration must be followed by a detailed study of the problem of diplomatic protection in all of its phases. For the moment, however, it is only possible to formulate a single article, drawn up in general terms, looking to the segregation of cases involving aliens and proposing a special method of protecting them.

In the resolution (XL) of the Conference on Problems of War and Peace, in which the Conference requested the Juridical Committee to prepare the present draft Declaration, it is stated in the preamble that "international protection of the essential rights of man would eliminate the misuse of diplomatic protection of citizens abroad, the exercise of which has more than once led to the violation of the principles of non-intervention and of equality between nationals and aliens, with respect to the essential rights of man." The use of the words "eliminate the misuse" would seem to indicate not the complete elimination of diplomatic protection, but the abuses with which it

has been attended in the past, as pointed out in the paragraph quoted. Nothing is said, however, with respect to the practical ways and means by which the Declaration of the International Rights and Duties of Man is to be made a substitute for the existing rules of international law upon the subject of the diplomatic protection of aliens. Some light, however, is thrown upon the subject by the project of resolution presented to the Conference by the Mexican delegation, in which the Governing Board of the Pan American Union is called upon to study the inclusion in the reorganized inter-American system of an "organ specially designed to watch over the regulation and the practical application of the principles proclaimed in the Declaration." In the report accompanying the project reference is similarly made to the "organization of an international mechanism" having the same object. In as much as the Mexican project appears to have exercised an important influence upon the adoption of Resolution XL, the Juridical Committee has given special study to the constructive proposals contained in it.

The Juridical Committee is of the opinion that the abuses attending the diplomatic protection of citizens abroad have been due chiefly to the unilateral character of the procedure by which such protection has been carried out; and that the most practical remedy consists in the substitution of procedure before an international court in accordance with established principles of law. It is therefore proposed that in cases in which aliens may allege violation of the rights secured to them by the Declaration, when adopted in juridical form, the complaint shall be decided, as under existing law, first by the courts of the state itself. In accordance with the provisions of Article XX, each state may determine whether there may be an appeal from the decision of its local courts to the highest court of the state or to a special court appointed for the particular purpose of hearing such claims.

In the great majority of cases it is to be expected that the decision of the courts of the state will settle the matter definitively. But in the exceptional cases in which the state of which the alien is a national has ground to believe that there has been a denial of justice the case shall, failing settlement by direct negotiation between the parties, be submitted to an international body, as contemplated in the Mexican project. The statute of this international body, designated in the draft Declaration as an International Court, would have to be drawn up separately and made an integral part of the instrument which the American States may decide upon as the proper legal form to be given to the proposed Declaration.

The Juridical Committee recognizes that the purpose announced in the preamble of Resolution XL, of eliminating "the misuse of diplomatic protection of citizens abroad", calls for a more exhaustive study of what constitutes denial of justice than it has been possible to undertake within the limits of the problem here considered by the Committee. For this reason the Committee would recommend that the competence of the International Court proposed in Article XXI be limited for the time being to cases directly involving funda-

mental rights, and should not extend to cases involving claims made in connection with contracts for public works or for personal service, or claims made in connection with public loans. Nor should cases involving claims for indemnity resulting from internal disturbances, international wars or transfers of territory come within the competence of the proposed court. The solution of these issues must await the adoption of more specific rules of international law with respect to diplomatic protection than are as yet generally recognized.

The study of this question, so intimately related to the peace of the American States, the Juridical Committee proposes to undertake in due course. But in so far as the objectives of the present Declaration of the International Rights and Duties of Man are concerned, the Committee is of the opinion that the solution proposed in Article XX is a constructive one, and that it will materially aid in attaining the purpose proclaimed in the preamble of the Resolution.

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In submitting the present draft Declaration the Juridical Committee has sought to reconcile conflicting points of view and to formulate as specific and detailed a declaration as was possible under the circumstances. If a Declaration of the International Rights and Duties of Man is to accomplish its purpose it must not be content with mere generalizations and abstractions. On the other hand it must limit itself to fundamental and essential rights, which may be taken as a present minimum of protection. Resolution IX of the Conference at Mexico City, on the Reorganization, Consolidation and Strengthening of the Inter-American System, contemplates that the two Declarations of the rights and duties of states and the rights and duties of man shall appear as an annex to the charter of the Pan American system, so that the two Declarations "may be revised from time to time to adapt them to the requirements and aspirations of international life."

The Juridical Committee now awaits the comments which the American Governments may deem it pertinent to make upon the proposed draft, in order that it may then proceed to prepare the final draft contemplated by Resolution XL.

RIO DE JANEIRO, December 31, 1945.

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# AMERICAN JOURNAL OF INTERNATIONAL LAW

VOL. 40

October, 1946

NO. 4

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## THE UNITED STATES ACCEPTS COMPULSORY JURISDICTION

BY FRANCIS O. WILCOX

*Head International Relations Analyst, Library of Congress*<sup>1</sup>

On August 2, 1946, the United States Senate approved the Morse resolution by the overwhelming vote of 62-2, thereby giving its advice and consent to the acceptance on the part of the United States of the compulsory jurisdiction of the International Court of Justice. It was the same Senate which, just one year and one week earlier, had cast a vote of 89-2 in favor of the United Nations Charter. On August 26 Herschel Johnson, acting United States representative on the Security Council, deposited President Truman's declaration of adherence with the Secretary-General of the United Nations. At long last the United States assumed far-reaching obligations to submit its legal disputes to an international court.

Inasmuch as the Morse resolution was considered in the closing and hectic days of a crowded legislative session, its significance probably was not fully appreciated by the American public. By any test that may be applied, however, the action taken by the United States is extremely important for at least two reasons. In the first place it reiterates once more the avowed policy of the United States to back to the hilt the United Nations. In the second place, it constitutes a great forward step in the direction of establishing a regime of law in the international community. With the historical importance of the occasion in mind, it is the purpose of this paper to review in some detail the action taken by the Senate and to analyze briefly the new obligations assumed by the United States.<sup>2</sup>

### I. THE TEXT OF THE MORSE RESOLUTION

At this point it may be well to recall the complete text of the Morse resolution as it was finally approved by the Senate. Words crossed out in the text below were deleted by the Senate. Those in italics were added as amendments. The full text follows:

Resolved (two-thirds of the Senators present concurring therein),  
That the Senate advise and consent to the deposit by the President

<sup>1</sup> The opinions expressed in this article are, of course, those of the writer and do not necessarily reflect the point of view of the Library of Congress or the Senate Foreign Relations Committee.

<sup>2</sup> For relevant documents see *Compulsory Jurisdiction, International Court of Justice*, Hearings Before a Subcommittee of the Committee on Foreign Relations, U. S. Senate, 79th Congress, 2nd Session; *International Court of Justice*, Report of the Foreign Relations Committee, No. 1835, 79th Congress, 2nd Session; *Congressional Record*, 79th Congress, 2nd Session, July 31, August 1, 2, 1946; S. Res. 160, 79th Congress, 1st Session; S. Res. 196, 79th Congress, 2nd Session; H. J. Res. 291, 79th Congress, 1st Session.

of the United States with the Secretary General of the United Nations, ~~whenever that official shall have been installed in office,~~ of a declaration under paragraph 2 of article 36 of the Statute of the International Court of Justice recognizing as compulsory ipso facto and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the International Court of Justice in all legal disputes hereafter arising concerning—

- a. the interpretation of a treaty;
- b. any question of international law;
- c. the existence of any fact which, if established, would constitute a breach of an international obligation;
- d. the nature or extent of the reparation to be made for the breach of an international obligation.

Provided, That such declaration ~~should~~ *shall* not apply to—

- a. disputes the solution of which the parties ~~shall~~ entrust to other tribunals by virtue of agreements already in existence or which may be concluded in the future; ~~or~~
- b. disputes with regard to matters which are essentially within the domestic jurisdiction of the United States *as determined by the United States, or*
- c. *disputes arising under a multilateral treaty, unless (1) all parties to the treaty affected by the decision are also parties to the case before the Court, or (2) the United States specially agrees to jurisdiction.*

Provided further, That such declaration ~~should~~ *shall* remain in force for a period of five years and thereafter until the expiration of six months after notice may be given to terminate the declaration.

## II. THE BACKGROUND

At the San Francisco Conference considerable sentiment developed in favor of granting to the new Court compulsory jurisdiction over legal disputes that might arise among the United Nations.<sup>3</sup> Due largely to the opposition of the United States and Soviet Russia, however, this favorable sentiment came to naught. The basic jurisdiction of the new Court under the new Statute, like that of the old, was established on a voluntary basis with Article 36, paragraph 2—the so-called optional clause—extending to all member states the privilege of accepting compulsory jurisdiction in the event they should choose to do so. The United States delegation argued against compulsory jurisdiction on the ground that the inclusion of such a provision in the Statute might make it more difficult for some states to accept the Charter. Mr. Green Hackworth, who represented the United States on Committee IV/1, expressed the hope, however, that the jurisdiction of the Court might eventually be expanded and that the United States might be

<sup>3</sup> On the background of this problem see P. C. Jessup, "Acceptance by the United States of the Optional Clause of the International Court of Justice," this JOURNAL, Vol. 39 (1945), p. 745; also his article on the Court in *Foreign Policy Reports*, Aug. 15, 1945; L. Preuss, "The International Court of Justice, and the Problem of Compulsory Jurisdiction," in *Department of State Bulletin*, Sept. 30, 1945; M. O. Hudson, "The New World Court," in *Foreign Affairs*, Oct., 1945; Department of State Publication No. 2491 *The International Court of Justice*, 1946; also N. J. Padelford in *International Conciliation*, No. 413.

among those states which would accept the optional clause at a later date.

Confronted with the desirability of winning the support of the two states whose coöperation was essential for the success of the new Court, the majority of the states represented at the Conference yielded to the inevitable. Article 36 was approved. At the same time, however, the Conference, without a dissenting vote, recommended to the members of the United Nations "that as soon as possible they make declarations recognizing the obligatory jurisdiction of the International Court of Justice according to the provisions of Article 36 of the Statute."<sup>4</sup>

It should be emphasized that the position taken by the United States delegation did not stem primarily from any fundamental opposition to the principle of compulsory jurisdiction. It resulted rather from a genuine desire to do nothing which would jeopardize the passage of the Charter in the Senate. As Senator Vardenberg pointed out on the floor of the Senate on July 27, 1945:<sup>5</sup>

It was the attitude of the American Delegation that in as much as each time this question has heretofore been submitted to the United States Senate the question of compulsory jurisdiction has always been a stumbling block, and there has always been a lack of willingness on the part of the Senate to go that far as yet, it would be unfortunate to write the court statute itself on a compulsory basis at the present time, but that rather we should leave its development to evolution, in as much as the whole process of world peace itself is finally dependent upon evolution in the spirit and attitude of the peoples of the earth. So we joined at San Francisco in maintaining the optional clause in order to be perfectly sure that at least this one needless hurdle would be removed from Senate consideration of the charter.

During the consideration of the Charter in the Senate there was relatively little discussion of the Court or the problem of compulsory jurisdiction. On July 28, 1945, however, the date the Charter was approved, Senator Morse introduced a resolution (S. Res. 160) providing that the Senate recommend to the President that he accept, on behalf of the United States, the compulsory jurisdiction of the Court. For the reasons already mentioned there was no disposition on the part of Administration leaders to consider the matter at that time. On November 23, 1945, Senator Morse introduced a second resolution (S. Res. 196) which differed from the first in two important respects. It was offered on behalf of 15 Senators from both sides of the aisle and it called for the advice and consent of the Senate by a two-thirds vote. It was thus designed to allay any possible fears that may have arisen in the Senate with respect to procedure and to secure additional support of a bipartisan nature.

<sup>4</sup> UNCIO Documents, Vol. 13, p. 413.

<sup>5</sup> *Congressional Record*, July 27, 1945, p. 8247.

With these developments taking place in the Senate one could hardly expect the House of Representatives to sit idly by. On December 17, 1945, Congressman Herter of Massachusetts introduced a joint resolution (H. J. Res. 291) under which the President would be "authorized and requested" by the Congress to deposit a declaration with the United Nations accepting the jurisdiction of the Court as outlined in Article 36 of the Statute. The limitations imposed upon the grant of jurisdiction were in essence the same as those provided for in the Morse resolution.

During the months following San Francisco public opinion in the United States crystallized rapidly in favor of compulsory jurisdiction. As the structure and functions of the United Nations were discussed throughout the land it became more and more apparent that the commitments of the United States with respect to the settlement of political and legal disputes were wholly out of balance. Under the Charter the Security Council may investigate any dispute or any situation which might lead to international friction or give rise to a dispute. Moreover the parties to a dispute have bound themselves in advance to refer any dispute "the continuance of which is likely to endanger the maintenance of international peace and security" to the Council in the event they fail to settle it by other means. In other words it may be said that the Council has a kind of compulsory jurisdiction over political disputes and may summon the members of the United Nations to appear before it even though they may later choose to disregard its recommendations.

It was an anomaly of the first order that the United States had no comparable obligations with respect to the submission of justiciable disputes to the International Court of Justice. So far as the peaceful settlement provisions of the Charter are concerned, we were willing to relinquish our prerogative to be judge of our own case in disputes before the Security Council but we hesitated to give up that prerogative with respect to the Court. Given our traditional veneration for the principles of law and justice our position seemed entirely illogical.

Moreover, if one takes the Charter seriously the acceptance of compulsory jurisdiction by the United States flows naturally from our membership in the United Nations. The fundamental purpose of the Organization, as expressed in Article 1, is "to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace . . ." This provision is implemented by the terms of Article 2 under which all members of the United Nations have assumed the obligation to settle their disputes "in such a manner that international peace and security, and justice, are not endangered." It is assumed that the Court will play an important role in bringing about these objectives. Article 7 establishes the Court as one of the six principal organs of the United Nations and Article 36 provides that "legal disputes should as a general rule be re-

ferred by the parties to the International Court of Justice in accordance with the provisions of the Statute of the Court."

Given this set of circumstances the failure of the United States to accept compulsory jurisdiction and support the Court might easily have been interpreted abroad as an admission on our part that we prefer to rely on force and compulsion rather than on law and justice in our international dealings. As Senator Thomas (Utah) pointed out in presenting the Morse resolution to the Senate:<sup>5a</sup>

You know and I know that the United States has no desire to impose its will on other states or take unfair advantage of them in any way. But we would be naïve indeed if we were to assume that a mere repetition of this principle would convince other nations of our good intentions. In diplomacy actions speak much louder than mere words. Until we demonstrate in a concrete fashion our willingness to accept the impartial decisions of the Court, we may have a hard time explaining to the small states in particular the apparent disparity between what we say with respect to world peace and what we are actually willing to do about it.

### III. THE HEARINGS AND THE SENATE DEBATE

On June 12, 1946, Senator Connally, Chairman of the Senate Foreign Relations Committee, appointed a subcommittee consisting of Senator Thomas (Utah), Senator Hatch and Senator Austin, to hold hearings on the resolution and report their findings to the full Committee.<sup>6</sup> The subcommittee met on July 11, 12, and 15, under the able chairmanship of Senator Thomas, hearing and questioning 17 witnesses in a period of about seven hours.<sup>7</sup> Unlike the hearings on the United Nations Charter the meetings attracted an exceedingly small listening audience. In fact, it was made up, for the main part, of individuals who were themselves planning to testify.

This seeming lack of interest may have been due in part to the complete unanimity with which the American public had accepted the principle of compulsory jurisdiction with respect to legal disputes. Truly the times had changed since 1936. A decade ago the resolution providing for United States membership in the Permanent Court of International Justice on a purely voluntary basis had met with a roar of protest in the Committee hearings, on the Senate floor, and in the country at large. Ten years later, even though every organization and every person who asked to be heard were granted the privilege not a single witness appeared before the subcommittee to oppose the acceptance by the United States of the compulsory jurisdiction of the new Court. Moreover, not a single letter or telegram was received by the subcommittee in opposition to the resolution. Not a single voice of protest was raised against it. In view of the overwhelming support mar-

<sup>5a</sup> *Congressional Record*, August 1, 1946, p. 10757.

<sup>6</sup> See *Hearings*, and the *Committee Report*, cited above.

<sup>7</sup> Senator Hatch, who was observing the Eikini tests during this period, was necessarily absent.

should in this country in favor of the United Nations Charter such a reaction should occasion no surprise. Nevertheless it stands out in contrast to many other cases in the past where opposition forces spontaneously made themselves heard. Few incidents in recent years have demonstrated more clearly the changing temper of American public opinion with respect to world affairs.

Important legal organizations in the United States were no doubt very influential in securing the proper atmosphere for the favorable consideration of the resolution. On December 18, 1945, the House of Delegates of the American Bar Association adopted a resolution, without a dissenting vote, calling upon the Senate and the President to accept compulsory jurisdiction "at the earliest practicable time." Likewise, at its annual meeting in Washington, on April 27, 1946, the American Society of International Law unanimously adopted a resolution strongly favoring such action.<sup>8</sup> These resolutions were referred to on a number of occasions during the hearings and in the course of the debate on the Senate floor. It is significant that a majority of the witnesses appearing before the subcommittee were members of the American Bar Association or the American Society of International Law.<sup>9</sup>

Witnesses also appeared or statements were submitted on behalf of such important organizations as the Federal Bar Association, the Inter-American Bar Association, the Federal Council of Churches, the General Federation of Women's Clubs, the National Education Association, the National League of Women Voters, the American Association of University Women, the American Veterans' Committee, the American Association for the United Nations, the National Council of Catholic Women, and the National Council of Jewish Women. While active support for the resolution was not forthcoming from organized labor, agricultural, or industrial groups, this seeming indifference should by no means be interpreted as a lack of interest on their part in the work of the Court. Had there been any opposition to the resolution during the hearings representatives of many of these organizations would doubtless have appeared on behalf of it.

It was against this backdrop of overwhelming public support that the subcommittee quickly decided to report the resolution favorably to the Foreign Relations Committee with only one unimportant amendment. On July 17 and again on July 24 the full committee debated the matter although

<sup>8</sup> The resolution reads: "Resolved, That the American Society of International Law strongly favors a declaration by the United States Government of its acceptance of the jurisdiction of the International Court of Justice in the types of legal disputes enumerated in Article 36 of the Statute of the Court."

<sup>9</sup> George A. Finch and Lester Woolsey, Vice-Presidents, and Pitman B. Potter, Secretary, appeared on behalf of the American Society of International Law. Philip C. Jessup, Lawrence Preuss, Helen Dwight Reid, Edgar Turlington, and Robert G. Wilson, all members of the Society, also appeared. President Charles C. Hyde, Clyde Eagleton, Quincy Wright and Norman J. Padelford, among others, sent statements for the record.

other items on the agenda restricted somewhat the time which could be devoted to it. On July 24, by a unanimous vote, the committee reported the resolution to the Senate for favorable action in exactly the form recommended by the subcommittee.

During the following week the Senate was burdened with an unusually heavy legislative program. With the date set for adjournment rapidly approaching, there was a growing feeling in certain quarters that it might be wise to postpone consideration of the Court issue until January when it could be studied more carefully. Apparently convinced that this was the intention of Senate leaders, Senator Morse, on July 31, moved that the Senate proceed to a consideration of his resolution. During the two following days the resolution was debated at some length although the thread of discussion was dropped from time to time as the Senate turned its attention to social security, federal aid to education, labor problems, and other matters. On August 2nd the final vote was taken late in the afternoon and the Senate adjourned *sine die* some two hours later.

The debate was neither as long nor as provocative as one might have expected in view of the importance of the resolution. There was no vocal opposition to the idea of compulsory jurisdiction; not a single Senator rose to speak against it. Nor was any reference made to the reservations which had stirred up such a heated discussion in the Senate during the era of the Permanent Court of International Justice. Republicans and Democrats joined hands in another bipartisan demonstration of the fact that the United States has moved far in direction of international cooperation. Even so, the amendments to the Morse resolution voted by the Senate will serve to remind mankind that the Senate still looks upon the United Nations as an organization of sovereign states and not a world government.

#### IV. THE LEGAL NATURE OF THE DECLARATION

One of the first problems to confront the subcommittee in its consideration of the Morse resolution related to the legal nature of the declaration to be deposited under Article 36 of the Statute. Article 36 states simply that the parties to the Statute "may at any time declare that they recognize as compulsory *ipso facto* and without special agreement . . . the jurisdiction of the Court in all legal disputes. . . ." The Article further provides that the declarations contemplated are to be deposited with the Secretary General of the United Nations who shall transmit copies to the parties to the Statute and to the Registrar of the Court.

Clearly such a declaration, deposited by the head of a state, cannot be considered a treaty in the strict sense of that term. It is rather, as the Permanent Court pointed out in the *Phosphates* case, a unilateral act, and is consummated by a state in accordance with the terms of a treaty, the Charter of the United Nations. While no one could doubt the authority of the United States Government to make such a declaration, a legitimate question

arose as to the proper method to be followed under the Constitution in order to legally bind our Government to the terms of Article 36. This uncertainty was reflected in the variety of procedures set forth in the three resolutions referred to above. The original Morse resolution (S. Res. 160) provided that the Senate, presumably by a simple majority vote, "recommend" that the President deposit our declaration with the Secretary General. The Herter measure (H. J. Res. 291) took the form of a joint resolution with the President "authorized and requested" by action of the two houses to take the step outlined in Article 36. Finally, the second Morse resolution (S. Res. 196) clearly contemplated the use of the treaty procedure since it provided that the Senate (with two-thirds of the Senators present concurring) "advise and consent" to the deposit of the declaration by the President.

The Constitutional issue had been raised originally on the Senate floor during the debate on the United Nations Charter. While no specific procedure was agreed upon at that time, members of the Senate took it for granted that legislative action of some kind—whether it be in the form of a joint resolution or a two-thirds vote in the Senate—would be necessary to empower the President to accept compulsory jurisdiction on behalf of the United States. In order to clarify this issue and to secure the point of view of the Executive, Senator Vandenberg requested an opinion from Green Hackworth, then Legal Adviser to the Department of State. The pertinent paragraph of Mr. Hackworth's memorandum which Senator Vandenberg read on the floor of the Senate, follows:<sup>10</sup>

If the Executive should initiate action to accept compulsory jurisdiction of the Court under the optional clause contained in Article 36 of the Statute, such procedure as might be authorized by the Congress would be followed and if no specific procedure were prescribed by statute, the proposal would be submitted to the Senate with request for its advice and consent to the filing of the necessary declaration with the Secretary General of the United Nations.

It will be recalled that a somewhat comparable situation arose in connection with the implementation of Article 43 of the Charter. That article provides that the members of the United Nations shall enter into special agreements with the Security Council in order to make available to the Council the armed forces and other facilities necessary to maintain peace. During the debates on the Charter there was considerable discussion as to whether these agreements should be considered as treaties or whether Congress might approve them by means of a joint resolution. On this point President Truman took a firm stand. "When any such agreement or agreements are negotiated" he informed the Senate on July 28, 1945 "it will be my purpose to ask the Congress by appropriate legislation to approve them."<sup>11</sup>

With respect to compulsory jurisdiction, however, the President main-

<sup>10</sup> *Congressional Record*, July 27, 1945, p. 8249.

<sup>11</sup> See 79th Congress, 1st Session, Senate Report No. 717, p. 8.



tained a discreet neutrality. In a letter to Raymond Swing dated February 25, 1946, he pointed out that the Executive Branch favored the passage of either the Morse resolution or the Herter resolution. "Either of them," he said, "would furnish a satisfactory legal basis for United States acceptance of the compulsory jurisdiction of the Court."<sup>12</sup> This view was also expressed by Under Secretary Dean Acheson in the hearings conducted by the subcommittee.

In the view of the writer the decision of the Foreign Relations Committee to resort to the treaty procedure was both politically wise and Constitutionally valid.<sup>13</sup> Even though the declaration—which is unique so far as the United States is concerned—is unilateral in form, in fact it will have the binding force of a treaty between the United States and the other states which have subscribed to Article 36. Moreover, it will impose upon the United States new and far-reaching commitments with respect to the peaceful settlement of disputes—a field which the Senate has always considered as belonging to the ordinary treaty-making power. As Senator George and Senator Murdock both pointed out on the floor of the Senate, the declaration is, in effect, a treaty of the highest importance; it has the dignity of a treaty and it ought to be handled as though it were a treaty. Even though the Senate made no attempt officially to classify the resolution as a treaty it is of some significance that it was considered in Executive Session.

H. M. Catudal, commenting on this point in the July issue of this JOURNAL, suggested that "all doubt concerning the legality of our acceptance of the obligatory jurisdiction of the new Court could be removed by the passage of a joint resolution of both Houses of the Congress." Exactly the opposite point of view would seem to be sound. The treaty procedure was designed to cover important international agreements. Clearly the Morse resolution, by providing for a two-thirds vote, could not transform a unilateral declaration into a formal treaty. But if uncertainty exists as to the proper procedure to follow, would it not seem preferable to err on the side of caution? If there is any doubt would it not seem desirable, in order to avoid possible criticism, to resolve that doubt on the side of the Constitution? This is the line of reasoning which seemed to dominate the Senate as it followed the formal procedure normally reserved for full-fledged treaties. While the wisdom of this decision may be debated on Constitutional grounds, actually it avoided the long and acrimonious debate which probably would have been precipitated had any other procedure been followed.

#### V. LIMITATIONS ON COMPULSORY JURISDICTION IN ORIGINAL MORSE RESOLUTION

During the San Francisco Conference and afterward it became apparent to anyone who talked with others about the work of the new Court that the

<sup>12</sup> Text in *New York Herald Tribune*, March 1, 1946.

<sup>13</sup> See *Committee Report*, p. 10.

nature of compulsory jurisdiction was generally misunderstood in the United States. Many people, including some of our leading public figures, assumed that once the United States accepted compulsory jurisdiction we would be obligated to submit all our disputes to the Court for settlement. Nothing, of course, could be further from the truth. An examination of the original Morse resolution reveals at least six limitations on the Court's jurisdiction. Two of these limitations are inherent in the terms of Article 36. The others are the kind of limitations or exclusions which states normally included in their declarations of adherence to the compulsory jurisdiction of the Permanent Court of International Justice.<sup>14</sup>

1. *Only Legal Disputes Included.* In the first place, the Morse resolution, by repeating the phraseology of Article 36, clearly limits the jurisdiction of the Court to the four categories of legal disputes specified therein. The Permanent Court Statute, it will be recalled, contained the proviso that states might accept the Court's jurisdiction in "all or any" of the four enumerated classes of legal disputes. The words "all or any" were dropped from the Statute of the new Court, however, and Article 36 provides simply that states may accept the compulsory jurisdiction of the Court

In all legal disputes concerning

- a. the interpretation of a treaty;
- b. any question of international law;
- c. the existence of any fact which, if established, would constitute a breach of an international obligation;
- d. the nature or extent of the reparation to be made for the breach of an international obligation.

During the debate on the Morse resolution some members of the Senate stressed the fact that the compulsory jurisdiction of the Court would be limited to strictly legal disputes. This may have been done in part to reassure possible opponents of the resolution. It should be emphasized, however, that in view of the ever-expanding network of treaties and the rapid development of the rules of international law a promise to submit even our legal disputes to the Court is exceedingly significant. In the future, as in the past, it will be extremely difficult to draw a satisfactory line of demarcation between legal and political differences. It follows that some justiciable disputes may be of a highly controversial nature. The Eastern Greenland case between Norway and Denmark, for example, involved the ownership of territory. Given the proper setting, nothing could be more controversial than just such an issue. It would be unfortunate, therefore, to minimize in any way the obligations the United States has assumed on the ground that legal disputes are relatively less important than political ones.

2. *Reciprocity.* In the second place, Article 36 makes perfectly clear that the jurisdiction conferred upon the Court is limited by the principle of

<sup>14</sup> For the texts of these declarations see M. O. Hudson, *The Permanent Court of International Justice, 1920-1942*, pp. 681 ff.

reciprocity. Paragraph 2 specifically provides for a state's acceptance of the Court's jurisdiction "in relation to any other state accepting the same obligation." It follows that when the United States deposited its declaration with the Secretary-General we became bound only with respect to those other states which have deposited or which may deposit in the future similar declarations. Actually the reciprocity clause in Article 36 is somewhat comparable to the most-favored-nation principle in commercial treaties. Limitations inserted by any state in its declaration immediately become available to any other declarant state with which it might become involved in a case before the Court. Thus if State X excluded from the jurisdiction of the Court disputes relating to certain territories, State X could not compel State Y to become involved in proceedings before the Court with respect to such territories, even though State Y might not have made a similar reservation.<sup>15</sup>

3. *Future Disputes.* According to the Morse resolution the grant of jurisdiction to the Court is also limited to legal disputes "hereafter arising." This is a very common limitation which was often used by states in accepting the compulsory jurisdiction of the Permanent Court. The protection afforded by such exclusion would seem highly desirable. Otherwise the filing of the declaration by the United States might constitute an invitation to certain other countries to revive old controversies—some of which might prove embarrassing—and take them to the Court for settlement.

4. *Other Tribunals.* Still a fourth limitation stems from the provision in the Morse resolution that the declaration shall not apply to disputes which the parties may entrust to other tribunals for settlement. This provision follows closely the language of Article 95 of the Charter.<sup>16</sup> It is also consistent with the letter and spirit of other sections of the Charter which encourage disputing parties to settle their controversies by peaceful means of their own choice.

5. *Domestic Questions.* The fifth limitation relates to domestic questions. Disputes with respect to matters which are essentially within the domestic jurisdiction of the United States, the Morse resolution provides, are not to come within the grant of jurisdiction conferred upon the Court. This is not a new limitation. The British Government inserted a comparable provision in its declaration of 1929 accepting the compulsory jurisdiction of the Permanent Court. Many other states including Albania, Argentina, Australia, Brazil, Canada, Egypt, India, Iran, Iraq, New Zealand, Poland, Rumania, South Africa and Yugoslavia followed suit.

It is easy to understand why states should hesitate to grant the Court jurisdiction over disputes involving important domestic issues like immigra-

<sup>15</sup> See *Committee Report*, p. 5; Hudson, pp. 465-3.

<sup>16</sup> Article 95 reads: "Nothing in the present Charter shall prevent members of the United Nations from entrusting the solution of their differences to other tribunals by virtue of agreements already in existence or which may be concluded in the future."

tion and trade barriers. These are vital matters over which the modern nation state has jealously and persistently guarded its sovereign prerogatives. It is difficult to see, however, just what can be accomplished by the insertion of such a provision in the declaration accepting compulsory jurisdiction. Article 2, paragraph 7 of the Charter is already quite explicit on that point. "Nothing contained in the present Charter," reads the Article, "shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the member to submit such matters to settlement under the present Charter. . . ." Moreover, the Court is instructed by the Statute to decide the cases brought before it in accordance with international law; its competence does not extend to domestic questions. If a dispute relates to matters which fall within a state's domestic jurisdiction it certainly would not fall within any of the four classes of disputes enumerated in Article 36. Hence, the domestic jurisdiction limitation, apart from reiterating an already accepted principle, cannot offer the United States any additional protection other than that already provided by the Charter itself and by the fundamental nature of international law.<sup>17</sup>

6. *Time Limit.* Finally, the Morse resolution provides that the declaration shall remain in force for at least five years with the possibility of terminating it thereafter six months after notice is given. The five year period is normal. It is the period most frequently used by the members of the Permanent Court although in some cases 10, 15, and 20 year periods were chosen and in a number of instances declarations were made without reference to any time limit. The six months termination notice offers reassurance that the United States will not renounce the obligation of compulsory jurisdiction merely to escape being drawn into Court by an impending case.

These limitations, which were incorporated in the Morse resolution, were accepted by the Senate Foreign Relations Committee and were reported without change for the favorable action of the Senate. It was not until the resolution reached the Senate floor that other important limitations were inserted in the form of amendments offered by Senator Connally and Senator Vandenberg. It will be well to examine these amendments in some detail.

## VI. AMENDMENTS ADDED TO THE RESOLUTION ON THE FLOOR OF THE SENATE

### 1. *The Connally Amendment*

Of the two the so-called Connally amendment is the more far-reaching. It involves the addition to paragraph (b) of the Morse resolution relating to domestic jurisdiction the six words "as determined by the United States." As Senator Connally explained his amendment on the floor of the Senate it simply means that "when it comes to submitting a question to the Inter-

<sup>17</sup> See the Connally amendment, however, as it is discussed below.

national Court, if we [the United States] say that it is a domestic question; the International Court cannot take jurisdiction of it."<sup>18</sup>

It is, of course, one thing for a state to accept the compulsory jurisdiction of the Court and exclude from the grant of authority those disputes which relate to domestic issues. But it is a horse of an entirely different color when a state reserves to itself the right to decide whether or not a matter is essentially domestic. For in such an event it may, by the simple expedient of labelling a dispute "domestic," set itself up as judge in its own case and successfully deny the jurisdiction of the Court.

It was precisely to avoid this dilemma that the framers of the Court Statute in San Francisco accepted the language of Article 36 of the Statute of the Permanent Court. "In the event of a dispute as to whether the Court has jurisdiction," reads Article 36, paragraph 6, "the matter shall be settled by the decision of the Court." International practice, too, has confirmed this principle. It has already been pointed out that since 1929 some 15 states, out of the 45 accepting the compulsory jurisdiction of the Permanent Court, inserted reservations with respect to domestic matters in their declarations. Not one of these states, however, reserved to themselves the right to decide which matters are domestic and which are not. At the outset the issue as to whether the Court or the individual states should determine the scope of domestic questions was deliberately avoided. As time passed, however, a number of cases arose under Article 36 in which one of the parties challenged the Court's jurisdiction. In each case the Court and not the states decided the issue.<sup>19</sup>

Given these historical facts some critics of the Connally amendment are inclined to condemn it in no uncertain terms. Senator Morse referred to it as an unfortunate precedent. Senator Pepper denounced it as a clear violation of Article 36, paragraph 6 of the Court Statute. Professor Laurence Preuss, writing in the August 11th issue of *The New York Times*, declared that the Senate "smuggled a veto power into our acceptance of the compulsory jurisdiction of the Court." And many people argued that it constituted an unhappy demonstration of our lack of confidence in the competence and integrity of the new Court.

Particularly impressive to some is the argument that the United States—avowedly desirous of encouraging a regime of law and order in the world—has set an undesirable precedent. Now that the ice is broken other states no doubt will want to accept Article 36 under much the same conditions. Or, if we may change the figure of speech, the pebble the United States dropped into the pond may result in an ever-widening circle of states each

<sup>18</sup> *Congressional Record*, p. 10835.

<sup>19</sup> In five of the eleven cases arising under Article 36 the Court's jurisdiction was challenged. In two cases the Court ruled it had jurisdiction, in two other cases that it did not, and in the fifth case it ruled that one of the objections to its jurisdiction was well founded. See Hudson, pp. 477-481.

claiming the right to determine for itself whether the Court has jurisdiction over cases in which it is involved. And it will be difficult indeed to establish a regime of law and order in the international community so long as each state reserves to itself the right to decide what the law is. Thus it may be said that the declaration of the United States has introduced a new political element into the concept of compulsory jurisdiction—an element which may tend to weaken the authority of the Court.

It should also be pointed out that the United States will be barred in any event from proceeding against other states in cases which they consider within their domestic jurisdiction. This result stems from the reciprocal nature of Article 36 which has been discussed above.

The Senate was unwilling to accept Senator Pepper's contention that the Connally amendment violates the terms of Article 36. A number of Senators, including Mr. Connally, Mr. Vandenberg, Mr. George, and Mr. Morse, insisted that each of the signatory states possesses the right under the Court Statute to file or not to file the declaration contemplated in Article 36 according to its discretion. Inherent in that right is the right, which each state may exercise when it files the declaration, to place on the jurisdiction conferred such conditions or limitations as it may see fit to place. International practice under the Permanent Court Statute would seem to confirm this argument at least in part. In the Fifth General Assembly of the League of Nations the view was expressed that states should be permitted to adhere to Article 36 "with the reservations which they regard as indispensable."<sup>20</sup> Actually many different types of limitations were included in the declarations deposited before World War II.

The writer cannot agree, however, with those who contend that the Connally amendment destroys the vitality of the Morse resolution. Even with the limitation imposed the United States has still taken a tremendously important step forward. The fact remains that we are still bound to accept the Court's jurisdiction in the four important categories of cases listed in Article 36. It may be safely assumed that most disputes that arise will clearly be either domestic or international in character, and that no question about the jurisdiction of the Court will be raised. The veto, therefore, if one can call it a veto, is only a qualified one. Moreover, if borderline cases develop, it is inconceivable that the United States would ever resort to subterfuge or evasion and claim an international law issue to be a domestic one. Our traditional reliance upon law and the pressure of world public opinion would prevent such a mistake from being made.

During the debate on the Senate floor several Senators argued that it would be preferable to reject the Connally amendment and to rely instead on the veto power the United States has in the Security Council to prevent the enforcement of a Court judgment which this country might find unac-

<sup>20</sup> *Records of Fifth Assembly, Plenary*, p. 225; Hudson, p. 453.

ceptable. This could be done under Article 94 of the Charter.<sup>21</sup> Then if the Court made the mistake of assuming jurisdiction of a domestic issue involving the United States, we could refuse to comply with the decision. In the event the other party appealed to the Security Council, we could in the last analysis safeguard our national interest with the veto.

While such a procedure would be entirely possible, it lays itself open to at least two serious objections. In the first place, under Article 94 of the Charter the United States has bound itself to comply with the decisions of the Court in any case to which it is a party. This obligation could not lightly be brushed aside. In the second place, it would seem highly undesirable to set up the Security Council as an appeal body to review decisions of the Court. The Charter definitely contemplates action by the Council to enforce decisions of the Court in case the failure of a state to comply constitutes a threat to the peace. But it certainly does not contemplate the review and possible reversal of the legal decisions of the Court by a political agency like the Council.

What prompted the Senate to adopt the Connally amendment? Very likely the action was prompted by the same feeling that caused the American delegation at San Francisco, and later the Senate, to support the veto in the United Nations Charter. It was prompted, in other words, by a desire to safeguard the vital interests of the United States. It is interesting to note that the substance of the amendment was first suggested in the hearings of the subcommittee by Senator Austin and at that time proved acceptable to Senator Morse.<sup>22</sup> However, the idea was not accepted by the subcommittee nor did it find a place in the resolution as it was reported out of the Foreign Relations Committee. It did not reappear until it was introduced on the floor of the Senate by Senator Connally.

Now few people would label Senator Connally an isolationist. He has valiantly supported the United Nations and has often acted as the Administration spokesman on the floor of the Senate with respect to foreign affairs. It may be fairly assumed, therefore, that he was voicing the sentiment of many of his colleagues when he remarked that he was not willing to grant the new Court jurisdiction over cases involving the navigation of the Panama Canal, immigration into the United States, tariffs or other similar matters. "The United States is the object of envy of many nations of the world and many peoples," he said. "Our Treasury is most attractive to them. Immigration to our shores is something they dream of. I do not favor and I shall not vote to make it possible for the International Court of Justice to

<sup>21</sup> Article 94, paragraph 2, reads: "If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment."

<sup>22</sup> *Hearings*, p. 36. Senator Morse later opposed the amendment and while Senator Austin voted for it he said he preferred the resolution without it. *Congressional Record*, p. 10840.

decide whether a question of immigration to our shores is a domestic question or an international question."<sup>23</sup>

An analysis of the final vote on the Connally amendment would seem to support this assumption. Only 12 Senators voted against it; 51 voted for it including Senators Connally and Vandenberg, Senator Barkley, Majority Leader, and Senator White, Minority Leader. Senators Thomas (Utah), Pepper, Guffey and Wagner, all members of the Foreign Relations Committee, were included among those opposing the amendment. No doubt some of the 51 Senators,<sup>24</sup> like Senator Austin, were not in favor of it but were willing to compromise in order to insure the passage of the bill. Nevertheless, it is probable that—particularly in view of the great pressure of legislative business during the closing days of the session—the Morse resolution without the Connally amendment would have encountered considerable difficulty in winning a two-thirds vote before the Senate adjourned.

## 2. *The Vandenberg Amendment*

A second limiting amendment, proposed by Senator Vandenberg and adopted by the Senate without a roll call vote, found its way into the Morse resolution. The amendment provides that the compulsory jurisdiction declaration deposited by the United States should not apply to "Disputes arising under a multilateral treaty, unless (1) all parties to the treaty affected by the decision are also parties to the case before the Court, or (2) the United States specially agrees to jurisdiction."<sup>25</sup>

The Vandenberg amendment apparently had its origin in a memorandum on compulsory jurisdiction which John Foster Dulles submitted to the Foreign Relations Committee during the hearings on the Morse resolution. In this memorandum Mr. Dulles correctly pointed out that disputes, particularly under multilateral conventions, often give rise to the same issue as against more than one other nation. Noting that the Court Statute provides for compulsory jurisdiction only "in relation to any other state accepting the same obligation," Mr. Dulles argued that it might be well for the Senate to make perfectly clear that jurisdiction should be compulsory "only when all of the other parties to the dispute have previously accepted the compulsory jurisdiction of the Court."<sup>26</sup> Certainly the United States would not want to place itself in a position where it could be forced into court by a state which had not itself accepted the terms of Article 36.

In a reply to Mr. Dulles' memorandum, Mr. Charles Fahy, Legal Counsellor of the Department of State, argued that under Article 36 the United States would be bound only with respect to other states accepting the same obligation. He suggested, however, that if additional safeguards were de-

<sup>23</sup> *Congressional Record*, p. 10839.

<sup>24</sup> Eight of the 15 sponsors of the original Morse resolution voted for the Connally amendment. Four voted against it. *Congressional Record*, p. 10841.

<sup>25</sup> *Congressional Record*, pp. 10757, 10760.

<sup>26</sup> *Hearings*, p. 44.



sired it would be possible to insert an amendment along the lines of the Vandenberg proposal cited above. This suggestion was incorporated in the report of the Foreign Relations Committee<sup>27</sup> and was later advanced by Senator Vandenberg on the Senate floor.

What does the Vandenberg amendment mean? At first glance it might seem unworkable. Does it mean, as some have suggested, that if the Court is called upon to interpret the United Nations Charter to settle a case between two disputants under Article 36 of the Statute that it could not act unless the other 49 members of the United Nations also became parties to the dispute? Does it mean that a respondent state might be able to reject the Court's jurisdiction unless all the parties to the treaty in question are before the Court? Does it mean that all the signatories to the Nine Power Treaty would have to intervene in a case before that treaty could be construed by the Court?

There was no discussion in the Senate on this point. However, such a narrow interpretation of the amendment undoubtedly goes beyond the intent of the Senate. In many instances it would be impossible to secure the participation in a case of all parties to a treaty since many of them would have no real interest in the dispute. To impose such a requirement would have the effect of nullifying the declaration of the United States with respect to a large and important class of cases involving multilateral treaties.

Moreover, it should not be forgotten that Article 63 of the Statute already provides a means by which states not parties to a dispute may intervene in a case if it involves the construction of a treaty to which they are parties.<sup>28</sup> This is a purely voluntary procedure designed to protect the interest of such states. To impose an additional requirement that these states must come into Court before such a treaty can be interpreted would modify considerably the meaning of the Statute and would serve no useful purpose since ample protection is offered all signatories under Article 63.

It is suggested, therefore, that the word "affected" in the Vandenberg amendment be interpreted to mean "directly affected" or "legally affected." If the latter interpretation were accepted it would tend to narrow the circle of states in each case to more logical and reasonable proportions. How the amendment might then operate may be illustrated by reference to a treaty of mutual guarantee comparable, let us say, to the Locarno Pact of 1925. States A, B, C, D and E are parties to the treaty. State A obtains judgment from the Court that B has violated the treaty. This decision might obligate States C, D, and E to join with State A in application of

<sup>27</sup> *Committee Report*, p. 6.

<sup>28</sup> Article 63 reads: "(1) Whenever the construction of a convention to which states other than those concerned in the case are parties is in question, the Registrar shall notify all such states forthwith. (2) Every state so notified has the right to intervene in the proceedings; but if it uses this right, the construction given by the judgment will be equally binding upon it."

sanctions against B, even though States C, D and E were not actually involved in the original dispute. Clearly the legal rights and duties of States C, D and E are so materially affected that they might well become parties to the case before the Court.

One other point ought to be kept in mind. The mere fact a treaty is subject to interpretation by the Court should not in itself constitute sufficient justification for a party to the treaty to claim that it is "affected by the decision." The one does not necessarily flow from the other. Judicial interpretation merely defines what the treaty, or certain parts of it, means, and does not affect the legal rights and duties of the signatories except those before the Court. Article 59 of the Statute specifically provides that "The decision of the Court has no binding force except between the parties and in respect of that particular case."

### 3. *Presidential Discretion*

The Senate adopted still a third amendment to the Morse resolution which should be mentioned in passing. At Senator Donnell's suggestion the word "should" was changed to "shall" in two places ostensibly with the intention of making mandatory upon the President the limitations upon compulsory jurisdiction set forth in the resolution. Senator Donnell expressed his position in these words: "While he [the President] is not obligated to consummate a treaty after it has once been approved by the Senate, I do believe that the Senate has a right, in giving its consent, to attach mandatory conditions thereto."<sup>29</sup> Since Senator Thomas (Utah) and Senator Morse accepted the amendment it was approved by the Senate without objection. Senator Thomas pointed out, however, that the mere insertion of the word "shall" would in no way diminish the discretion inherent in the office of the President. "We are giving advice to the President of the United States," he said. "He, of course, can do what he wants to do with that advice."<sup>30</sup> In fact the issue was never joined. The President did not protest the mandatory language of the Morse resolution. And the declaration signed by him contained all the limitations and restrictions to which the Senate had offered its advice and consent.

## VII. THE MILLIKIN PROPOSAL

While the Connally and Vandenberg amendments received the overwhelming support of the Senate, a third major amendment proposed by Senator Millikin was actually defeated by a vote of 49 to 11.<sup>31</sup> In the development of a legislative measure, rejected amendments are often as important in diagnosing the attitude of the legislative body as those amendments which are favorably acted upon. This was true of Senator Millikin's proposal. In approving the Connally and Vandenberg amendments the

<sup>29</sup> *Congressional Record*, p. 10768.

<sup>30</sup> Same, p. 10767.

<sup>31</sup> *Congressional Record*, pp. 10842-10849.

Senate demonstrated a desire to definitely limit the compulsory jurisdiction of the Court as it applies to the United States. But in voting down the Millikin proposal it demonstrated its reluctance to do anything that might hamper the Court in carrying out its normal judicial functions in an effective manner.

Article 38 of the Court Statute, it may be recalled, provides that the Court, in deciding the disputes submitted to it, shall apply international conventions, international custom, and the general principles of law recognized by civilized nations as well as judicial decisions and the teachings of the most highly qualified publicists of the various countries. In his memorandum to the Foreign Relations Committee John Foster Dulles made Article 38 the subject of rather severe criticism.<sup>32</sup> If the rules of international law to be applied are so uncertain that resort must be had to alleged custom and the teaching of publicists, he pointed out, "then the Court can scarcely avoid indulging in a large amount of judicial legislation or political expediency." To be sure, three of the four categories of disputes listed in Article 36 relate to matters susceptible of judicial determination. But what about legal disputes "concerning any question of international law"? Given the undeveloped status of international law, could the United States risk submitting such disputes to the Court in advance without prior agreement defining the rules of law to be applied in any particular case?

It was in line with this reasoning that Senator Millikin introduced his amendment designed to safeguard the United States against the legislative tendencies of the Court. The amendment provided that the declaration of adherence to Article 36 "shall not apply to disputes where the law necessary for decision is not found in existing treaties and conventions to which the United States is a party and where there has not been prior agreement by the United States as to the applicable principles of international law." It will be noted that the proposal would not attempt to limit the Court to treaties and conventions as the single source of international law to which it might turn in deciding a case. Other sources might be consulted, provided they were agreed upon in advance by the United States and the other parties to the dispute. "We should not commit the destiny of this country," said Senator Millikin, "to a game in which the rules are made by the referee as he goes along."<sup>33</sup>

Leaders from both parties marshalled several convincing arguments to refute Senator Millikin's proposal. In the first place, Article 38 of the Court Statute clearly specifies the four sources of law which the Court shall apply in rendering its decisions. Inasmuch as Article 38 forms an integral part of the United Nations Charter which has been accepted by 51 nations, it is difficult to understand how the United States, by a unilateral declaration, can alter these fundamental provisions which so vitally affect the successful functioning of the Court. Clearly if any state accepts compulsory jurisdic-

<sup>32</sup> *Hearings*, p. 44.

<sup>33</sup> *Congressional Record*, p. 10844.

tion, it must be accepted under the terms and conditions prescribed in Article 38. In the second place, the concept of compulsory jurisdiction implies a general willingness on the part of the contracting states to appear before the Court whenever they are summoned. If a new agreement has to be arrived at in each case specifying the law the Court is to apply, then much of the value of the automatic process envisaged in Article 36 would be nullified. For in the conclusion of these special agreements every state involved in the dispute would find a permanent invitation to exercise a veto power over the judicial function of the Court.

These arguments can be put in still another way. The Court, as one of the principal organs of the United Nations, has an extremely important role to play both in the settlement of legal disputes and in the development of international law. To require prior agreement before the Court can assume jurisdiction, or to limit the sources of international law to which it can turn in order to arrive at its decision, might seriously hinder it in the fulfillment of its purpose. Surely any risk the United States might take in submitting cases to the Court—even where the rules of law are still uncertain—would be outweighed by the tremendous advantage that would accrue to the world if the Court is given the freedom and authority it needs to develop the judicial process.

These arguments were vigorously advanced by Senators Morse, Taft, Austin and George in combating Senator Millikin's contention that "we should not commit our fortunes to legal speculation and invention." Senators Morse and Taft particularly insisted that it would be far better not to adopt any resolution at all than to accept the Millikin proposal. As a result of this outspoken opposition the amendment was overwhelmingly defeated.

#### VIII. CONCLUDING COMMENTS

Viewed in historical perspective, it is a rather remarkable fact that the United States embraced the idea of compulsory jurisdiction only a little over a year after the San Francisco Conference. By that act we have brought into balance our international commitments with respect to the settlement of legal and political disputes. We have demonstrated once again our confidence in the United Nations. We have encouraged the development of international law and the peaceful settlement of disputes. We have made our words about world peace square more nearly with our deeds.

The immediate effect of the declaration, of course, is that the United States may now be sued before the Court without its consent by any other declaring state.<sup>34</sup> This fact in itself should not give rise to any apprehension. The new Court has been carefully protected against political influences and the experience of the Permanent Court certainly demonstrates that the acceptance of compulsory jurisdiction is no hazardous venture. Moreover, it should not be forgotten that the United States can now sue any other

<sup>34</sup> Subject to the limitations discussed above.

declaring state. Since we have always been an important claimant state this should prove a very real advantage.

One final observation should be made. Some people will continue to belittle the action taken by the United States on the ground that we may still successfully deny the Court's jurisdiction in certain important cases. Senator McRae took a constructive attitude toward that question when he pointed out that regardless of the limitations imposed we have still taken "a great stride in the direction of developing a world order under law." He declared:

We will have placed upon our Government, in my judgment, an even greater moral obligation to keep the faith, because if we should adopt the resolution with the Connally amendment in it, then clearly the eyes of the world will be turned upon us in any case in which any other country with which we find ourselves in dispute seeks to hale us before the World Court.<sup>35</sup>

<sup>35</sup> *Congressional Record*, p. 10831.

## THE INTERNATIONAL COURT OF JUSTICE, THE SENATE, AND MATTERS OF DOMESTIC JURISDICTION

By LAWRENCE PREUSS

*Of the Board of Editors*

It has been remarked that the Government of the United States "seldom loses an opportunity to profess its loyalty to international arbitration in the abstract. . . . The expression of this sentiment has become so conventional that a popular impression prevails that it accords with the actual policy of the United States."<sup>1</sup> This ambivalent attitude is nowhere more clearly illustrated than in a memorandum addressed by Mr. John Foster Dulles on July 10, 1946, to the Senate Committee on Foreign Relations.<sup>2</sup> "The United States, since its formation," Mr. Dulles states, "has led in promoting a reign of law and justice as between nations. In order to continue that leadership, we should now accept the jurisdiction of the International Court of Justice. If the United States, which has the material power to impose its will widely in the world, agrees instead to submit to the impartial adjudication of its legal controversies, that will inaugurate a new and profoundly significant international advance." Although the initial step of accepting the compulsory jurisdiction of the Court would in itself be "of profound moral significance," it would, Mr. Dulles continues, "assume greatly increased practical significance" only when "limiting factors" have been removed, for the "path is as yet so untried that it would be reckless to proceed precipitately," the Court "has yet to win the confidence of the world community," and "international law has not yet developed the scope and definiteness necessary to permit international disputes generally to be resolved by judicial rather than political tests."

Pursuant to these views Mr. Dulles suggested the addition of three further reservations to the resolution (S. Res. 196) which Senator Morse had introduced on November 28, 1945, with the purpose of authorizing acceptance by the United States of the compulsory jurisdiction of the International Court of Justice. Two of these, proposed as amendments by Senators Vandenberg<sup>3</sup>

<sup>1</sup> Manley O. Hudson, this JOURNAL, Vol. 22 (1928), pp. 368, 369.

<sup>2</sup> Pp. 43-45, *Hearings before a Subcommittee of the Committee on Foreign Relations, United States Senate, 79th Congress, 2d Session, on Senate Resolution 195, A Resolution proposing acceptance of compulsory jurisdiction of International Court of Justice by United States Government* (cited hereinafter as *Hearings*).

<sup>3</sup> To exclude from the jurisdiction of the Court "Disputes arising under a multilateral treaty, unless (1) all parties to the treaty affected by the decision are also parties to the case before the Court, or (2) the United States specially agrees to jurisdiction." *Congressional Record*, Vol. 92, No. 153, Aug. 1, 1946, p. 10760.

This amendment, accepted by the Senate without debate or objection, was apparently

and Connally,<sup>4</sup> were accepted by the Senate; and a third, proposed by Senator Millikin,<sup>5</sup> was rejected. The Resolution was approved on August 2, 1946, by sixty affirmative and two negative votes,<sup>6</sup> and on August 16, 1946, the President exercised the recommendation made therein by transmitting to the Secretary-General of the United Nations a declaration accepting the jurisdiction of the Court under the terms of Paragraph 2 of Article 36 of the Statute.<sup>7</sup>

The Morse Resolution, which was introduced with strong bipartisan support, had been carefully drafted in consultation with officers of the Department of State and other experts on international judicial organization. It had received the unqualified endorsement of the President, of the Secretary of State, and of representatives of national organizations and individuals who had appeared before, or had filed statements with, the Subcommittee of the Foreign Relations Committee which held hearings on the Resolution on July 11, 12 and 15. The American Bar Association and the American Society of International Law had unanimously approved the principle of compulsory adjudication. Furthermore, the Foreign Relations Committee, without a dissenting voice, had on July 25 reported the Resolution favorably in its unamended form. In the light of these facts it becomes difficult to find an explanation for the sudden appearance of reservationist sentiment among members of the Senate who had already had abundant opportunity for expressing any dissenting views prior to the opening of debate on the Resolution formulated without reference to Articles 59 and 63 of the Statute of the Court. It is difficult to wrest any intelligible meaning from the language which Mr. Dulles employed in suggesting it, and it seems doubtful that the Committee on Foreign Relations, which drafted the amendment, succeeded in formulating in legal terms whatever purpose he may have had. See Senate Report No. 1835 [to accompany S. Res. 196], 79th Cong., 2d Sess., pp. 6, 7 (cited hereinafter as *Report*).

<sup>4</sup> To insert the italicized words in the following exclusion: "b. Disputes with regard to matters which are essentially within the domestic jurisdiction of the United States, *as determined by the United States*." Approved, yeas 51, nays 12. *Cong. Rec.*, Vol. 92, No. 154, Aug. 2, 1946, p. 10841.

<sup>5</sup> To insert a further exclusion: "Disputes where the law necessary for decision is not found in existing treaties and conventions to which the United States is a party and where there has not been prior agreement by the United States as to the applicable principles of international law." Rejected, yeas 11, nays 49. *Cong. Rec.*, Vol. 92, No. 154, Aug. 2, 1946, p. 10849.

In proposing this amendment, Mr. Dulles asserted that the United States can "properly refrain from subjecting itself" to judgments based upon "alleged custom, teachings, etc." Mr. Dulles thereby reveals himself to be *plus positiviste que les positivistes*. They, at least, acknowledge generally accepted international custom as a legal source subsidiary to treaties, although, in order to preserve the symmetry of their consensual theory, they are compelled to fall back upon the fiction of "tacit consent" as the basis of its binding force.

<sup>6</sup> Same, p. 10850.

<sup>7</sup> For the text of the declaration and the note of the Acting United States Representative to the United Nations, Aug. 26, 1946, transmitting the declaration for deposit with the Secretary-General, see Doc. US/ICJ/5, *Department of State Bulletin*, Vol. 15, No. 375 (Sept. 8, 1946), p. 452.

tion on July 31. It is impossible, of course, to measure the extent to which considerations extraneous to the merits of the question at issue may have contributed to the result, or to assess the influence that the Dulles memorandum exerted upon the Senate. That its influence was considerable may, however, be judged from the fact that all of the amendments were clearly inspired by it. The readiness with which its proposals were accepted, and all contrary counsels dismissed, suggests the not unfair inference that the basic distrust of the international legal process which it reflects was shared by those who translated it into the restrictive amendments.

The exclusion of "disputes with regard to matters which are essentially within the domestic jurisdiction of the United States" was originally inserted in the Morse Resolution for the purpose of reassuring the Senate and disarming any possible opposition which the omission of an express reference might have aroused. Although it was believed that such a reservation<sup>8</sup> was unnecessary it was doubtless recalled that matters of domestic jurisdiction, variously defined, had been reserved in earlier treaties of obligatory arbitration,<sup>9</sup> both unratified<sup>10</sup> and ratified.<sup>11</sup> Paragraph 8 of Article 15 of

<sup>8</sup> During the Senate debate, Senator Thomas questioned the use of the term "reservation" as descriptive of the proposed amendments, on the ground that the Morse Resolution was not part of an international agreement, but was initiated by the Senate. *Cong. Rec.*, Vol. 92, No. 153, Aug. 1, 1945, pp. 10757, 10758. However, the amendments added by the Senate have become reservations by inclusion in the United States Declaration accepting the jurisdiction of the Court under Art. 36 (2) of the Statute, which is itself a treaty. See *Report*, p. 5.

<sup>9</sup> The term "obligatory" is used herein to describe the jurisdiction provided in a treaty which prescribes an obligation to submit certain classes of disputes to arbitration or judicial settlement, but necessitates the conclusion of a special agreement for the submission of each specific dispute. A treaty of obligatory arbitration or judicial settlement, therefore, is, in a sense, "only an agreement to agree—a *pactum de contrahendo*. The obligation which it creates falls far short of creating a compulsory jurisdiction. The latter may be said to exist only where a particular tribunal, either preëxisting or susceptible of being brought into existence without the concurrence of the parties to the dispute, is endowed with power to decide a dispute upon the application of a single party." Manley O. Hudson, *International Tribunals: Past and Future*, Washington, 1944, p. 75. Philip C. Jessup suggests that the term "compulsory" is misleading and that it would be more precise to speak of the "automatic" jurisdiction of the Court. "The International Court of Justice of the United Nations," *Foreign Policy Reports*, Vol. 21 (Aug. 15, 1945), p. 156. The word "compulsory," in any case, is redundant when used in connection with jurisdiction accepted under Art. 36 (2) of the Statute. Jessup, in *Hearings*, p. 149. There is always a danger that "compulsory" will be deemed to refer to the possible use of compulsion to enforce the judgments of a tribunal, and that the absence of a determinate sanction to compel compliance will imply that they have only a "moral" and not a "legal" force. Senator Austin apparently holds this typically Austinian view, for from the fact that "this court does not have a sheriff and does not have power of execution," he concludes that "the only power this court has is moral power. . . ." *Cong. Rec.*, Vol. 92, No. 153, Aug. 1, 1946, p. 10763.

<sup>10</sup> A Senate amendment to Article 1 of the Olney-Pauncefote Treaty, rejected by the Senate on May 5, 1897, provided that "no difference shall be submitted under this treaty which, in the judgment of either power, materially affects its . . . foreign or domestic policy. . . ."



the Covenant of the League of Nations had been added upon the suggestion of William Howard Taft, who considered that the exclusion from the competence of the Council of differences which "grow out of an exclusively domestic policy" was one of the principal means by which "the ground will be completely cut from under the opponents of the League in the Senate."<sup>12</sup> A sweeping exclusion of domestic questions was among the Lodge reservations to the Treaty of Versailles.<sup>13</sup> The Declaration annexed to the Four Power Pact signed at Washington on December 13, 1921, provided that controversies to be submitted to joint consultation should "not be taken to embrace questions which according to principles of international law lie exclusively within the domestic jurisdiction of the respective Powers." Furthermore Great Britain, in accepting the compulsory jurisdiction of the Permanent Court of International Justice in 1929, had excluded "disputes with regard to questions which by international law fall exclusively within the jurisdiction

For the text, see "Arbitration and the United States," *World Peace Foundation Pamphlets*, Vol. 9 (1926), p. 509.

An amendment added by the Senate to Article 3 of the Taft-Knox treaties, concluded with Great Britain and France, respectively, on Aug. 3, 1911, contained the proviso that "the treaty does not authorize the submission to arbitration of any question which affects the admission of aliens into the United States, or the admission of aliens to the educational institutions of the several states, . . . or concerning the question of the alleged indebtedness or monied obligation of any state of the United States, . . . or other purely governmental policy." President Taft declined to take further action on these treaties on the ground that, having come back "thus crippled and maimed" by this and other amendments, they were "not very useful." Same, p. 534.

<sup>11</sup> The reservation as to disputes which affect "the vital interests, the independence, or the honor" of either party, contained in the Root treaties of 1908-1909, covers, of course, disputes concerning matters of domestic jurisdiction. In the Kellogg treaties, initiated by the treaty with France signed on Feb. 6, 1928, this formula is replaced, in part, by the proviso that the treaty "shall not be invoked in respect of any dispute the subject matter of which (a) is within the domestic jurisdiction of either of the High Contracting Parties. . . ." Article 2 of the Inter-American Treaty of 1929, proclaimed April 16, 1935, excepts from the stipulations of the treaty controversies "which are within the domestic jurisdiction of any of the Parties to the dispute and are not controlled by international law. . . ."

<sup>12</sup> Telegram to President Wilson, March 18, 1919. David Hunter Miller, *The Drafting of the Covenant*, New York, 1928, Vol. I, p. 277. The provision, which, with minor stylistic changes, was to become Art. 15 (8) of the Covenant was drafted by the President on the basis of Mr. Taft's suggestion, and was approved by the Commission on the League of Nations at its meeting of March 24, 1919. Same, Vol. II, p. 350. On the American origin of this provision, which the author considers to be the *expression d'un exclusivisme farouche*, see Pierre Mariotte, *Les limites actuelles de la compétence de la Société des Nations*, Paris, 1926, pp. 124-128; W. Sukiennicki, *La souveraineté des états en droit international moderne*, Paris, 1927, pp. 352-362.

<sup>13</sup> The fourth reservation provided: "The United States reserves to itself exclusively the right to decide what questions are within its domestic jurisdiction and declares that all domestic and political questions relating in whole or in part to its internal affairs, including immigration, labor, coastwise traffic, the tariff, commerce, the suppression of the traffic in women and children and in opium and other dangerous drugs, and all other domestic questions, are solely within the domestic jurisdiction of the United States and are not under this

of the United Kingdom."<sup>14</sup> This reservation found its way into later acceptances of the jurisdiction of the Permanent Court, and now by virtue of Paragraph 5 of Article 36 of the new Statute, constitutes an express limitation upon the compulsory jurisdiction of the International Court of Justice in the case of nine<sup>15</sup> of the nineteen states which are bound thereby. Finally, a provision similar in principle, but applicable to the entire United Nations Organization, was incorporated in the Charter as Paragraph 7 of Article 2.<sup>16</sup>

In presenting its favorable report on the Morse Resolution the Committee on Foreign Relations apparently believed that the express reservation of matters of domestic jurisdiction constituted sufficient deference to an attitude which had become traditional with the Senate. It drew attention to the fact that the reservation "is implicit in the nature of international law," which is, "by definition, a body of rights and duties governing states in their relations with each other, and does not, therefore, concern itself with matters

treaty to be submitted in any way either to arbitration or to the consideration of the council or of the assembly of the League of Nations, or any agency thereof, or to the decision or recommendation of any other power." *Cong. Rec.*, Vol. 59, Pt. 5, 66th Cong., 2d Sess., March 19, 1920, p. 4599.

<sup>14</sup> Great Britain, *Parliamentary Papers*, Misc. No. 8 (1929); this JOURNAL, Vol. 25 (1931), Supplement, p. 85. Under the influence of Art. 15 (8) of the Covenant, similar reservations had been inserted in a number of postwar treaties of arbitration. For example, Art. 2 of the Helsingfors treaty of 1925 (Estonia-Finland-Latvia-Poland) provided that the obligation of the treaty should not "apply to questions the legal nature of which makes them subject solely to the domestic legislation of the Party concerned. . . ." League of Nations, *Treaty Series*, Vol. 38, p. 359.

<sup>15</sup> Australia, Brazil, Canada, Great Britain, India, Iran, New Zealand, and South Africa, in addition to the United States. All of the reservations of matters of domestic jurisdiction made under the former Statute are identical with that of Great Britain, with the exception of the Brazilian declaration, which reserves "questions which, by international law, fall exclusively within the jurisdiction of the Brazilian courts of law, or which belong to the constitutional régime of each State."

<sup>16</sup> It was provided in Ch. VIII, A (7) of the Dumbarton Oaks Proposals that the provisions relating to pacific settlement "should not apply to situations or disputes arising out of matters which by international law are solely within the domestic jurisdiction of the state concerned." On May 4, 1945, the Four Sponsoring Governments proposed an amendment by which the above paragraph was suppressed and a new formula substituted, which, with an Australian amendment, became Art. 2 (7) of the Charter. *Documents of the United Nations Conference on International Organization*, Vol. 6, pp. 567, 513 (cited hereinafter as *Conference Documents*). Art. 2 (7) reads:

Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.

The transfer of the paragraph on domestic jurisdiction from the section on pacific settlement to the chapter on "Principles" made it "a general principle and hence widened the scope of its application. The change of place in this case involved a change in the *portée* of the text." Report of the Rapporteur of Subcommittee I/1/A to Committee I/1, *Conference Documents*, Vol. 6, pp. 507-508.

of domestic jurisdiction."<sup>17</sup> This position, restated by Senator Thomas of Utah in the able speech with which he opened the debate, is identical with that taken by the British Government in 1929 when it filed its declaration under the Optional Clause. The reservation, the British Memorandum stated, is "merely an explicit recognition of a limitation on the jurisdiction of the Permanent Court which results from international law itself. It is merely the application in this connection of the principle that, subject to any relevant treaty stipulations, a state is entitled to regulate as it pleases matters which fall exclusively within the domain of its sovereignty."<sup>18</sup>

During the course of the debate in the Senate it became obvious that little was known about domestic jurisdiction "except its extreme sanctity."<sup>19</sup> Apprehensions of possible encroachment upon the sacred domains of immigration and the tariff were not dispelled by the repeated assurance that international law, which the Court is bound to apply, does not "cover" such questions. "There is no international law dealing with the subject of immigration," Senator Thomas said. "So far as international law is concerned, on those subjects [immigration, the tariff, etc.] there is a void, and . . . no one of those questions could possibly come before the International Court until the law had developed to such degree that it would be before the Court."<sup>20</sup>

Perhaps the discussion might have been somewhat clarified if this proposition had been stated in a positive form, for it is "a mistake . . . to say that international law has *no* rule for matters of domestic jurisdiction; its rule is that they *are* matters of domestic jurisdiction."<sup>21</sup> The notion that there are "gaps" in the law leads readily to the conclusion that a court, confronted with a case concerning which there is "no rule," will either pronounce a *non liquet* (in which event there is no purpose served in submitting it), or that it will proceed to fill the "gaps" by judicial legislation (to the prejudice of the party which has raised the plea of domestic jurisdiction).<sup>22</sup> The deceptive

<sup>17</sup> *Report*, p. 5.

<sup>18</sup> Memorandum on the Signature of His Majesty's Government in the United Kingdom of the Optional Clause of the Statute, *Parliamentary Papers*, Misc. No. 12 (1929), Cmd. 3452; this *JOURNAL*, Vol. 25 (1931), Supplement, p. 93. See H. Lauterpacht's comments upon this statement in *Economica*, June 1930, p. 149.

<sup>19</sup> To use Professor J. L. Brierly's phrase: "Matters of Domestic Jurisdiction." *British Yearbook of International Law*, Vol. 6 (1925), p. 3.

<sup>20</sup> *Cong. Rec.*, Vol. 92, No. 153, Aug. 1, 1946, pp. 10755, 10762.

<sup>21</sup> J. L. Brierly, "The General Act of Geneva, 1928" *British Yearbook of International Law*, Vol. 11 (1930), p. 129; *italics in original*.

An international tribunal *ne s'occupe pas des affaires domestiques pour indiquer comment elles doivent être réglées. Il s'en occupe seulement au point de vue formel pour dire à qui en revient le règlement*: N. Politis, *Le problème des limitations de la souveraineté et le théorie de l'abus des droits dans les rapports internationaux*, in *Recueil des Cours de l'Académie de Droit International*, T. VI (1925-I), p. 43; D. Schindler, *Le progrès de l'arbitrage obligatoire depuis la création de la Société des Nations*, same, T. XXV (1928-V), p. 304.

<sup>22</sup> See Torsten Gihl, *International Legislation*, London, 1937, pp. 82-99; *Lacunes du droit international*, in *Acta Scandinavica juris gentium*, Vol. 3 (1932), pp. 37-64; H. Lauterpacht,

simplicity of this view explains its wide acceptance and its constant repetition. Refusal to submit to an international tribunal matters which are claimed to belong to the domestic jurisdiction seems obviously justifiable for, according to this conception, the tribunal would fail to reach a decision because of the absence of applicable rules. ". . . Questions which are susceptible of arbitration or impartial decision," Secretary of State Frank B. Kellogg once asserted, "are those involving rights claimed under a treaty or under international law. A political question cannot be arbitrated because there are no principles of law by which it can be decided, and unless there are relevant treaty provisions requiring construction, no nation can agree to arbitrate purely domestic questions like tariff, taxation, immigration, and, it may be said, all political questions involving the exercise of sovereignty within the nation's territorial limits. There are no positive rules of international law applicable to such questions to guide arbitrators in reaching a decision."<sup>23</sup>

Senator Ferguson's interventions during the debate on the Morse Resolution seem to have been based upon a similar order of ideas.<sup>24</sup> Mr. Ferguson apparently assumed that matters of domestic jurisdiction can be infallibly recognized, and that they can in some unexplained way be excluded from the competence of the Court without a preliminary legal examination as to whether the subject matter of any given dispute actually is within the exclusive jurisdiction of the state concerned. This conception of the inherent "non-justiciability" of matters alleged to be of domestic jurisdiction—and fortunately the term "justiciability" was not injected into the debate—begs the very question which will be at issue in a specific case. Matters of domestic jurisdiction do not qualify themselves. Their boundaries are traced by international law, and it is surely a preëminently legal question whether, in any given case, a matter which belongs in principle to the reserved domain has, as a result of the development of international relations or the conclusion of an international engagement, entered the domain regulated *au fond* by international law. This is a legal question to which a

*The Function of Law in the International Community*, Oxford, 1933, pp. 60-84; Eugène Borel, in *Annuaire de l'Institut de Droit International* (1931-I), pp. 65-76; H. Tassin, *No Man's Land du Droit des Gens*, Paris, 1936.

<sup>23</sup> "The War-Prevention Policy of the United States," this JOURNAL, Vol. 22 (1928), p. 256.

"Eminent statesmen and jurists insist that questions like immigration are not 'arbitrable.' In fact, they are a typically appropriate subject for judicial settlement. An international court will in such cases invariably pronounce that the claim [which runs counter to the rule of international law that recognizes such matters to be of domestic jurisdiction] must be dismissed. To submit questions of immigration to arbitration does not mean to expose it to the risks of bargaining and compromise by political mediators; it means having the right to exclusive regulation of immigration upheld by an impartial decision more authoritative than the fiat of the State concerned. H. Lauterpacht, work cited, p. 174.

<sup>24</sup> *Cong. Rec.*, Vol. 92, No. 154, Aug. 2, 1946, pp. 10836-10838.

tribunal, if given the power under a system of compulsory adjudication, can always find a legal answer.<sup>26</sup>

It is precisely this power which the Connally Amendment denies to the International Court of Justice whenever a dispute relates to matters which are essentially within the domestic jurisdiction of the United States, "as determined by the United States." This, as Senator Thomas remarked, "is a contradiction of compulsory jurisdiction itself,"<sup>26</sup> the essence of which is the assurance that the competence of the tribunal cannot be excluded or paralyzed after a dispute has arisen by the resistance of one of the parties or by disagreement between them.<sup>27</sup> The Report of the Committee on Foreign Relations states the situation with clarity and force:

The question of what is properly a matter of international law is, in case of dispute, appropriate for decision by the Court itself, since, if it were left to the decision of each individual state, it would be possible to withhold any case from adjudication on the plea that it is a matter of domestic jurisdiction. It is plainly the intention of the statute that such questions should be decided by the Court, since article 36, paragraph 6, provides:

In the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court.

. . . A reservation of the right of decision as to what are matters essentially within domestic jurisdiction would tend to defeat the purposes which it is hoped to achieve by means of the proposed declaration as well as the purpose of article 36, paragraphs 2 and 6, of the Statute of the Court.<sup>28</sup>

<sup>26</sup> Rejection by the tribunal of the claim of the "plaintiff" state on the ground that it is without support in international law is equivalent to holding that there exists no rule of international law which limits the freedom of action of the "defendant" state within the "reserved domain" of its domestic jurisdiction. A. F. Fachiri, *The Permanent Court of International Justice: Its Constitution, Procedure and Work*, London, 1932, pp. 73, 103; Sir John Fischer Williams, *Current Chapters on International Law and the League of Nations*, London, 1929, pp. 50 ff. During the meetings of the Advisory Committee of Jurists at The Hague in 1920 the subject of *lacunae* was fully discussed. *Procès-verbaux of the Proceedings of the Committee*, pp. 293-297, 307-321. Mr. Root having expressed the opinion that the Court might in exceptional cases have to pronounce a *non liquet*, M. Ricci-Busatti said: "By declaring the absence of a positive rule of international law, in other words an international limitation on the freedom of the parties, nevertheless a legal situation is established. That which is not forbidden is allowed; that is one of the general principles of law which the Court would have to apply. If a case is brought before the Court and if the latter finds that no rules exist concerning it, the Court shall declare that one party has no right against the other, that the conduct of the accused State is not contrary to any admitted rule." *Same*, p. 314.

<sup>26</sup> *Cong. Rec.*, Vol. 92, No. 153, Aug. 1, 1946, p. 19765.

<sup>27</sup> E. Borel and N. Politis, *L'extension de l'arbitrage obligatoire et la compétence obligatoire de la Cour Permanente de Justice Internationale*, in *Annuaire de l'Institut de Droit International* (1927-II), p. 675.

<sup>28</sup> *Report*, p. 5.

"The principle that each State shall be the sole and exclusive judge of the expediency of policies which are purely and admittedly domestic, is sound and incontestable. But grave

The Under Secretary of State, Mr. Dean Acheson, expressed the same conviction when he said:

The rule of law becomes effective to the extent that states agree to submit themselves to the decision of the Court in all cases involving questions of law. It cannot become effective if states may reserve this decision to themselves, regardless of the degree of good faith by which they govern their actions.<sup>29</sup>

The initial proposal that the United States reserve to itself a right of unilateral determination concerning domestic questions was made during the hearings on the Resolution by Senator Austin, who interrupted Senator Morse's opening statement to ask whether he would regard it as "nullifying" his purpose if words were inserted in exclusion "b" to read: "Disputes which are held by the United States to be with regard to matters which are essentially within the domestic jurisdiction of the United States." Senator Morse, who apparently had not anticipated the question, replied that he would "accept the language as of now."<sup>30</sup> The amendment was not accepted by the Committee and later, on the floor of the Senate, Senator Morse withdrew his tentative approval on the ground that after study he found the amendment unwise.<sup>31</sup> In its earlier stages the Senate debate turned about the question whether the Court itself or the United States, under the terms of the Resolution as introduced, would be competent to determine the jurisdictional issue. Senator Wiley introduced a new element into the debate when he envisaged the possible refusal of the United States to respond in proceedings concerning a dispute which it alleged to arise out of matters within its domestic jurisdiction. If the question were "a close one," he said, "and the Court held that it did have jurisdiction, the question would be presented of whether or not we would abide by the judicial process . . . . If the Court held against the United States, then the question of what power the Court had to enforce its judgment would arise."<sup>32</sup> In elaborating this view, Senator Austin said:

differences may easily arise as to whether a particular dispute involves merely a domestic question or whether it is really an international one. . . . It is one thing to recognize, as we must, the right of every sovereign state to determine freely its own domestic policies; it is a wholly different proposition to maintain that a state is the sole and exclusive judge of whether a particular policy or question is purely domestic, when it gives rise to an issue with another state whose rights are affected by such policy and which claims that it involves an 'international matter.' It is easily conceivable, in the absence of a common judge, that either party to a dispute if it wishes to evade its treaty obligation to arbitrate, may claim that the dispute is one involving a domestic policy, and from its decision there is no appeal." James W. Garner, "The New Arbitration Treaties of the United States," this JOURNAL, Vol. 23 (1929), p. 598.

<sup>29</sup> *Hearings*, p. 129.

<sup>30</sup> Same, p. 36.

<sup>31</sup> *Cong. Rec.*, Vol. 92, No. 154, Aug. 2, 1946, p. 10831. Senator Austin later stated in the Senate: "Mr. President, I am supporting the [Connally] amendment. I would rather see the resolution not contain it, but for many reasons I shall vote for the amendment." Same, p. 10840.

<sup>32</sup> Same, No. 153, Aug. 1, 1946, p. 10761.

The only power this court has is moral power, and if the situation should arise . . . that a state, a party, has been ruled against when it raised the question of jurisdiction, and that state has held up its head and said, "Notwithstanding the decision we know from our history, and our experience, and existing conditions that this is a question which is domestic, and that we will disregard the decision of the court," that state has the final decision instead of the Court. The court cannot execute its judgment.

By the terms of Article 94 of the Charter of the United Nations, measures to give effect to a judgment could be taken by the Security Council only if it should find that non-compliance by the United States resulted in a threat to or breach of the peace. Unless the Council should so determine, Mr. Austin concluded, "the United States is the last arbiter, and has the final word upon a matter which is domestic. Such a position is entirely moral and entirely legalistic, and is within the four corners of our great engagement [under the Charter]." <sup>33</sup> It is evident that Mr. Austin draws a sharp distinction between a legal obligation and one resting merely upon the dictates of positive international morality. Senator Connally, who introduced his amendment at this point "to settle this question," agreed that "in case the Court should decide that a question which the United States considered to be domestic was nondomestic and international we would be justified . . . in defying the court." <sup>34</sup>

The effect of the Connally Amendment is to give to the United States a veto upon the jurisdiction of the Court after a dispute has been referred to it by an applicant state. It constitutes an extension of unilateral determination into a field in which it has hitherto been unknown, for the reason that it is utterly in contradiction with the very concept of a compulsory jurisdiction. It is unfortunate that the original sponsor of the Resolution, in his zeal to exclude this prior veto upon the exercise of the Court's jurisdiction, should have

<sup>33</sup> Same, p. 10763.

In his statement before the Subcommittee, Mr. Charles Fahy, Legal Adviser of the Department of State, said: "Although parties to cases are obligated to comply with the decisions of the Court, which is a moral obligation based on the provisions of the Charter, there is no provision for the enforcement of such decisions unless the failure to comply constitutes a threat to the peace or breach of the peace under article 39 of the Charter. There is an article in the Charter (art. 94, par. 2) which provides that a party may resort to the Security Council if the other party fails to carry out the judgment and that the Security Council may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment. This Government takes the position that the Security Council's action under this article is limited by the scope of its powers as defined in article 39, that is, it must first be determined by the Security Council that the breach constitutes a threat to, or breach of, the peace or an act of aggression (hearings on the Charter, Senate Foreign Relations Committee, Pasvolksky testimony, pp. 285-287; Hackworth testimony, pp. 330-332). *Hearings*, p. 142. Also, L. Preuss, "The International Court of Justice and the Problem of Compulsory Jurisdiction," in *Department of State Bulletin*, Vol. 13, No. 327 (Sept. 30, 1945), pp. 476, 477.

<sup>34</sup> *Cong. Rec.*, Vol. 92, No. 153, Aug. 1, 1946, p. 10763.

stressed the possibility of a veto interposed at a subsequent stage to prevent the enforcement of the Court's judgment. It remained for Senator Morse to point out clearly that:

Under Article 94, we would have the veto power when the case went before the Security Council if we took the position, without the Connally amendment, that the decision involved a domestic issue and not an issue of international law.

Senator Morse considered that the objection that the Court might encroach upon our domestic jurisdiction had "no reality," and argued that it would demonstrate "a lack of faith in the court if we withheld the right to make this decision in one of the most important categories of jurisdictional problems. . . ." However, if "The World Court should, in a given case, render a decision which involved not a question of international law, but a domestic issue, the United States would have the right, under article 94 of the United Nations Charter, to raise that point and refuse to abide by the decision of the World Court."<sup>35</sup>

No one will doubt that there are obligations which rest upon more lofty sanctions than those of the strict law; that there is "a law behind law"; and that extraordinary exigencies may give rise to rights and duties which transcend those of mere legality. But it is not customary to stress the ultimate right of revolution at a constitutional convention; nor is it usual to stress the possible nullification of a court's decisions in a body which is debating the extension of that court's jurisdiction. The debate in the Senate was no academic disputation upon juridical doctrines of *excès de pouvoir*; it revealed that several influential Senators actually contemplated that the United States might maintain a position *contra legem* in the event of disagreement with the Court. They apparently considered the obligation to comply with the Court's judgments to be somewhat less than a legal one, for no better reasons than that the Court has "no sheriff" and "no power of execution," and that the concurring vote of the United States in the Security Council is always requisite for decisions under Chapter VII of the Charter.

Senator Millikin was alone in objecting to the constant reference to the possible contumacy of the United States. He considered that recourse to "a veto power on our judicial commitments" would be "stultifying all the proclamations we make, that in legal matters we wish to be ruled by law rather than by political decisions." Referring to the remarks by Senator Morse, he said:

. . . There is nothing in the statute of the Court which contemplates a political reversal of its decisions. There is a review called for in the statute, by the same Court, but no appeal. The only way the Security Council could become involved in the matter, would be in the enforce-

<sup>35</sup> Same, No. 154, Aug. 2, 1946, p. 10833; No. 153, Aug. 1, 1946, No. 153, p. 10770; No. 154, Aug. 2, 1946, p. 10828.



ment of the judgment; and then the Security Council would be at liberty to consider political aspects, and everything else. But I repeat that whenever the Security Council reverses, in effect, a decision of this Court, we shall have a political reversal of a judicial system, and the Court will pass out of the picture. . . . I am very much in favor of having a judicial system which will be complete in itself, not subject to political veto."<sup>36</sup>

Although he presented the case against the Connally Amendment with force and eloquence, Senator Morse denied that its acceptance would deprive the United States declaration of its significance as a great stride toward the development of a world order under law. Adoption of the Amendment, he said, would enhance the moral obligation of the United States, for it would directly involve the element of good faith, and "if then we should ever break faith, if we then should ever hide behind this amendment . . . and claim that an issue which is clearly international is in fact domestic, we can be most certain that we will lose not only face but, in my judgment, the confidence of the peace-loving nations of the world."<sup>37</sup>

However, so broad a reservation as that of the Connally Amendment, even if applied in the utmost good faith, may readily become destructive of any real obligation. Since its scope is unilaterally determined, it may, under the influence of nationalistic sentiment or of dogmas of sovereignty,<sup>38</sup> be invoked to exclude from judicial settlement precisely the types of disputes described in earlier treaties as affecting "national honor, independence, and vital interests."<sup>39</sup> That the traditional distrust of the international judicial process which reservation of such disputes implied has lost little of its force, may be judged from Senator Connally's exaggerated apprehensions of judicial encroachment upon control of the Panama Canal, the regulation of tariffs, and immigration.<sup>40</sup>

<sup>36</sup> Same, No. 154, Aug. 2, 1946, pp. 10833-10834.

<sup>37</sup> Same, p. 10831.

<sup>38</sup> On the influence of doctrines of fundamental rights and of sovereignty on the concept of domestic jurisdiction, see Fritz Ullmann, *Die ausschliessliche Zuständigkeit der Staaten nach dem Völkerrecht*, in *Kölner rechtswissenschaftliche Abhandlungen*, Heft 10 (1933), pp. 18 ff.; Eberhard v. Thadden, *Der vorbehaltene Betätigungsbereich der Staaten*, in *Abhandlungen aus dem Seminar für Völkerrecht und Diplomatie an der Universität Göttingen*, Heft 10 (1934), pp. 38-46.

<sup>39</sup> See Manley O. Hudson, "The New Arbitration Treaty with France," this JOURNAL, Vol. 22 (1928), p. 371.

<sup>40</sup> *Cong. Rec.*, Vol. 92, No. 153, Aug. 1, 1946, pp. 10763-10764; No. 154, Aug. 2, 1946, pp. 10839-10840.

The danger that the reservation of domestic questions may be interpreted so broadly as to encroach upon the Court's jurisdiction is enhanced by omission of the phrase "questions which by international law fall exclusively within the jurisdiction," contained in the original Morse Resolution (S. Res. 160) as introduced July 28, 1945 (*Cong. Rec.*, July 28, 1945, p. 8304), and the substitution in S. Res. 196 of the phrase "matters which are essentially within the domestic jurisdiction." This change, made to bring the language of the Resolution into conformity with that of Art. 2(7) of the Charter, deprives the concept of domestic jurisdiction of all legal precision, through adoption of a vague and indefinite formula unknown to

Perhaps the principal danger of evasion or avoidance of the obligation of judicial settlement arises from the over-simplification of the problem of domestic jurisdiction as conceived by Senatorial minds. The Senate in 1919, when approving the fourth Lodge reservation, undoubtedly acted in good faith and in the firm belief that it was safeguarding incontrovertible American rights as well as interests in reserving to the United States "exclusively the right to decide what questions are within its domestic jurisdiction," and in further declaring that "all domestic and political questions relating wholly or in part to its internal affairs . . . are solely within the jurisdiction of the United States."<sup>41</sup> Mr. David Hunter Miller, in a trenchant criticism of this reservation, pointed out that the United States had concluded treaties on all seven subjects therein enumerated as being solely within the domestic jurisdiction of the United States.<sup>42</sup>

The debate on the Morse Resolution reveals the persistence of the simplistic conception illustrated above. Constant reference was made to the regulation of tariffs as a subject incontestably within the domestic jurisdiction of the United States, although perhaps the most numerous class of treaties relates to this subject.<sup>43</sup> The Senate appears figuratively to view the domain of domestic jurisdiction as one surrounded by an impassable wall which separates it from the domains of other nations, a wall which is of equal height throughout. It has become a truism to observe that the content of domestic jurisdiction "is relative, and depends upon the development of international relations."<sup>43</sup> But it is less frequently remarked that the domain which is reserved to one state will vary *vis-à-vis* every other state. Freedom of action, unlimited save by general international law with regard to one state, may be limited with regard to another by the conclusion of an international engagement. Whether a state has exclusive jurisdiction, or whether its jurisdiction is subject to international limitations, can be determined only with respect to a particular state, in a specific case, and within the field in which the controversy arises.<sup>44</sup>

international law. On the origin and possible meaning of the term "essentially" as contained in the Charter, see the writer's statement before the Subcommittee of the Committee on Foreign Relations, *Hearings*, pp. 30-34.

<sup>41</sup> See note 13, above.

<sup>42</sup> *My Diary at the Peace Conference*, Vol. 20, pp. 577-580.

<sup>43</sup> Advisory Opinion No. 4, *Publications of the Permanent Court of International Justice*, Series B, No. 4, p. 24.

*Le 'fait international' constitue . . . une notion contingente, dont le cas enu est déterminé en grande partie par les idées régnautes, influencées elles-mêmes à cet égard par l'état des relations internationales. Entre le domaine de l'activité discrétionnaire de l'État et celui de son activité internationalement réglée aucun partage n'est imposé par un principe immuable, aucune ligne infranchissable n'est objectivement établie. Si bien que l'ordre international est juridiquement maître de soumettre à sa réglementation des zones précédemment abandonnées à la discrétion du droit interne.* Maurice Bourquin, *Règles générales du droit de la paix*, in *Recueil des Cours de l'Académie de Droit International*, T. 35 (1931-I), p.149.

<sup>44</sup> E. Borel, in *Annuaire de l'Institut de Droit International* (1931-I), p. 70; Arnold Raestad,

The determination of so complex a question, therefore, is one which can be adequately performed only by a judicial tribunal. To entrust it to an interested party is to add to the risk of evasion that of error committed in good faith. The Senate has itself hitherto undertaken to pass finally upon the scope of the matters reserved under treaties of arbitration by conditioning the submission of specific disputes upon a further exercise of its treaty-making power.<sup>45</sup> Perhaps it may be considered an advance over previous practice that this determination, under the terms of the United States Declaration, will be made by the President alone, without the advice and consent of the Senate.

It was pointed out by the Report of the Committee on Foreign Relations that, because of the reciprocal nature of the jurisdiction provided in Paragraph 2 of Article 36 of the Statute, reservations made by the United States would inure to the advantage of any other state against which the United States should invoke the Court's jurisdiction.<sup>46</sup> Senator Morse warned that the United States would, if the Connally Amendment were accepted, bar itself from proceeding against other states in disputes which are "essentially" within their domestic jurisdiction, "as determined by" themselves.<sup>47</sup> In brief, the effect of the Amendment is to multiply the reservation of domestic matters, as determined unilaterally, by the number of acceptances of the jurisdiction of the Court. This is true not only with relation to states which have expressly excluded matters of domestic jurisdiction (although none of these have themselves reserved the right of unilateral determination); it is true even with regard to states which have accepted the compulsory jurisdiction unconditionally.

Perhaps this legal situation was insufficiently comprehended for none of the proponents of the Amendment appeared to envisage the possibility that the United States would ever appear before the Court as a "plaintiff" seeking judicial recognition of its legal claims. Despite the fact that the United States has in the past most frequently appeared as the claimant state in international adjudications Senator Connally and his supporters visualized the

*La reconnaissance, la détermination et la signification en droit international du domaine laisse à ce dernier à la compétence exclusive de l'État*, in *Acta Scandinavica juris gentium*, Vol. 3 (1932), pp. 111, 112.

<sup>45</sup> On the requirement that the *compromis* under treaties of obligatory arbitration take the form of a special agreement subject to the advice and consent of the Senate, see John B. Whitton and John W. Brewer, Problems Raised by the General Treaty of Inter-American Arbitration, this JOURNAL, Vol. 25 (1931), pp. 463-468; and James O. Murdock, Arbitration and Conciliation in Pan America, in same, Vol. 23 (1929), pp. 285-288. The practice of the United States with respect to the submission of disputes to adjudication is summarized by Green H. Hackworth, then Legal Adviser of the Department of State, in a memorandum prepared at the request of Senator Vandenberg, July 23, 1945. *Cong. Rec.*, Vol. 91, No. 151, July 27, 1945, p. 8249.

<sup>46</sup> *Report*, pp. 4, 5. On the reciprocal character of jurisdiction under Art. 36(2), see Manley O. Hudson, *The Permanent Court of International Justice, 1920-1942*, New York, 1943, pp. 465-467.

<sup>47</sup> *Cong. Rec.*, Vol. 92, No. 153, Aug. 1, 1946, p. 10770.

United States as occupying always the position of an embattled and outnumbered defendant, exposed to the judicial usurpations of a tribunal composed of fourteen alien judges and one lone American. There is, in the spirit of the Connally Amendment, "a vague apprehension of danger, as exhibited in this nervous quest for security from law, which it is difficult to comprehend."<sup>48</sup>

The Connally Amendment, now a reservation to the United States Declaration, may have serious consequences in depriving the United States of judicial remedies against other states in cases in which it would otherwise have a valid legal claim. It is well known that certain Latin American countries, among others, tend to take an expansive view of the extent of their internal sovereignty, and to define as domestic matters those which fall within the jurisdiction of their courts or find a sanction in their constitutional law.<sup>49</sup> The International Court of Justice, under a true system of compulsory jurisdiction, would find no difficulty in reducing these claims to their proper proportions. But the Connally Amendment offers to such states the opportunity to assert and maintain—with finality so far as settlement by judicial means is concerned—a defense which the United States has always contested: that a state may bar an international reclamation by setting up its own law or the decisions of its own courts as the final test of its international obligations.<sup>50, 51</sup>

<sup>48</sup> These remarks are Professor Lauterpacht's, and were expressed on the occasion of the acceptance of compulsory jurisdiction by Great Britain, with reservation of domestic questions. Their application to the United States Declaration represents an *a fortiori* case, for Great Britain, at least, did not challenge the competence of the Court itself to decide jurisdictional disputes arising out of its reservation. "The British Reservations to the Optional Clause," in *Economica*, June, 1930, p. 159.

<sup>49</sup> See note 13, above; and note the character of the reservations of various Latin American countries to the General Treaty of Inter-American Arbitration of 1929. Compare the remarks of M. Titulesco in rejecting a demand for judicial settlement in the dispute between Rumania and Hungary relating to the expropriation of property of the Hungarian optants. To arbitrate such a question, M. Titulesco said, would be to submit "not merely a problem but a veritable page of history. . . . Is the question only a simple violation of our international obligations by an act of the Government, by a law having the character of a common law? No. If we have violated international law it is by our constitution, by the supreme law which to-day governs relations between the Rumanians; yet you are asking me, a representative of my Government . . . to submit the constitution of Roumania to the arbitration of a third party." League of Nations, *Official Journal*, 1923, No. 6, p. 607.

<sup>50</sup> It should be recalled that a state cannot relieve itself from an international obligation by means of a reservation. The reservation of a unilateral right of determination in matters alleged to fall within the domain of domestic jurisdiction cannot extend that domain beyond its limits as defined by international law. It cannot relieve the United States of responsibility for any action which it claims to fall within its jurisdiction but which actually violates the legal rights of another state. The reservation simply means that the United States may refuse to have recourse to settlement through a judgment of the International Court of Justice in any matter of domestic jurisdiction "as determined by the United States." The same possibility of refusal is, of course, available, on the ground of reciprocity, to other states accepting the jurisdiction of the Court. Compare the remarks of Charles Evans Hughes on the legal nature of reservations, quoted, this JOURNAL, Vol. 23 (1929), p. 289.

<sup>51</sup> Senator Pepper vigorously attacked the validity of the Connally Amendment on the

Whether the United States Declaration, with the Connally Amendment annexed, restores the United States to a position of leadership in promoting the rule of law among nations may fairly be judged in the light of a brief comparison with the trend in international adjudication in the period between the two World Wars. Under the Covenant of the League of Nations there was provision for an international determination of what is included within the domestic jurisdiction. The General Act of 1928 permitted accession with reservations, defined and limited in a list which included disputes concerning "questions which by international law are within the domestic jurisdiction of States"; but it further provided that disputes "relating to the interpretation or application of the present General Act, including those concerning the classification of disputes and the scope of reservations, shall be submitted to the Permanent Court of International Justice." The Locarno treaties of conciliation, arbitration, and compulsory adjudication provided that if the parties should fail to agree upon a *compromis*, "one or other of them may bring the dispute before the Permanent Court of International Justice by means of an application."<sup>52</sup> The above are illustrative of a significant tendency, shown in numerous postwar treaties of international arbitration and adjudication, toward a general recognition of the principle that where reservations are made they should be interpreted and applied in a specific controversy, not by each interested party itself, but by an arbitral or judicial agency, authorized to decide the preliminary question whether any stated reservation, including that of domestic matters, becomes

ground that it "flies first into the very teeth of the purpose and concept of the Court, and in the second place, into violent conflict with subparagraph 6 of Article 36. . . ." Adoption of the Amendment, he said, would be "a vain act, because we cannot impair the express provision of the Charter [Statute]. . . . Once we have given authority for compulsory jurisdiction to attach, then the law as embodied in Article 36 of the Statute becomes effective, and we cannot by reservation in conflict with and in opposition to the Charter [Statute] authority limit the jurisdiction of this Court." *Cong. Rec.*, Vol. 92, No. 154, Aug. 2, 1946, p. 10837. Professor Lauterpacht has suggested that "Possibly it might be argued that sweeping and indefinite reservations might be regarded as contrary to the very purpose of the Optional Clause and as such invalidating its signature. As such, for instance, might be regarded a reservation offending against the fundamental principle of the Statute of the Court in regard to its right to determine its own jurisdiction": article cited p. 169. On the problem of the validity of reservations in accepting the compulsory jurisdiction of the Court, see the writer's article on "Questions Resulting from the Connally Amendment" in *American Bar Association Journal* (Oct., 1946), pp. 660-662, 721.

<sup>52</sup> For a brief discussion of the "forced *compromis*," see Max Habicht, *Post-War Treaties for the Pacific Settlement of International Disputes*, Cambridge, 1931, pp. 1043-1044. An approach to this type of *compromis* was contained in the Knox-Taft treaties of 1911, Art. 3 of which provided that "in cases in which the parties disagree as to whether or not a difference is subject to arbitration under Art. I of this treaty, that question shall be submitted to the joint high commission of inquiry; and if all or all but one of the members of the commission agree and report that such difference is within the scope of Art. I, it shall be referred to arbitration in accordance with the terms of this treaty." This article was stricken out by the Senate, which substituted a broad reservation of domestic questions (see note 10, above), and added the requirement that the special agreement for the submission of each case receive the advice and consent of the Senate.

operative.<sup>53</sup> This same tendency toward third-party determination is shown by the fact that none of the forty-four states, which at one time or another accepted the compulsory jurisdiction of the former Court, reserved to itself the right of determining the scope and application of its reservations. Finally, attention may be called to the first declaration made under the Statute of the International Court of Justice, that of the Netherlands Government, August 5, 1946. This declaration conditioned the acceptance of the compulsory jurisdiction of the Court only by restricting it to "future disputes, except those in regard to which the parties would have agreed . . . to have recourse to another method of pacific settlement."<sup>54</sup>

The Morse Resolution was introduced with the purpose of extending the scope of international adjudication and of marking a significant advance toward the realization of an oft-proclaimed ideal. This purpose was thwarted and the significance of the United States Declaration seriously impaired by the insertion of an exclusion which reserves for unilateral determination the scope of the obligation assumed. Inclusion of the Connally Amendment leaves the United States in substantially the position it has occupied under earlier treaties of obligatory arbitration, which is "obligatory as long as there is no dispute, but become[s] optional as soon as one has arisen."<sup>55</sup> In view of legitimate expectations of substantial progress which had been aroused by the relatively unanimous approval of the principle of compulsory adjudication, both in official quarters and in public opinion, the reversion of the United States to previous practice constitutes a retrogressive step.

<sup>53</sup> See Robert R. Wilson, "Reservation Clauses in Agreements for Obligatory Arbitration," this JOURNAL, Vol. 23 (1929), pp. 68-93; and "Clauses relating to Reference of Disputes in Obligatory Arbitration Treaties" in same, Vol. 25 (1931), pp. 469-489.

<sup>54</sup> Text by courtesy of Department of State.

<sup>55</sup> Baron Marschall von Bieberstein, German delegate to the Hague Conference of 1907, in proposing a plan for an "obligatory *compromis* as the complement of obligatory arbitration." *Proceedings of the Hague Peace Conferences: The Conference of 1907*, New York, 1920, Vol. I, p. 378.

## THE EGYPTIAN MIXED COURTS AND FOREIGN ARMED FORCES

BY JASPER Y. BRINTON

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In the April issue of this JOURNAL, Colonel Archibald King contributed, under the title "Further Developments Concerning Jurisdiction over Friendly Foreign Armed Forces," a study designed to bring down to date his previous article on the same subject which appeared in the issue for October 1942.

A brief comment on Colonel King's article is rendered doubly interesting by reason of the important role played by its author in negotiating during the war a series of agreements securing special immunities for visiting American troops abroad. These services entitle Colonel King to the gratitude of the Army and their delicate nature and successful issue are appreciated by none more than by the writer, who was privileged to follow the conduct of the negotiations in one important military area.

The first five pages of Colonel King's article are devoted to an examination of the Egyptian jurisprudence. This might be thought to be a compliment were it not for the observation which appears in a note later in the article:<sup>1</sup>

Nor will it do to say that British forces have been serving in countries having a less advanced system of criminal justice to which British soldiers and sailors ought not to be subjected. That may be true as to Egypt and Ethiopia, but it is not true of France and the United States.

This is not the occasion to speak of the highly interesting Ethiopian legal system, based on the Mosaic law, and which appears to be well adapted to the conditions of life in which it is administered. As to Egypt it is only proper to remark that it possesses one of the most modern and carefully developed legal systems in existence. In the Mixed Courts both the penal code and the code of criminal procedure have been recently revised and so far as the procedure is open to criticism it lies in the direction rather of an excess of vigilance in the protection of the rights of the accused than in the opposite direction. It is saying enough on this point to mention that in normal criminal proceedings against a foreigner his case will be heard first by a trained judge sitting as *juge d'instruction*, then by a *chambre de conseil* composed of three judges, next by a court of assizes of five judges with an appeal on points of law to a court of cassation, by whom, in case of error, a new trial is ordered. The procedure before the purely national courts presents substantially similar guarantees.

<sup>1</sup> This JOURNAL, Vol. 40 (1946), p. 265, Note 34.

Later on, commenting on the decisions of the Mixed Courts in matters of jurisdiction over members of foreign military forces, Colonel King makes certain observations which, it is submitted with due respect seem to invite allegiance to a reign of force rather than to the reign of law. The Colonel observes that the defendants in the cases before the Mixed Courts belonged either to the Greek or the French forces,<sup>2</sup> and adds:<sup>3</sup>

The Greek Government was in exile. The Vichy French Government was a prisoner. . . . None of these Governments was in a position to *oppose effectively* the exercise of jurisdiction over its soldiers and sailors by the Mixed Courts of Egypt.

It is clear that the Colonel does not refer to an opposition presented through the regular channels of the law. Certainly there was no inadequacy in the legal defense of any of the various individuals whose cases presented this interesting question to the Courts. Greek and French lawyers are among the ablest members of a very able bar. The exhaustiveness of the arguments presented to the Mixed Courts in the cases referred to, reflected, as they were, in the elaborate opinions rendered, was in full keeping with the best traditions of the Courts. Colonel King has evidently other than legal arguments in mind. He writes:<sup>4</sup>

As has been said, Great Britain has a treaty, and the United States an executive agreement, with Egypt conceding exclusive jurisdiction over their forces; but even in the absence of a treaty or agreement it is not to be supposed that any nation able to prevent it will permit its soldiers or sailors to be withdrawn from its control by another power in time of war and in a theatre of operations *whatever a court may say about the matter*.

It is hard to believe that Colonel King seriously intends to suggest that any government (even the most powerful!) would have assumed the responsibility of defying the decision of the highest courts of the land on a question involving the exercise of territorial jurisdiction over members of visiting military forces accused of crimes against public order, unrelated to their military duties and committed outside of military precincts.

Another point deserves comment. On the first page of his article Colonel King, after referring to the conclusion of an executive agreement between the United States and Egypt conceding to the American military courts exclusive criminal jurisdiction over members of our armed forces in Egypt, observes:

Even before the notes constituting that agreement were exchanged, the Egyptian Government made no effort to subject United States military and naval personnel to the jurisdiction of its courts.

<sup>2</sup> This statement is not strictly correct. The nationals of several other countries, as for instance Portugal, Spain, Yugoslavia, and Poland, were among the defendants.

<sup>3</sup> Article cited, p. 260. Italics supplied, as also in succeeding quotations.

<sup>4</sup> Same.



So far as it is intended to suggest a tacit acquiescence by the Egyptian Government in the principle of exclusive jurisdiction contended for by Colonel King this statement is misleading. In all the proceedings the Egyptian Public Prosecutor appeared and, in written briefs and oral argument, opposed the claim of the military authorities to complete immunity from jurisdiction of the local courts. The claim was rejected in favor of the principle which limits exemption to offenses committed within military precincts or while the members of the forces were engaged in the execution of a military duty. Obviously, while negotiations of this character were proceeding in a friendly spirit neither party was desirous of raising issues that might have disturbed the discussions. Tact and forbearance were exercised by all concerned. But it is certain that the Egyptian Government at no time by act or word made any concessions affecting the legal principles for which it was stoutly contending in the courts, a conclusion which will be readily understood by any one familiar with the jealous vigilance which Egyptian legal authorities invariably show in the defense of the national jurisdiction.

The Colonel takes exception to the decisions of the Mixed Courts as disregarding "the military necessities of the situation." He paints an alarming picture of a general being locked-up "if in his haste to get to the front his car has knocked down a civilian" . . . and adds "and the army may lose its directing head." But obviously the supposititious general was engaged in a *service commandé* and as such was not subject to the jurisdiction of the local courts. Certainly the fears expressed by Colonel King find no support in the acid test of practical experience, as exhibited in the score or more of cases in which the principle was applied in Egypt. In no quarter was the suggestion seriously made that the trial before the courts of the land of offenders against the public peace had in any manner obstructed military discipline. Indeed practical considerations suggest strong reasons in favor of the exercise of the civil authority. The offenses in question were, by their very definition, committed outside the military precincts and invariably involved, or were directed against, members of the civilian population. They also involved the intervention of the local police and the setting in motion of those measures of immediate record of the facts recorded in an official *procès-verbal* which forms, in general, such an admirable feature of European criminal systems. For the most part they have been brawls and shootings in the public streets and in cafés, or robberies or other similar offenses affecting public peace and order, where the language used by the available witnesses has often been one with which the military authorities are unfamiliar. The difficulties presented by the trial of such cases by a court martial remote from the scene of the offense are obvious.

There is also another class of cases to be considered which are indeed far from "divorced from reality." These are the offenses committed by members of the forces before their induction into service. Such cases arise quite

frequently in countries such as Egypt where a considerable proportion of the different foreign forces represented in the country have been long resident in the country and have been inducted into military service locally. Such a situation is presented by the case involving an embezzlement committed before the commencement of the war.<sup>5</sup>

Turning now for a moment to the review of recent authorities presented in Colonel King's article, it is difficult to find in them support for the broad and complete immunity for which he contends, as a matter of legal principle. Apart from the long line of Egyptian decisions, the substance of which has been reported in this JOURNAL, the only elaborate judicial discussion of the problem is that presented in the advisory opinions of the Supreme Court of Canada in a proceeding bearing the following title: "In the matter of a reference as to whether members of the Military or Naval Forces of the United States of America are exempt from Criminal Proceedings on Canadian Criminal Courts." A majority of three against two pronounced against the American claim to complete immunity.

Only two other judicial decisions are cited in the article. One of these, Wright v. Cantrell, decided by the Supreme Court of New South Wales, involved the civil liability of an Australian officer serving with the American armed forces, in which the defendant's claim of immunity was rejected.<sup>6</sup> The other case was that decided by the Judicial Committee of the Privy Council in the case of Chu-ig Chi Cheung v. The King involving the jurisdiction of the local courts of Hong Kong in the case of an alleged murder committed on board a Chinese Maritime Customs cruiser in the territorial waters of Hong Kong, both the victim and the accused being British nationals and in the service of the Chinese Government as members of the officers and crew of the ship.<sup>7</sup> In sustaining the jurisdiction of the local court on the ground of a clear waiver of immunity by the Chinese Government the opinion limits the effects of this decision in a manner which certainly excludes all possibility of its constituting an authority against the principle followed by the Mixed Courts:

What are the precise limits of the immunities, it is not necessary to consider. Questions have arisen as to the exercise of jurisdiction over members of a foreign crew who commit offenses on land. It is not necessary for their Lordships to consider these.

But it is clear that only such a case as that expressly excluded from this decision would furnish any analogy to the question now under discussion, concerning offenses committed outside the military precincts and unrelated to military duties. This decision in no way runs counter to the well established attitude of the British Government and the British courts in opposing any encroachment upon the principle of territorial civil authority.

<sup>5</sup> This JOURNAL, Vol. 39 (1945), p. 347.

<sup>6</sup> Colonel King's article, as cited, p. 268.

<sup>7</sup> Same, p. 273. See text of this decision, this JOURNAL, Vol. 33 (1939), p. 376.

On the whole judicial decisions during the war lend little support to a claim for immunity in the case of offenses unrelated to the military duties of the offender. The question is a controversial one, inviting, as it has received, diplomatic solution in accord with the particular and special situation presented. There are certainly numerous and highly respectable authorities in support of the solutions adopted by the Mixed Courts. Indeed it may be asked whether their decisions do not, after all, represent an eminently fair and reasonable interpretation of the principle of "implied consent" which lies at the basis of the classic decision of Chief Justice Marshall, an interpretation which reconciles the practical necessities of the situation with a proper respect for national sovereignty.

In a personal letter to the writer, acknowledging a copy of his previous article on the subject published in this JOURNAL, Judge E. F. M. Besly, a jurist who as Judicial Adviser to the British Embassy and Judge of the British Consular Court occupied for many years a preëminent position in judicial circles in Egypt, expresses an opinion with which it may be permitted to conclude this note:

I think the Mixed Courts have made a real contribution to international law by the series of decisions which you quote on the subject of the immunity enjoyed by members of Allied Forces where the offense is committed while they are on *service commandé* and the carefully defined limitations their jurisprudence has applied.

## THE SECOND WORLD WAR AND INTERNATIONAL LAW

BY EUGENE A. KOROVIN<sup>1</sup>

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### I

The Second World War inflicted countless sufferings and misfortunes on mankind. At the same time the war put to the test, in the sacrifice and heroism at the battlefronts and in the rear, many peoples and states, social forms and political systems, doctrines and theories.

In the crucible of war all the sciences, both the technical and the social—beginning with the men working in them and ending with their definitions and formulae—were subjected to a thorough tempering check-up and recasting of values. Some the war overthrew and dispersed as ashes in the wind; others it elevated to an unprecedented height.

This fully applies to our branch of law—to the science of international law.

### II

At the present time the very definition of the conception of international law holds not only academic interest but is a most topical problem as well.

The great war of all the freedom-loving peoples against Hitlerism led to a strengthening and consolidation of relations among those peoples and states. The treaties of alliance and mutual assistance, the decisions of international conferences (the Moscow, Teheran, Crimean and Berlin conferences), and the official documents of the anti-Hitlerite coalition (the Atlantic Charter, London Declaration, Charter of the United Nations) set before the governments and peoples the task, as Stalin has put it, of "establishing lasting economic, political, and cultural collaboration among the peoples of Europe, based on mutual confidence and mutual assistance for the purpose of restoring their economic and cultural life which the Germans have wrecked."

International law is one of the forms for the realization of this collaboration. On the other hand, in the course of the war international law, which was daily trampled upon by the fascist aggressors, served as an ideological *place d'armes* for mobilizing forces against the enemy, as a weapon for unmasking the cannibalistic theories and cannibalistic international practices of fascism.

In the final analysis it must be admitted that there is not and cannot be such a code of international law as would be equally acceptable to the

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cannibal and his victim, to the aggressor and the lover of freedom, to the "master race" and its potential "slaves," to the champions of the sanctity of treaties and to those who would treat pacts as "scraps of paper," to the advocates of humanising and abolishing war and to the proponents of totalitarian war, to those who "value every tear of a child," to quote Dostoyevsky, and to those who try to build a third or any other empire on a foundation of women's corpses and children's skulls. The United Nations have resolved not only to wipe off the face of the earth Nazism and fascism together with their brigand theory and practice, but also to establish a "world family of democratic countries"<sup>2</sup> based on democratic principles of foreign policy, and to build up a genuinely new international order as a "great banner of freedom for the peoples and of peace among the peoples."<sup>3</sup>

Hence, paraphrasing and deepening the description of international law made in his time by Professor N. Korkunov of St. Petersburg, we may define its specific nature in the coming period of history as the sum-total of legal norms guaranteeing international protection of the democratic minimum. This, of course, does not preclude the existence in contemporary international law of anti-democratic trends, survivals and forms, beginning with the imperialistic and ending with the feudal. It is no less indisputable, however, that the process of overcoming them, the struggle for their abolition and the affirmation of the principles of democracy in international relations, constitutes an immediate objective which unites the progressive elements of contemporary mankind.

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### III

*Redefinition*

In the light of the lessons of the Second World War a new and more profound treatment of international sovereignty is necessary.

We know that in the period of national states sovereignty is the expression in international law of the principle of national self-determination, and that the Soviet Union, which itself is built up on the principle of the sovereign equality of both its large and small member nations, has always been a consistent champion of international sovereignty, a friend and defender of oppressed peoples. Through the brutal maw of German nationalism the war reminded us that there can be reactionary national movements just as well as progressive ones, and that it is no less essential for mankind to combat the former than it is to support the latter. On the one hand we witnessed the heroic struggle of the peoples of Russia, the Ukraine, Bielorussia, Yugoslavia, Poland, and other countries to restore their sovereignty, and on the other hand we saw sovereignty—in the German and Japanese interpretation—turned into a privilege for a group of the chosen and an iron heel for all the rest.

<sup>2</sup> Teheran Declaration.

<sup>3</sup> Stalin.

Hence, in the interests of the preservation and consolidation of sovereignty, as a factor of universal progress, it becomes necessary temporarily to limit to a considerable degree the sovereignty of the most aggressive nations, that is, Germany and Japan. This is to be gathered from both the decisions of the Berlin Conference regarding Germany and the declaration of the Allied commanders-in-chief of June 5, 1945, concerning the assumption of supreme authority in Germany by the Governments of the four Allied powers.

Through a limitation of the sovereignty of the aggressor nations history is leading us to the strengthening of the sovereignty of the peace-loving state and to the affirmation of sovereignty as a legal form of democratic international policy, and, in the final analysis, to the strengthening of the sovereignty of the German people itself if and when Germany becomes a peace-loving and democratic state.

It is not to be wondered at, therefore, that the Soviet Union, which contributed more to the defeat of fascism than any other country, should demand the most resolute measures for the abolition and rooting out of Hitlerism and at the same time should ardently defend the sovereign rights of all the democratic peoples, both on the European continent and in the overseas colonies, against any encroachment by anybody (the categorical refusal of the Soviet Government to intervene in the internal affairs of the Balkan countries, in particular, its refusal to supervise the parliamentary elections in those countries; also, its protests against the presence of foreign troops in Greece, Syria, Lybia, and Indonesia).

#### IV

The war advanced a number of new problems with regard to the subjects of international law.

The prolonged sojourn in emigration of the governments of the states occupied by Germany gave rise to many questions concerning their legal status, beginning with their right to enact legislation and ending with their right to carry out judicial, administrative, and other functions while on foreign territory. Without touching on these points, which have already been dealt with in detail in published American and English studies (the studies by Oppenheimer and others), we shall dwell on one problem: international recognition of national resistance movements (e.g., in France, Yugoslavia, and Poland). The experience of the war eloquently demonstrated that the question of the degree to which one or another national organization is authorized to represent its temporarily enslaved people and to act in its name cannot be decided by old and formal legal methods. Some bodies, which were or claimed to be the lawful successors to governmental authority and possessed the other attributes of formal legality, in actual fact turned out to be more and more separated from their people as time went on, and to express the people's aspirations and will less and less; this is

not to speak of such governments as the Polish in London, which acted as a direct traitor to the national interests of its country. On the contrary, in the course of the struggle against the fascist invaders there came into being, on the occupied territory or outside it, bodies of national resistance (national committees, *narodnie vecha*, and others) which embodied the heroic spirit and finest traditions of their peoples and mobilized the latter's will to fight and to achieve victory. As is known, a number of such organizations were subsequently recognized by the powers of the anti-Hitlerite coalition to be the provisional Governments of their respective states, although owing to war-time circumstances many of them did not and could not have formal constitutional sanction.

Thus the principles of a new and broader democracy going farther than parliamentary forms and election ballots yet directly expressing the will and heroic ardor of the popular masses are entering the international arena as well.

The war fully unmasked and cast into the dust-heap of history the fiction of "puppet governments." When in June, 1944, the Government of the United States broke off diplomatic relations with the Ryuti government of Finland it motivated this rupture (with a government formally legal and recognized by America) by the factual transformation of the Finnish Government from the Government of an independent state into a Hitlerite agency, or puppet.

The war has shaken the traditional conception of the state as the sole subject of international law. The tremendous activity, heroism and self-sacrifice of the working class and its decisive influence on the outcome of the war have received further consolidation in the establishment of such powerful international associations of the working people as the World Trade Union Federation, which numbers 65,000,000 members. Can it now be stated, without giving offense either to fact or to common sense, that while any state, even a tiny one which plays no role whatsoever in international relations, is a subject of international law, an international organization of 65,000,000 members is a *quantité négligeable* for international law? If international law is to deal with realities and not with fictions, it must admit that the conception of subject is not an absolute category existing out of space and time. There was a period, for example, when the Roman Catholic Church was a subject of international law, and a highly influential one.

We are entering a new period, in which international associations of the working people are stepping out as a most active factor in international politics; associations in whose close and daily collaboration the democratic states are vitally interested. Hence the institution of appropriate organizational forms for such collaboration, for example, the admission of the largest international workers' organizations into the United Nations with a consultative vote (to the Assembly or the Economic and Social Council),

would considerably promote the progressive development and democratization of international law.

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The war has also brought new features into the conception of the "basic rights" of states as subjects of international law by elucidating the distinction between the formal equality of states and their weight in the international arena: while recognizing the sovereign equality of all peace-loving states the declarations of the powers of the anti-Hitlerite coalition and the Charter of the United Nations likewise recognize special rights and special obligations for the great democratic states (the Big Five). The distinction made here lies not only in the efforts and the sacrifices made by the leading democratic states in saving mankind from the fascist plague. The distinction lies also in the obligations which the great peace-loving states undertake with regard to safeguarding universal peace and maintaining international security. It is nothing new in history for Great Powers to occupy a privileged position. What is new is that definite privileges are accorded the great democratic states not in their own interests but in the interests of all the states, of the whole international collectivity, by making their international rights correspond to their international obligations. Indeed, can there be an equal international status for a state which, like Switzerland, for example, considers it the height of wisdom to pursue a *still sitzen* policy while mankind is experiencing a shattering catastrophe, and on the other hand for a state which is ready to invest the blood of its sons and its hard-earned wealth to protect the peace, progress, and culture of mankind against any threat from a criminal aggressor; this aside from the fact that many states have neither the human nor material resources to effectively check aggression.

Genuine democracy and juridical leveling have nothing in common, and the organization of international relations on formal and leveling principles would be a crying violation of the most elementary equality inasmuch as it would lead to absurd privileges for small states, which would be accorded international rights on a par with the Great Powers but would at the same time be free from the most important international obligations and consequently might easily become blind weapons for aggressive schemes of others. Moreover the recognition of special rights for the great democratic states in accordance with their special obligations is absolutely essential for guaranteeing genuine equality in international relations, instead of equality on paper only.

The sad history of the League of Nations and the grim lessons of the Second World War eloquently show that as long as there are rapacious imperialistic countries the very existence of small states, let alone the question of equality, depends first and foremost upon the preparedness of the great peace-loving state to come to their defense. Only in consequence of the defeat of Fascism, Nazism, and Japanese militarism by the armed forces of the Big Three and their allies has it become possible to restore the independent existence of the small states that had been enslaved by the



aggressors. Thus genuine equality, as a guarantee of equal opportunities for each state to develop and assert its spiritual and material culture, is possible in modern times only if it is under the reliable protection of the great democratic states. Hence to recognize that the latter have special international rights not only does not undermine the principle of equality in international relations but for the first time in history provides this principle with a stable legal foundation.

When speaking of the problem of sovereignty we cannot but touch on the tendencies to abolish this very conception that have been expressed not only in theoretical studies but also in utterances by prominent foreign statesmen. In a speech during debates in the British House of Commons on November 22 and 23, 1945, for example, Mr. Anthony Eden stated that in connection with the invention of the atomic bomb he saw no other way of "protecting the world from atomic energy than a rejection of our present conceptions of sovereignty." He said, "We must remove nationalism's sting." Eden was supplemented by Foreign Secretary Bevin, who came out for the establishment of a world assembly directly elected by the peoples of the whole world; an assembly to which the Governments of the United Nations would be responsible and which would enact universal laws. In Mr. Bevin's opinion, with the establishment of this assembly the expression "international law" would disappear, to be replaced by "world law," and in place of the sovereignty of the separate states there would be the sovereignty of mankind as a whole. The dreams of Eden and Bevin are quite removed from reality; they bring to mind the talk at the time of World War I about "super-imperialism" and "over-state," about the gradual development of the League of Nations into a world parliament, and so on; these were arguments with which journalists and publicists, predominantly of the social reformer type, used to console both themselves and others.

The chief fault of these theories lies in their authors' inability or refusal to understand that the roots of aggressive nationalism, which the world parliament is to check, lie in the very nature of imperialism. It is by no means accidental, for example, that arch-conservative ideas of the old Curzon mold are to be heard so frequently in the diplomatic "novelties" of Mr. Bevin, the Laborite Foreign Secretary of Great Britain.

The nature and essence of imperialism cannot be changed by any amount of parliamentary voting.

No less incorrect is the idea that state sovereignty is absolutely synonymous with rampant nationalism, in other words, something like a bull in a china shop on a world scale. It is indisputable that any state of the imperialist type always holds forth such a threat. But it is just as indisputable that there is another type of state (the Soviet), whose social nature completely precludes even the possibility of such a transformation. The social level of each state, the level of development of its social forms, the degree of democracy it has achieved—all these are a greater or lesser guarantee of the pursuit of democratic principles both in domestic and foreign policy. In the

USSR, for example, the steadily increasing sovereignty of the Union of Republics has not only not led to national narrowmindedness or national strife or the weakening of relations within the Union, but on the contrary, has guaranteed swift progress of the Soviet republics in all fields thanks to their fraternal collaboration and indivisible unity.

The major successes of democracy in a number of states in post-war Europe (Bulgaria, Rumania, Yugoslavia, Hungary, Poland) simultaneously with a fundamental change in their foreign policy, convincingly testifies that sovereignty and democracy, just as sovereignty and socialism, are conceptions that not only are wholly compatible but mutually enriching.

In a world where there are rich and poor, exploiters and exploited, weak states and strong ones, and independent countries and colonies, to reject the conception of sovereignty or the other legal guarantees of national independence and freedom would always help those who are strong and would never benefit those who are weak.

It is highly characteristic that the present-day grave-diggers of sovereignty are among the leading figures of the state, whose government has never evinced, either in the past or in the present, any special tendency to respect the sovereignty of the peoples of dependent and colonial countries.

## V

In the light of the events of the Second World War the conception of international delict is extended as regards both substance and subject.

When applied to the foreign policy of the German state, the Hitlerite regime of "rule by criminals" brought forth a number of new kinds of international crimes—against peace, against the laws and customs of warfare, against mankind (the Moscow and Berlin Declarations, the London Agreement of August 8, 1945, and the indictment of the International Military Tribunal of October 19, 1945), the qualification and international judicial repression of which are substantial contributions to the struggle against manifestations of international banditism.

Revelation of the Nazi criminal international methods led to an extension of the conception of the subject of international crimes: not only the state and its individual agents, but entire institutions and organizations (the Gestapo, the German high command, the leaders of the Nazi party, the SS and SA) as well as private individuals (German industrialists, landowners, slave-owners and others) turned out to be active participants, accomplices, and instigators of various international crimes.

## VI

As a result of the work of the Allied conferences in Moscow, Teheran, Dumbarton Oaks, the Crimea, and San Francisco, there was established the

United Nations Organization, which, as distinct from the Versailles League of Nations, has all the rights and the requisite means for combating aggression. nm

The United Nations Charter introduces a number of important features into the practice of international law.

Admission into the United Nations is open not for all states but only for the peace-loving ones; moreover, only for those which, in the judgment of the organization, are able and willing to carry out the obligations that fall upon its members. Among these obligations, apart from that of settling international disputes by peaceful means, is the obligation to promote and encourage "respect for human rights and for fundamental freedoms" without thought of race, sex, language, or religion, and also recognition of the sovereign equality of all members of the organization. It is clear that both the spirit and the letter of the Charter bar states of the anti-democratic and fascist type from membership in the international organization, which is called upon to guarantee the observance of a democratic minimum both within the member-countries and in international relations.

The organization treats in an entirely new way the question of the relation between the international legislative and executive bodies. In contrast to the League of Nations, which did not have a clear-cut differentiation of functions between the Assembly and the Council, in the United Nations Organization the chief duties with regard to the maintenance of peace and security are entrusted to an executive body—the Security Council—and the members are obliged to abide by its decisions. Definite measures to combat aggression, peaceful as well as coercive, are carried out only by the Security Council. The Assembly, which considers general principles and submits recommendations, can discuss only those questions pertaining to the maintenance of peace and security that do not fall within the competence of the Council. ✓

Different voting procedures are used in the Assembly and the Council. While in the Assembly questions are settled by majority vote (either plain or qualified) on the basis of the formal equality of all the members of the Organization, decisions in the Council, apart from two special cases (the Yalta formula), require a majority vote plus a unanimous vote by the Big Five. This principle, which has inaccurately been called the "right to veto" of the Great Powers, and which should be more aptly called the principle of obligatory unity or "agreement" of the Big Five, is an expression of the indisputable truth that at the present stage of international relations peace and security cannot be guaranteed on a world scale without close collaboration and mutual understanding among the great democratic states.) ✓

The first session of the General Assembly and the Security Council in January and February of 1946 furnished a new illustration of this thesis. Thus, of all the problems submitted for its consideration, the Council was able to take a decision only on the complaint of the former Government (now

there is a new one) of Iran against the USSR in connection with events in Persian Azerbaijan. The Council declared, contrary to the claims of the Iranian Government, the question to be the subject of direct negotiations between the USSR and Iran, and limited itself to expressing the hope that it would be informed concerning the outcome of these negotiations.

Owing to a fundamental difference of viewpoint of the members on the question of the presence of British troops in Greece, the Council had to limit itself to a statement by the chairman, who suggested taking note of the statements made to the Council by the representatives of the respective states, and considering the question closed. Regarding the military action in Indonesia by British and Dutch troops against the national liberation movement the Council adopted no resolution and could not even resort to a summary by the chairman.

A similar fate befell the appeal by Syria and the Lebanon regarding the presence of British and French troops on their territory. In the end, after the failure of all the resolutions proposed—the last of which was rejected thanks to the protest of the USSR,—for the formulation of that resolution would have permitted the occupation of an independent state by foreign troops for an indeterminate period of time—the chairman of the Council noted that the voting had been invalid and moved the next questions.

The results of the first session of the Security Council provide new confirmation of the indisputable fact that of all the members of the Council the most consistent defender of the spirit and letter of the United Nations Charter is invariably the Soviet Union, which consistently follows its line of consolidating international peace and collective security, no matter where or by whom it is threatened; they also confirm the conclusion that all big problems of contemporary world politics, regardless of the form they assume—be it a disagreement regarding voting procedure or a direct threat to peace—can be successfully settled only with the unanimity of the great democratic states on the basis of close collaboration and mutual understanding.

Those who calculated on the possibility of replacing this collaboration by various blocs and maneuvering, and who thought that by whipping together a temporary majority in one or another of the bodies of the United Nations they could foist their policy on all the other powers, again received a good object lesson.

✓ Speaking of the development of principles of international collaboration in the United Nations Charter, such new forms of collaboration as the Economic and Social Council, the system of international trusteeship, and the reform of the International Court should be mentioned.

The Economic and Social Council, which has come into being together with the United Nations, is called upon not only to promote the settlement of international problems of a social and economic order but to become a coordinating center for various bodies of international mutual assistance, both old and new (UNRRA, the International Monetary Fund, and others).

Although the system of international trusteeship over colonial countries does not fully satisfy the demands of their peoples, it is nevertheless a step forward in comparison with all the old forms of international colonial administration (including the League of Nations mandate system), inasmuch as international trusteeship is called upon to guarantee the development of the trustee territories toward self-government or independence, and insofar as one of the members of the Trusteeship Council is the USSR, a state which has fully solved the problem of the peaceful collaboration and the fraternal relationship of different peoples.

The International Court of Justice of the United Nations, which according to the Charter is the principal judicial organ, is formed and acts as one of the links in the new system of organized security. Its main function is the settlement of juridical disputes that threaten international peace and security. Execution of the decisions of the tribunal are guaranteed by the Security Council with all the means at its disposal.

Finally, the Charter settles the complicated problem of combining regional security with universal security by permitting regional security agencies to employ an extensive arsenal of peaceful means for settling international disputes, while according the central body a monopoly on the employment of coercive measures, with the sole exception of action required to curb a new aggression by a member or members of the former Hitlerite bloc.

Of the other problems of international law that are connected with the Charter, we cannot but note paragraph 2 of Article I, according to which the member states are obliged "to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples." The acceptance of the progressive principle of equal rights as one of the generally recognized norms of international law does not yet mean, of course, that it is being realized, but it undoubtedly promotes this process.

## VII

*sanctity of treaties*

The new international law and order that is being born after the Second World War presupposes maximum strengthening of the force and significance of international treaties, as the chief foundation for the entire postwar system of international law.

According to the preamble of the Charter, it is the purpose of the United Nations "to establish conditions under which justice, and respect for the obligations arising from treaties and other sources of international law, can be maintained."

Faithfulness to treaty obligations is an age-old tradition of the Russian people; it runs unbroken from the stern vows in the ancient Russian treaties ("may we be cursed by God, in whom we believe, may we turn yellow as gold, and may we be cut down by our own weapons"), through Ivan the Terrible's demand that treaties be sworn to not "avoiding the cross, and not

with one's nose," through the provisions of the Andrusov Peace Treaty, on the observance of treaties "in all their articles, dots, and commas without any belittling or false interpretation, completely and without violation," and Peter I's memorable statement that a person's "word of *слова* is dearer than everything else."

But particularly firm is the Soviet word, and no treaties in the world are more stable than the treaty obligations of the USSR. The main reasons for their stability are: 1) Soviet Russia does not have the incentives to violate its international obligations which many other states have, owing to their imperialist nature and policy; 2) Soviet diplomatic practice, as the practice of a truly democratic state, is characterized by utmost clarity and honesty, qualities that are inherent in a truly people's diplomacy; 3) the exceptional stability of Soviet foreign policy, and consequently, of Soviet treaties, follows from the monolithic nature of the Soviet society and state and the absence of antagonistic classes or groups.

A contrasting picture is presented by the treaty practice of Germany, and especially of Prussia.

From Frederick II, who justified the rejection of any treaty as soon as it became disadvantageous ("If it is advantageous to be honest, we will be that. If it is necessary to deceive, we will be deceivers"), through the likening by Wilhelm II's government of an international treaty to a "scrap of paper," and right up to the cynical admissions by that super-bandit Hitler, in a conversation with Rauschning, that he was ready to sign any agreement and then just as lightly tear it up if necessary—through all these runs an unbroken line of German perfidy elevated into a system.

The Second World War, begun by the German, Italian, and Japanese aggressors, "put under question the value of international treaties and obligations," as Stalin has said. As regards restoring the force and stability of international agreements, the defeat of Hitlerism is of tremendous importance. The Soviet Union, which played the leading role in the smashing of fascist barbarism, has consistently and resolutely fought, in San Francisco, London, and many other places, attempts at post-war treaty "revisionism," regardless of the grounds it was based on (imperialism or demagogy), and both by its example and all the weight of its prestige is defending the stability of international treaties, regarding this as one of the guarantees of international peace and security.

## VIII

✓ In the light of the United Nations Charter the aspect of war is fundamentally altered.

104 The United Nations are joined by a categorical obligation to settle their disputes by peaceful means and to refrain from the threat or use of force in international relations. Thus for a member of the United Nations military action is permissible only in realization of his right to individual or collective

self-defense (against aggression), or to maintain or restore international peace and security by common efforts, as to curb an aggressor, on the basis of corresponding decisions of the Security Council (Articles 39 and 51).

Any other war between states becomes an international crime, with all resulting consequences.

The new legal aspect of war as a means of self-defense developing into international action against aggression places on a new plane all the problems of war and its so-called laws and customs. For example, can persons be considered guerrillas as defined by the Fourth Hague Convention, if, even though they meet the formal requirements of the Convention, they act voluntarily on the side of the aggressor or are accomplices in his crimes?

Further, can we demand observance of the Hague rules of military occupation (respect for the sovereignty of the local government and so on) in the event of the occupation of the territory of an aggressor state by troops of peace-loving nations? Or can we permit the thought that in such a case the occupation army would provide armed protection for those same reactionary social forms and political institutions which led the country on the path of international crime?

And, conversely, can we confine a sacred people's war against an aggressor and enslaver, a heroic struggle of millions of people for their country's independence, for its national culture, for its right to exist, can we confine this war within the strict bounds of the Hague rules, which were calculated for wars of a different type and for a totally different international situation?

It remains to be added that the means of waging war have developed to such an extent that many of those employed in the Second World War were not foreseen in the former agreements on the rules of warfare and are in need of corresponding legal definition, as, for example, the parachute as a means of live-saving and the parachute as a means for dropping troops, magnetic mines and flying bombs, not to speak of the atomic bomb, which revealed a tremendous destructive force in actual warfare but has as yet been far from tested, as V. Molotov put it, "as a means of preventing aggression or of safeguarding peace."

## IX

The conception of neutrality also requires serious modification in our times. *neutral*

The previous World War confirmed the indisputable truth that both war and peace are indivisible; and that under contemporary international communications not only a weak country but a great power as well cannot remain outside a World War. Another step in the liquidation of neutrality was made by the Second World War. The neutrality of some states (Norway, Denmark, Holland, Belgium, Luxembourg) was trampled upon by the fascist aggressor; for others, like Spain, neutrality served as camouflage for the closest kind of collaboration with the aggressor; the third group of

neutrals, like the republics of Central and South America, regarding themselves vitally interested in the defeat of the aggressor, broke off diplomatic relations with him and declared war.

In the future a member of the United Nations will be able to remain neutral only in the exceptional event that a war breaks out between two non-members and if the United Nations itself does not deem it necessary to take measures to stop this war. In all other cases the members of the United Nations are to render it every assistance in all its preventative or coercive actions against the eventual aggressor (paragraph 5, Article II). With aggression an international crime, neutrality becomes a form of connivance at this crime.

## X

Throughout history the Russian people and the Russian state have made no small contribution to the development of international law. But of really great theoretical and practical significance is the international law experience of the Soviet state in introducing new democratic principles into international usage and in fighting for their recognition. Some of the stages and landmarks in this glorious path are: the Soviet "peaceful offensive" against the warmongers and for collective security; the Soviet pacts regarding the definition of aggression, on economic non-aggression, and on mutual aid; the Soviet rejection of unjust treaties and imperialistic privileges; the Soviet proposals for universal and partial disarmament, for activating the League of Nations, for humanizing warfare, and, finally, the Soviet diplomatic acts in unmasking the fascist aggressors, in mobilizing international forces for the defeat of the enemy and for the prevention of new aggression and wars. Whether it has been the question of liquidating the grim heritage of fascist aggression, of the war criminals and their victims, of a rebuff to newly-baked champions of Hitlerism, of the rights and position of the international labor movement, of the fate of the peoples of the colonial countries and satisfying their national demands, of the sovereignty and independence of small peoples and states—always and everywhere representatives of the USSR have been the foremost champions of democracy and international justice, defending the sacred cause of freedom of the peoples and peace among nations with the prestige of their great country and their skill in statesmanship and diplomacy.

In Stalin's words concerning the services of Soviet diplomacy, "which sometimes carries more weight than two or three armies at the front," we find a high and just appraisal of the work it has accomplished.

The force and importance of Soviet international law practice lies in that both as a whole and in each individual step it is not a tactical manoeuvre or a tribute to a transient situation but follows from the very basis and very nature of the Soviet state as an advanced state, as a truly people's democratic state, a fraternal union of free men and free peoples. Precisely because of



this the Soviet state can sincerely and consistently undertake the lofty tasks of politically educating its people in the spirit of defending the interests of peace, in the spirit of establishing firm friendship and effective collaboration among the nations.

At the present time, as Molotov has said, the Soviet people "have no more important task than the task of consolidating our victory."

In his election speech on February 9, 1946, Generalissimo Stalin declared that before the Soviet people stands the task of organizing a mighty new upsurge in the national economy, an upsurge that would guarantee the country against all possible accidents. From this follows the lofty and noble goal set the Soviet scientists: not only to overtake but in the nearest future to surpass the achievements of science abroad.

The task of the Soviet science of international law is to prove equal to Soviet international practice, to generalize and comprehend its experience, to map out and blaze new trails for it.

## THE ARAB LEAGUE AS A REGIONAL ARRANGEMENT

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### 1. THE BACKGROUND

The Arab countries long ago aspired to form some kind of union and the movement towards that ideal came to be known as Pan-Arabism. The roots of the movement go back to the time when the various nationalities of the Ottoman Empire rose in revolt against Turkish domination and aimed at eventual separation from Ottoman sovereignty. Some of the Arab countries actually defied Turkish authority and were separated, at least for a definite period of time, from the Ottoman body politic; such were the Arabian Peninsula under the Wahhabis and Egypt under Mohammed Ali.<sup>1</sup>

The Arab nationalist movement took a more definite shape after the Turkish Revolution of 1908 when a clash occurred between the Young Arabs and the Young Turks. The latter, in defiance of Arab aspirations, embarked on a policy of Turkification which virtually meant the subordination of all non-Turkish elements of the Empire to the Turks. To this policy the Young Arabs could not agree and consequently they began to agitate for "decentralization." When this was not granted they actually began to spread separatist propaganda, through secretly organized societies, aiming at a complete renunciation of Turkish sovereignty.<sup>2</sup> At the time when World War I broke out the Arab nationalist movement had become such a grave threat to the integrity of the Ottoman Empire that the Germans very shrewdly advised their Turkish ally to grant self-government to the Arabs in order to win their support in a "holy war." The Germans even approached the Arabs indirectly, through secret agents, and tried to persuade them to arouse the Moslems in India, Egypt, the Sudan, and North Africa.<sup>3</sup>

Great Britain proved to be more successful in influencing the Arabs and was able to win their support by promising them help to realize their national aspirations.<sup>4</sup> Great Britain's promise, as demanded by Sherif Hus-

<sup>1</sup> See on the Wahhabi movement W. G. Palgrave, *Essays on Eastern Questions*, London, 1872, pp. 111-141; and Hans Kohn, *History of Nationalism in the East*, London, 1929, pp. 15-25. See a discussion on Mohammed Ali as champion of the oppressed Arabs against the Turks by Asad J. Rustum, *The Royal Archives of Egypt and the Origins of the Egyptian Expedition to Syria, 1831-1841*, Beirut, 1936.

<sup>2</sup> On the origins of Arab nationalism see George Antonius, *The Arab Awakening*, London, 1938; and Hans Kohn, work cited, pp. 266 and ff.

<sup>3</sup> T. E. Lawrence, *Secret Despatches From Arabia*, London, no date, pp. 68-69.

<sup>4</sup> "Some Englishmen, of whom Kitchener was chief, believed that a rebellion of Arabs against Turks would enable England, while fighting Germany, simultaneously to defeat her

sain of Mecca, was made in correspondence between him and Sir Henry McMahon, British High Commissioner in Egypt. Sherif Hussain wrote as follows:

England to acknowledge the independence of the Arab countries, bounded on the north by Mersina and Adana up to the 37° of latitude . . . on the east by the borders of Persia up to the Gulf of Basra; on the south by the Indian Ocean, with the exception of the position of Aden to remain as it is; on the west by the Red Sea, the Mediterranean Sea up to Mersina . . .<sup>5</sup>

Sir Henry McMahon was authorized from London to approve Sherif Hussain's demand in a letter dated October 24, 1915, subject to the following reservations:

The two districts of Mersina and Alexandretta and portions of Syria lying to the west of the districts of Damascus, Homs, Hama, and Aleppo cannot be said to be purely Arab, and should be excluded from the limits demanded.

With the above modification, and without prejudice to our existing treaties with Arab chiefs, we accept those limits.

As for those regions lying within those frontiers wherein Great Britain is free to act without detriment to the interest of her ally, France, I am empowered in the name of the Government of Great Britain to give the following reply to your letter:

(1) Subject to the above modifications, Great Britain is prepared to recognise and support the independence of the Arabs in all the regions within the limits demanded by the Sherif of Mecca.

(2) Great Britain will guarantee the Holy Places against all external aggression and will recognise their inviolability.

(3) When the situation admits, Great Britain will give to the Arabs her advice and will assist them to establish what may appear to be the most suitable forms of government in those various territories.

(4) On the other hand, it is understood that the Arabs have decided to seek the advice and guidance of Great Britain only, and that such European advisers and officials as may be required for the formation of a sound form of administration will be British.

(5) With regard to the *vilayets* of Baghdad and Basrah, the Arabs will recognise that the established position and interests of Great Britain necessitate special administrative arrangements in order to secure these territories from foreign aggression, to promote the welfare of the local populations and to safeguard our mutual economic interests.<sup>6</sup>

ally Turkey. Their knowledge of the nature and power and country of the Arabic-speaking peoples made them think that the issue of such a rebellion would be happy: and indicated its character and method. So they allowed it to begin, having attained formal assurances of help for it from the British Government": T. E. Lawrence, *Seven Pillars of Wisdom*, New York, 1938, pp. 7, 28.

<sup>5</sup> See letter from Sherif Hussain to Sir Henry McMahon, July 14, 1915 (Correspondence between Sir Henry McMahon . . . and the Sherif Hussein of Mecca, in Great Britain, *Parliamentary Papers, Miscellaneous No. 3* (1939), Cmd. 5957, London, 1939, p. 3).

<sup>6</sup> Same, p. 8.

Following the war Great Britain was confronted with various conflicting pledges which rendered the situation in the Arab world, as well as the whole Near East, confused from the legal point of view. There was, in the first place, the McMahon-Hussain agreement which promised the Arabs unity and independence. In the second place there was the Sykes-Picot agreement (May 16, 1916) which partitioned the Arab World into zones of British and French influence, leaving only the Arabian Peninsula fully independent.<sup>7</sup> In the third place there was the Balfour Declaration of November 2, 1917, which promised the Jews to establish a national home for them in Palestine. Finally, there was the principle of international administration of former enemy territory which was advocated by certain publicists at the Paris Peace Conference.<sup>8</sup> In this atmosphere of bewilderment and clash of loyalties, General Jan C. Smuts saved the situation by publishing his proposals for a League of Nations, proposals which included the creation of a system of "mandates."<sup>9</sup> The mandates system proved to be a big compromise, since it implied the idea of international control and, at the same time, "provisionally" recognized the independence of the former Turkish provinces.<sup>10</sup> The Mandates System was officially instituted at the Paris Peace Conference (1919) through Article 22 of the Covenant of the League of Nations. At the San Remo Conference (April 25, 1920) the Near Eastern Mandates were distributed—the Iraq mandate was given to Great Britain and the Syrian and Lebanese mandates to France. The Jewish National Home was tried out in Palestine, whose mandate was also given to Great Britain.

The Arab nationalists, needless to say, were far from being satisfied with this compromise, because they were not prepared to accept any settlement short of unity and complete independence. Those nationalists wanted independence as a matter of right, as embodied in Great Britain's pledge to Sherif Hussain, rather than as a matter of capacity for self-government as laid down in the Mandates System. It is no wonder that the whole of the Near East rose in revolt against Great Britain and her allies for their alleged

<sup>7</sup> See text of the agreement in H. W. V. Temperley (ed.), *A History of the Peace Conference of Paris*, London, 1924, Vol. VI, pp. 16-17; also Jean Pichon, *Le Partage du Proche-Orient*, Paris, 1938, pp. 99-118.

<sup>8</sup> J. A. Hobson, *Towards International Government*, London, 1915, pp. 138-141. Professor Pitman B. Potter regarded Hobson's proposals for international administration of colonies as "the clearest anticipation of the mandate system before Smuts": Pitman B. Potter, "Origins of the System of Mandates under the League of Nations," in *American Political Science Review*, Vol. XVI (1922), p. 574.

<sup>9</sup> J. C. Smuts, *The League of Nations: A Practical Suggestion*, New York, 1919, pp. 14 and ff. See also Quincy Wright, *Mandates Under the League of Nations*, Chicago, 1930, pp. 24 and ff.

<sup>10</sup> "Certain communities formerly belonging to the Turkish Empire have reached a stage of development where their existence as independent nations can be provisionally recognised subject to the rendering of administrative advice and assistance by a Mandatory until such times as they are able to stand alone" (Article 22 of the Covenant of the League of Nations).

broken promises.<sup>11</sup> At the Cairo Conference (March, 1921), which was called by Winston Churchill, then Colonial Secretary, to settle Middle Eastern affairs, it was decided to nominate Emir Faisal, Sherif Hussain's second son, to the throne of Iraq and to conclude a treaty with him which was to replace the mandate. This nomination, it was unjustifiably held, was to fulfil Great Britain's pledges to Sherif Hussain for the establishment of Arab Government.<sup>12</sup> Of all the Arab mandated territories, Iraq alone was fortunate enough to be emancipated from the mandate and was admitted to membership in the League of Nations on October 3, 1932. But the other Arab countries, with the exception of Saudi-Arabia and Yeman, remained either under direct or indirect European control.

Thus failing to achieve unity and independence the Arab nationalists naturally contended that European imperialism had deliberately followed a policy of *divide et impera* since it was easier to dominate the Middle East by creating small and helplessly weak states than to allow a vast area of Western Asia to unite, and hence to become difficult to control.<sup>13</sup> The Arab nationalists argue that since the Arab countries are bound by common aspirations and by a community of interests—geography, history and culture—they are therefore entitled to form a union.<sup>14</sup> It has been admitted, however, that there exist certain factors which run counter to the project of unity. There are, in the first place, religious, racial, and racial-religious groups and communities which do not favor unity. Secondly, the Arab countries are radically different in cultural level and in standard of living. Thirdly, there is still a strong feeling of parochialism and local independence supported by dynastic interests. These factors, as Professor H. A. R. Gibb rightly pointed out, constitute "a problem for the Arab nationalists and (that) grave dangers were involved in not facing that problem."<sup>15</sup> But the Arab nationalists, though not entirely unconscious of

<sup>11</sup> Sir Henry Dobbs, British accredited representative, admitted before the Permanent Mandates Commission of the League of Nations, at its tenth session, that "For various reasons, into which I need not enter, my country had fallen into disfavour among Oriental peoples . . . from India to Egypt the Eastern world lay in a welter of resentment against the policy of the British and their allies, whose aim had everywhere been industriously misrepresented": League of Nations, *Minutes of the Permanent Mandate Commission*, Tenth Session (November, 1926), p. 45.

<sup>12</sup> In a letter to William Yale dated October 22, 1929, T. E. Lawrence wrote: "It is my deliberate opinion that the Winston Churchill settlement of 1921-1922 (in which I shared) honourably fulfils the whole of the promises we made to the Arabs, in so far as the so-called British spheres are concerned" (See David Garnett, *The Letters of T. E. Lawrence*, London, 1938, p. 671; and Lawrence's *Seven Pillars of Wisdom*, p. 276). See a criticism of this point of view in George Antonius, *The Arab Awakening*, London, 1937, p. 319.

<sup>13</sup> See speech by Lutfi Beg el-Haffar, a former Syrian Prime Minister, on the occasion of King Ghazi's death by accident, *al-Istiqlal*, Baghdad, May 16, 1939.

<sup>14</sup> Yusuf Haikal, *Towards Arab Unity*, Cairo, 1943, pp. 37-48 (in Arabic); also Edmond Rabbath, *Unité Syrienne et Devenir Arabe*, Paris, 1937, p. 33 and ff.

<sup>15</sup> H. A. R. Gibb, "The Future of Arab Unity," in Philip W. Ireland (ed.), *The Near East: Problems and Prospects*, Chicago, 1942, p. 77.

the gravity of these forces, maintain that these are quite insufficient grounds for disunity;<sup>16</sup> they are rather inclined to think that these factors have been mainly used as pretexts by European Powers, especially France in Syria, in order to justify their policy of *divide et impera*.<sup>17</sup> The Arab nationalists argue, moreover, that they do not ask the impossible, that is, they are not desirous of full union; they are merely aiming at a union on a federal basis which would at once gratify their Pan-Arab aspirations and satisfy local conditions. Such a project indeed would allow sufficient local autonomy for the various communities as well as for the heterogeneous social systems to adjust themselves before further unity is achieved.

When the second World War broke out the Arab nationalists, though they were in agreement as to their national aspirations (namely, unity and independence), were divided into two schools of thought with regard to their attitude to the two belligerent camps. The first school comprised the ultra-nationalists and was, by the very nature of its extreme nationalism, opposed to supporting the two dominating Powers in the Arab world, namely, France and Great Britain, since they were disillusioned by the way these Powers were handling the Palestine and Syrian problems. Italy and Germany, on the other hand, did not fail to exploit the grievances of the Arabs against France and Great Britain and gave them lavish and alluring promises in order to win them to their side.<sup>18</sup> This school of thought, counting on an ultimate Axis victory, naturally saw the salvation of the Arabs in taking sides with the Axis Powers. The other school of thought comprised the moderate nationalists and the liberal elements who were opposed to Axis ideologies and foresaw grave dangers to the Arabs from Axis penetration to the Middle East.

Developments in the international situation, especially after the fall of France in June, 1940, were bound to have intense repercussions upon the internal affairs of the Arab world. The sweeping Axis victories in 1940 had immensely impressed the Arab masses, and when the Germans advanced so rapidly in the Spring of 1941 to the Balkans, while the *Afrika Corps*, under the able command of General Erwin Rommel, was able to harass Great Britain in Egypt, the moderate nationalists were put into the background and the pro-Axis elements became either very influential or took actual control.

Under the circumstances Great Britain wisely decided, with a foresight worthy of her traditional prestige in diplomacy, to follow a more forward policy towards the Arabs by promising them "a greater degree of unity

<sup>16</sup> Amir Chekib Arslan, *Arab Unity*, Damascus, 1937, pp. 10, 12, 16-17 (in Arabic).

<sup>17</sup> Elizabeth P. MacCullum, *The Nationalist Crusade in Syria*, New York, 1928, pp. 35 and ff.; also M. Jamil Baihum, *The Two Mandates of Iraq and Syria*, Sidon, 1931, pp. 96-98 (in Arabic).

<sup>18</sup> On the work of German agents in the Near East see C. L. Sulzberger, "German Preparations in the Middle East," in *Foreign Affairs*, Vol. 20 (July, 1942), pp. 663-678; and Albert Viton, "Hitler Goes to the Arabs," in *Asia*, Vol. 39 (July, 1939), pp. 419-422.

than they now enjoy." With regard to Palestine and Syria, the latter was promised independence, but no new policy was announced for the former except that Great Britain declared that she still regarded herself bound by the White Paper of 1939. Hence the movement towards Arab unity was pushed a step further and the moderate nationalists came again to the fore in international Arab politics. Great Britain's new promises were given by Mr. Anthony Eden, Secretary of State for Foreign Affairs, in his Mansion House speech on May 29, 1941, when the Rashid Ali revolt against Great Britain was still raging in Iraq. Mr. Eden's statement is of particular interest to the Arabs and deserves to be quoted in full:

This country has a long tradition of friendship with the Arabs, a friendship that has been proved by deeds, not words alone. We have countless wellwishers among them, as they have many friends here. Some days ago I said in the House of Commons that His Majesty's Government had great sympathy with Syrian aspirations for independence. I should like to repeat that now. But I would go further. The Arab World has made great strides since the settlement reached at the end of the last war, and many Arab thinkers desire for the Arab peoples a greater degree of unity than they now enjoy. In reaching out towards this unity they hope for our support. No such appeal from our friends should go unanswered. It seems to me both natural and right that the cultural and economic ties between the Arab countries and the political ties, too, should be strengthened. His Majesty's Government for their part will give their full support to any scheme that commands general approval.<sup>19</sup>

On June 8, 1941, General Georges Catroux, in the name of General Charles de Gaulle, issued a proclamation to the Syrians and Lebanese declaring that Free France had granted independence both to Syria and the Lebanon.<sup>20</sup> Thus the Arabs were promised unity and independence by both Great Britain and France.

But there was no direct reactions to Mr. Eden's declaration in 1941. Probably the international situation was not so favorable as to warrant any active movement to be undertaken. When, however, the danger of the war receded from the Middle East in 1943, Mr. Eden reiterated his promise, in a statement made on February 24, 1943, in which he reassured the Arabs of Great Britain's support of Arab unity.

## II. PRELIMINARY STEPS

There was a prompt reaction to Mr. Eden's reassurance that Great Britain would support the scheme of Arab unity. The Emir Abdullah, Ruler of Transjordan, declared on March 2 and 17, 1943, that the Arabs should immediately seize the opportunity and call for a general Arab

<sup>19</sup> *The Times*, London, May 30, 1941.

<sup>20</sup> *The Times*, London, June 9, 1941; official text in *Journal officiel de la République Syrienne*, No. 40 bis (October 14, 1941), p. 1.

Conference to decide upon the ways and means of carrying out that scheme.<sup>21</sup> Prime Minister Nuri al Said of Iraq sent a note on "Arab Independence and Unity" to Mr. R. G. Casey, Great Britain's Minister of State in Cairo, in which he laid down certain proposals for Arab unity, including a settlement of the Palestine problem.<sup>22</sup> In a statement to the Egyptian Senate on May 30, 1943, Nahas Pasha, Prime Minister of Egypt, declared that the Egyptian Government had decided to explore the opinions of the various Arab Governments independently and then would invite them to a conference to be held in Egypt in order to reach an agreement on the form of the proposed Arab union.<sup>23</sup>

Shortly afterwards Nahas Pasha sent invitations to Iraq, Syria, the Lebanon, Transjordan, Saudi-Arabia, and Yeman, inviting them to send delegates with a view to stating their official attitudes towards the scheme of Arab unity. General Nuri al-Said of Iraq went to Egypt in person and his conversations with Nahas Pasha lasted from July 31 to August 5, 1943. The conversations, as General Nuri declared later in the Iraq Senate, were in the nature of "an exchange of personal views on the project," and that he "could not disclose anything further on this subject, as the two Prime Ministers had agreed on complete secrecy pending the laying down of a basis for the scheme."<sup>24</sup> General Nuri, as a matter of fact, had long ago given much thought to this scheme which he laid down in his note to Mr. Casey. General Nuri, as a veteran of the Arab revolt in World War I and as a colleague of King Faisal I, has been the most helpful in laying down the provisions of the Arab Pact, and his proposals to Mr. Casey became the working plan for the Arab conference. General Nuri's proposals may be summarized in the following terms:<sup>25</sup>

1. Syria, the Lebanon, Palestine and Transjordan to be reunited to constitute one State.

2. The people of that state to decide its form of government, whether they have a monarchical or republican regime, or whether it be a unitary or federal State.

3. An Arab League to be formed; Iraq and Syria to join at once, the other Arab States to join if and when they desire.

4. The Arab League to have a permanent Council nominated by the member States and presided over by one of the Rulers of the States, to be chosen in a manner acceptable to the States concerned.

5. The Arab Council to be responsible for: (a) defence, (b) foreign affairs, (c) currency, (d) communications, (e) customs, (f) protection of minority rights.

<sup>21</sup> *Al-Ahram*, Cairo, March 3 and 18, 1943. See similar declarations and comments by other Arab leaders in *al-Ahram*, March 1 and 2, 1943.

<sup>22</sup> General Nuri al-Sa'id, *Arab Independence and Unity*, Baghdad, 1943.

<sup>23</sup> *Al-Ahram*, Cairo, May 31, 1943.

<sup>24</sup> *The Iraq Times*, Baghdad, January 8, 1944.

<sup>25</sup> See work cited in note 22, pp. 11-12; the plan has been quoted by Colonel S. F. Newcombe in his article "A Forecast of Arab Unity," in *Journal of the Royal Central Asian Society*, Vol. XXXI (1944), p. 158.



6. The Jews in Palestine to have semi-autonomy, and the right to their own rural and urban district administration including schools, health institutes, and police, subject to general supervision by the Syrian State and under international guarantee.

7. Jerusalem, a city to which members of all religions must have free access for pilgrimage and worship, to have a special commission composed of the three theocratic religions to ensure this result.

8. If required, the Maronites in the Lebanon to have a privileged regime, under international guarantee, such as they possessed under the Ottoman Empire.

Nahas Pasha continued his negotiations with the delegates of the other Arab States in order to learn independently their views on Arab unity. When these soundings were completed, he announced that a Preparatory Committee, composed of delegates of the various Arab States, was to meet in order to prepare the draft pact of the union before the Arab conference should meet.

It is to be noted that Egypt, which at no time previously had been very enthusiastic about Arab unity, definitely took the initiative in this movement.<sup>26</sup> Egyptian nationalism, since the days of Arabi Pasha, had taken an independent line with Egyptian independence as the ultimate goal.<sup>27</sup> During the period between the two World Wars Arab leadership was changing hands between Syria and Iraq, with Faisal I, first as King of Syria and then of Iraq, as its moving spirit. Upon the death of King Faisal, the position of the moderate nationalists was undermined and the ultra-nationalists became extremely anti-democratic. The Egyptian Government, it is true, may have been encouraged by Great Britain to take the leadership of the movement, but the new circumstances of the War must have made the Egyptian politicians realize that economically and culturally it would be of benefit to Egypt to cooperate with the Arab countries, and politically would enhance the prestige of Egypt if she led a bloc of several Arab States in any conference after the war as well as in the new United Nations Organization.<sup>28</sup>

### III. FULL UNION VERSUS FEDERAL UNION


On September 25, 1944, a Preparatory Committee, composed of the delegates of the Arab states, met in Alexandria in order to discuss the various proposals set forth in the "soundings" with a view to working out a scheme of unity acceptable to all the delegates.

At the outset it was realized that full union, with a central executive authority, was impossible at this stage of development of Arab nationalism. Some of the Arab states asserted their internal independence while others were not prepared to renounce their sovereignty in favor of a full union.

<sup>26</sup> There has always been a Pan-Arab group in Egypt advocating cooperation with the Arab countries. See Sami Kayyali, *al-Fikr al-Arabi*, Cairo, 1943, pp. 57-74.

<sup>27</sup> George Young, *Egypt*, London, 1927, and W. E. Hocking, *Spirit of World Politics*, New York, 1932, Chap. V.

<sup>28</sup> *Al-Ahram*, Cairo, June 26, 1944, p. 6.

Only Syria stood for full-fledged Arab unity and was quite prepared to renounce her sovereignty in favor of a central executive authority of the Arab union. Prime Minister Sadullah beg al-Jabiri, the Syrian delegate, stated the attitude of his Government in his speech at the opening session by quoting a statement to that effect made by Shukri beg al-Quwatli, President of the Syrian Republic, that "Syria will never allow to have raised in her sky a flag higher than her own save that of Arab unity."<sup>29</sup> Iraq and Transjordan were not in favor of full unity, but advocated union on a federal basis. The Lebanon, while asserting her independence, pledged coöperation with the other Arab countries. Her attitude, as stated by Prime Minister Riadh al-Sulh in his speech at the opening session, is as follows: "The Lebanon has pledged herself never to be a seat of imperialism, nor a channel for the colonization of her sister Arab countries."<sup>30</sup> Saudi-Arabia and Yeman reluctantly agreed to join a loose association of independent Arab states. Finally, Egypt, which took the role of the mediator, did not advocate any definite plan of unity, but Nahas Pasha, her Prime Minister, declared that his Government was prepared to go along the path of Arab unity as far as the other Arab Governments were jointly prepared to go. Thus the more idealistic proposals were dropped, and in practice only those proposals which were of practical value in the circumstances were finally adopted. The form of the unity acceptable to all had to be in the nature of a loose federation in order to satisfy both local and dynastic interests. 

At the sixth meeting of the Preparatory Committee on October 4, 1944, the problem of Syrian Unity was fully discussed. The Emir Abdullah of Transjordan had already advocated the so-called "Greater Syria" plan in 1943.<sup>31</sup> General Nuri al-Said, it will be recalled, had incorporated that plan in his note to Mr. Casey, in which he proposed to unite Syria, the Lebanon, Palestine, and Transjordan to constitute one state.<sup>32</sup> At this juncture the plan was fully and frankly discussed by the Preparatory Committee. The Syrian and Transjordan delegates unhesitatingly welcomed the proposal. But it was understood that Transjordan welcomed the plan only on condition that her Ruler, the Emir Abdullah, was to be the future king of the new state. Jamil Mardam beg, the Syrian delegate, declared that while Syria supported the project, she preferred to maintain her republican regime. Moreover, Saudi-Arabia was not in favor of Syrian unity with Transjordan, fearing an extension of Emir Abdullah's authority to Damascus. The Lebanon, on the other hand, was not prepared to join such a unity, while Palestine's position was complicated by the Zionist claims. The "Greater Syria" plan, accordingly, was received with mixed feelings by the Prepara-

<sup>29</sup> *Al-Ahram*, Cairo, September 26, 1944, p. 3.

<sup>30</sup> Same.

<sup>31</sup> See text of Amir Abdullah's plan in *Al-Ahali*, Baghdad, April 21, 1943.

<sup>32</sup> See work cited in note 22, pp. 4, 10, 11. See also J. Schacht, "Will there be an Arab Federation?" in *Great Britain and the East*, Vol. LX (September 25, 1943), p. 17.

tory Committee and dismissed as premature under the circumstances.

Finally, the problem of Palestine was carefully examined. Though not an independent Arab country, Palestine was represented by Musa beg al-Alami (chosen by the various Arab parties in Palestine) who stated the case of his country before the Preparatory Committee. Musa beg stressed the gravity of the Arab situation in Palestine due mainly to the continual flow of Jewish immigrants and to the sale of Arab land to Jewish owners. He pointed out, likewise, that the Arabs of Palestine were prepared to accept the proposals of the White Paper of 1939, which Great Britain had declared since 1939 to be binding, as a basis for the settlement of the Palestine problem. To maintain the present state of affairs, however, Musa beg proposed, in the first place, to establish an Arab Bank, in the name of the Arab countries, with a view to buying lands open for sale by the Jews. In the second place he proposed to set up Arab bureaux in London and Washington in order to present the Arab case concerning Palestine to the English and American publics. Musa beg's statement of the Arab situation in Palestine was so impressive that the Preparatory Committee at once approved his proposals.

On October 7, 1944, a Protocol was signed by all the members of the Preparatory Committee except Saudi-Arabia and Yeman.<sup>33</sup> The Protocol provided for the establishment of a *League of Arab States*, composed of the independent Arab States which desired to join the new organisation.<sup>34</sup> The League would be governed by a council called *The Council of the League of Arab States*, whose membership would be based on the sovereign equality of the member states. The purpose of the League would be

to execute agreements reached between member-states, to organise periodical meetings to re-affirm their relations and to coördinate their political programmes, with a view to effecting coöperation between them, so as to safeguard their independence and sovereignty against any aggression; and to concern itself with the general interests of the Arab countries.

Members of the League must not pursue foreign policies harmful to the policy of the League or to any one of its members. The independence of the Lebanon within its present frontiers was also confirmed. Regarding Palestine, the Protocol states:

The Committee considers Palestine one of the most important elements of the Arab countries and that the rights of the Arabs could not be harmed without danger to the peace and stability of the Arab World. Furthermore, the Committee considers that the engagements entered into by Great Britain involving the cessation of Jewish immigration, the safeguarding of lands belonging to the Arabs, and the

<sup>33</sup> The Saudi-Arabian and Yeman delegates declared that they had to submit the Protocol to their Governments for approval before signature. Later on the Protocol was signed by them. The Palestine delegate likewise did not sign and his name was not mentioned in the Protocol, since Palestine was not an independent Arab state.

<sup>34</sup> See text of the Protocol in *al-Ahram*, Cairo, October 8, 1944, p. 3.

progress of Palestine towards independence constitute rights acquired by the Arabs and that their execution will be a step towards the desired goal and the return of peace and stability.

While recognizing the horrors of persecution undergone by Jews in Europe, the Preparatory Committee declared that "nothing would be more arbitrary or unfair than settling this problem by another injustice the victims of which would be the Arabs in Palestine to whatever religious faith they belong."

A special committee was appointed to prepare the draft Pact of the League, based on the Alexandria Protocol, and by March, 1944, the draft was ready for approval by the Preparatory Committee. On March 22, 1944, the members of the Preparatory Committee met as an Arab Conference and signed the Arab Pact. This instrument may be regarded as the constitution of the League and a basis for any further development in the structure of this new organization.

#### IV. STRUCTURE OF THE ARAB LEAGUE

The Arab Pact provides for the establishment of an Arab League whose members are those Arab States who have signed or will sign that pact.<sup>35</sup> The League is made up of a *Council*, composed of the representatives of its members, with one vote for every member-state regardless of the number of representatives; a *General Secretariat* for organizing the work of the League; and a number of committees dealing with social or economic matters connected with the Arab League.

Membership in the League is open only to independent Arab states. The original members who signed the Pact were Egypt, Transjordan, Syria, the Lebanon, Iraq, Saudi-Arabia, and Yeman. Other Arab countries may join the League by adhering to its Pact, provided they have attained their independence.<sup>36</sup>

It is to be noted, however, that some of the original members are either only *de facto* independent states or, in the case of Transjordan, not independent at all, since it is legally still under the Mandates System. The independence of Syria and the Lebanon has, it is true, been recognised by a number of the United Nations, including France, the Mandatory Power but only on the understanding that the juridical situation of the Mandate should be eventu-

<sup>35</sup> Text in this JOURNAL, Vol. 39 (1945), Supplement, p. 266. The term "league" is not an accurate translation of the word "*jami'a*" which is particularly chosen for the Arab group of States.

<sup>36</sup> Some of the Arabic speaking countries, especially the North African protectorates, sought to join the Arab League but, owing to their special dependent status, it was thought desirable to confine membership at present to the independent Arab countries. Whether the North African countries could, in the future, be brought within the orbit of the Arab League depends upon national and international factors too complicated to be foreseen. See Philip K. Hitti, "The Possibility of Union among the Arab States," in *The Annual Report of the American Historical Association*, Vol. III (1942), p. 156; also J. Schacht, "Will There be an Arab Federation?" in *Great Britain and the East*, Vol. LX (Sept. 25, 1943), p. 15.

ally changed by the consent of the Council of the League of Nations.<sup>37</sup> For various reasons France has failed to give effect to her pledge and consequently her relations with Syria and the Lebanon are far from satisfactory.<sup>38</sup> The juridical situation of Syria and the Lebanon *vis-à-vis* the League of Nations should be clarified. Syria and the Lebanon signed the United Nations Declaration of January 1, 1942, and the United Nations Charter of June 26, 1945, and are represented in the new World Organisation. They can not be placed under the system of Trusteeship, which will replace the old Mandates System, because Article 78 of the United Nations charter stipulates that "the Trusteeship system shall not apply to territories which have become members of the United Nations."

The cases of Palestine and Transjordan may be treated differently. Legally both Palestine and Transjordan stand as one territory under the Mandates System and Great Britain, the Mandatory Power, is responsible for their administration to the League of Nations (or to the United Nations Organisation in accordance with Article 77 of the United Nations Charter). Both of them, therefore, lack full independence, one of the conditions of membership in the Arab League. Palestine was not a signatory to the Arab Pact and is not a member of the Arab League. Its representative attended the Alexandria conference only as an observer, but declared that "Palestine is a trust in the hands of the Arab countries."

Transjordan's membership raises an interesting legal nicety. Legally it is still under the Mandates System; unless its juridical status is changed, the new system of Trusteeship should apply to it according to Article 77 of the United Nations Charter. Thus Transjordan, while an original member of the Arab League and regarded as an independent state under that Pact, would be only a trust territory under the United Nations charter. The representative of Transjordan, however, declared at the Alexandria Conference that Great Britain had already promised the Emir Abdullah, Ruler of Transjordan, that she would grant him independence in the post-war period.<sup>39</sup> Furthermore, since the Arab countries have never recognized the

<sup>37</sup> In a letter to the League of Nations dated November 28, 1941, General Charles de Gaulle said: "The independence and sovereignty of Syria and the Lebanon will . . . not affect the juridical situation as it is established by the mandate." He added that "this juridical situation could not be changed without consent of the League Council, agreement of the United States—party to the Franco-American treaty of April 4, 1924—and conclusion of a treaty by France with the Syrian and Lebanese Governments." See Philip W. Ireland (ed.), *The Near East: Problems and Prospects*, Chicago, 1942, p. 235.

<sup>38</sup> See Majid Khadduri, "The Franco-Lebanese Dispute and the Crisis of November, 1943," in this JOURNAL, Vol. 38 (1944), pp. 601-620.

<sup>39</sup> Mr. Bevin, British Secretary of State for Foreign Affairs, declared, in his speech at the Assembly of the United Nations on January 17, 1946, that "regarding the future of Transjordan, it is the intention of His Majesty's Government in the United Kingdom to take steps in the near future for establishing this territory as a sovereign independent state and for recognizing its status as such": *The Times*, London, January 18, 1946. Great Britain formally recognized the independence of Transjordan in 1946.

Mandates System, it was decided, accordingly, to regard Transjordan as an independent country.

The purpose of the Arab League, as stated in its Pact, is to promote the common interests of the Member-States, to realize closer collaboration among them and to safeguard their independence and sovereignty. Since the Arab countries which have not yet won their independence were not eligible for membership, the Arab League extended its scope of interest "to consider in a general way the affairs and interests of the Arab countries."<sup>40</sup> As stated in the Pact, cooperation among Member-States will be specifically promoted in the following matters:

- (1) Economic and financial matters, including trade, customs, currency, and industry.
- (2) Communications, including railways, roads, aviation, navigation, and posts and telegraphs.
- (3) Cultural matters.
- (4) Matters connected with nationality, passports, visas, execution of judgment, and extradition.
- (5) Matters of social welfare.
- (6) Matters of health.

The use of force for the settlement of disputes between members is prohibited. "Should there arise among them a dispute that does not involve the independence of a State, its sovereignty or its territorial integrity, and should the two contending parties apply to the Council for the settlement of this dispute, the decision of the Council shall then be effective and obligatory."<sup>41</sup> The Council of the League will mediate in a dispute which may lead to war between two member-states or between a member-state and another state in order to conciliate them. Decisions relating to arbitrations and mediation are to be taken by majority vote only.

In the case of aggression or the threat of aggression, the member-state may request an immediate meeting of the League Council. The Council will decide, by a unanimous vote, upon the measures to be taken against the aggressor. If the aggressor were a state member of the Arab League, "The vote of that state will not be counted in determining unanimity."<sup>42</sup> The nature of sanctions, whether military or economic, to be applied against the aggressor is not defined. As in the League of Nations, the Council is to consider what measures would be most effective in the circumstances. This is in contrast to the Act of Chapultepec which established a permanent military council and other mechanisms for the purpose.<sup>43</sup> The only specific

<sup>40</sup> Article 2.

<sup>41</sup> Article 5.

<sup>42</sup> Article 6.

<sup>43</sup> For a critical study of sanctions see Pitman B. Potter, *Collective Security and Peaceful Change* (Chicago, 1937), pp. 6-19, and T. P. Conwell-Evans, *League Council in Action* (London, 1929).

sanction mentioned in the Arab Pact to be applied automatically is dismissal. Article 18 states:—

The Council of the League may consider any State that is not fulfilling the obligations resulting from this Pact as excluded from the League, by a decision taken by a unanimous vote of all the States except the State referred to.

Withdrawal from the League is voluntary—it takes effect after a year from notification sent to the Council of the League. But if a member-state does not approve an amendment to the Pact carried by two-thirds of the members, that state may withdraw when the amendment becomes effective.

#### V. NATURE OF THE ARAB LEAGUE

The Arab League is a legal entity composed of many legal personalities. It is not, however, a federal union, since the latter is a perpetual union of several states with a central government invested with power not only over the member-states, but also over their citizens, and to which, from the international point of view, the conduct of all foreign relations is confided.<sup>44</sup> The constituent states forming such a union have no right to separate themselves from it and their citizens have a common nationality.<sup>45</sup> The constituent states have no legal competence to conduct foreign relations, since the federal state alone, if recognised, is to be regarded as the international personality possessing all the rights and duties of a sovereign member of the Family of Nations.<sup>46</sup> The Arab League, needless to say, possesses no such attributes either in law or in fact; the independence and sovereignty of each member-state, as expressly stated in the Arab Pact, are safeguarded and any member-state can withdraw from the League whenever it deems it necessary to do so.

Nor has the Arab League, on the other hand, the nature of an international legal personality such as the League of Nations or the United Nations Organization, because the jurisdiction of the Arab League is limited within the confines of a certain geographical area and distinguished by a special type of national character. Article I of the Arab Pact stipulates that "The

<sup>44</sup> L. Oppenheim, *International Law*, ed. H. L. Lauterpacht, London, 1937, Vol. I, p. 160; W. E. Hall, *A Treatise on International Law*, ed. A. P. Higgins, Oxford 1924, pp. 24–25.

<sup>45</sup> Internally, a federal state is said to be a real state side by side with its constituent states, because its organs have a direct power over the citizens of those member-states. "The citizen of each constituent state," says MacIver, "within the federation owes a double but not a conflicting political allegiance": R. M. MacIver, *The Modern State*, Oxford, 1926, p. 353. This is a characteristic distinction established by early American jurists between a federal and a confederal union. See *The Federalist* (Hamilton) No. 15. See also Oppenheim, work cited, Vol. I, p. 160.

<sup>46</sup> See *United States v. Curtiss-Wright Export Corporation*, 57 Supreme Court Reporter, 216–227. See also Oppenheim, work cited, Vol. I, p. 160; W. E. Hall, work cited, p. 25; Quincy Wright, *Control of American Foreign Relations*, New York, 1922 pp. 21, 28–29.

League of Arab States shall be composed of the independent Arab States." Thus the Arab League is not a truly international organisation since it asserts a special national character and is confined to certain Middle Eastern States; at the same time it is not a comprehensive "regional" league, because its membership is not open to all states of one regional area, namely, the Near Eastern States, but only to the Arab States.

The Arab League may be said to possess the legal nature of confederated States (*Staatenbund*) or Confederation. Such a union is composed of independent states, linked together for the maintenance of their external and internal independence by international treaty. The member states agree to forego part of their liberty of action in favor of an organ of the union whose power would extend only over the member-states, but not over the citizens of these states. (In contrast to a federation, the confederated states do not constitute one international personality, since the member-states remain full sovereign states and separate international persons.<sup>47</sup>)

The Arab League may be compared, to all intents and purposes, with the Germanic confederation which was formed by the Vienna Powers in 1815. Like the German Diet, where the member-states were represented by diplomatic envoys, the Council of the Arab League is vested with an international power which does not affect the full sovereignty of the member-states. Unlike the German Diet, however, the Arab countries which are still in a dependent status are not themselves, nor are their metropolitan governments, represented in the Arab League. Finally, the Arab countries aspire, as was the fate of the Germanic confederation, to achieve further unity by turning the League into a sort of Arab federation. History supports such an aspiration. For it has been observed that such unions tend to transfer much of the legal sovereignty to the central organs. Such a development, when supported by common material and cultural interests, is more likely to become a reality.

#### VI. THE ARAB LEAGUE AND THE UNITED NATIONS ORGANIZATION

It remained for the Arab countries to secure world recognition of the Arab League either as a separate legal entity or as part of the new World Organization. The Dumbarton Oaks Proposals provided for the establishment of regional agencies within the framework of the new United Nations Organization for the settlement of regional disputes. When the Arab Pact, accordingly, was signed a few months later, means were provided for integrating the work of the Arab League with the new world organization. Article 3 of the Arab Pact laid down that the Arab League

Shall also have the function of determining the means whereby the League will collaborate with the international organizations which may be created in the future to guarantee peace and security and organize economic and social relations.

<sup>47</sup> Oppenheim, Vol. I, p. 159; and W. E. Hall, p. 27.



In February, 1945, President Roosevelt and Prime Minister Churchill held several meetings at Suez, on their way back from Yalta, where they met King Farouk of Egypt, King Abdul Aziz ibn-Saud of Arabia, and President Quwatli of Syria. It was reported that friendly exchanges of views on Arab problems were the main purpose of that conference and shortly afterwards (on February 26) Egypt and Syria declared war on the Axis Powers and the Lebanon followed on February 27, 1945. Saudi-Arabia declared war on March 1, 1945. Iraq had already been at war with the Axis Powers since January 17, 1943. Of the independent Arab countries only Yeman remained neutral while Transjordan, still under the Mandates System, had been at war with Germany since 1939.

When, however, invitations to the San Francisco Conference were issued on March 5, 1945, by the United States, on behalf of the sponsoring Powers, Syria, the Lebanon, Yeman and Transjordan were not invited to that conference. Yeman and Transjordan, it is true, had no right to expect such invitations, since the latter was not an independent country while the former had not complied with the Yalta decision, namely, to declare war and join the United Nations. Syria and the Lebanon protested formally against their exclusion and later on, after consultation with France, they were both invited. Thus five out of the seven signatories of the Arab Pact attended the San Francisco Conference and formed an Arab bloc within the conference. The heads of the Arab delegations held a series of private conferences in order to decide upon the attitude to be taken during the Conference on all important issues.

It may be said that three main issues were raised during the Conference which touched, directly or indirectly, the Arab countries. In the first place, there was the issue of Trusteeship. The Conference had undertaken to lay down only the general principles and sketch the machinery of the system, but since Palestine was to be effected the Arab delegates took a keen interest in the discussions and tried to amend the draft plan prepared by Commander Harold Stassen, the United States delegate in the Trusteeship Committee, in such a way as to limit the Zionist claims in Palestine. Commander Stassen's plan was in fact amended, but only to the extent that the present status of Arab-Jewish relations was to be maintained, pending an individual agreement concerning that territory. The head of the Iraq delegation was not satisfied with the results and, consequently, did not sign the Charter. Syria and the Lebanon, however, were successful in having their independence safeguarded by the provision that trusteeship could not be applied to any member of the United Nations.

The Franco-Syrian dispute which arose during the conference was also discussed, but mainly outside the sessions of the conference. The Arab delegates had time to discuss the Syrian problem with American, British, and French delegates and were successful in defending their case as well as in making their point of view clear to the American press.

Finally, there was the issue of regional arrangements which directly affected the status of the Arab League. In the Dumbarton Oaks Proposals it was suggested that

Nothing in the Charter should preclude the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action, provided such arrangements or agencies and their activities are consistent with the purposes and principles of the organization.

But it is added that though the Security Council should, when appropriate, utilize regional agencies in enforcing its decisions, "no enforcement action should be taken under regional arrangements or by regional agencies without the authorization of the Security Council."

The heads of the Arab delegations supported the scheme of regional agencies in their speeches at the Conference; and in the committee on Regional Arrangements they asked for recognition of the Arab League or a reference to it to be made in the Charter. The text of the Arab Pact was submitted to the Secretariat of the Conference and it was circulated, with other documents, among the delegations of the Conference. Moreover, together with other of the smaller states, they advocated increasing the membership of the Security Council, seeking to have a seat for a member of the Arab League in that Council.

On the question of the limitation of regional actions the Arab delegates joined hands with the Latin-American delegates. It was argued that under the Dumbarton Oaks Proposals the regional agencies would be unable to act, in fulfilment of their mutual aid pledges, until they had been authorized by the Security Council and that such permission might not be given at all because of the right of veto of any one of the Big Five. In the case of the Inter-American System it virtually meant that a foreign power could interfere, in defiance of the Monroe Doctrine, in decisions affecting the Western Hemisphere. So the Latin-American delegates demanded, to the delight and satisfaction of the Arab delegates, that their security system should be kept beyond supervision of the Security Council. Since Russia had already demanded that her mutual aid pacts with Great Britain, France, Czechoslovakia, Yugoslavia, and Poland should be permitted to operate without prior authorization of the Security Council, the Latin-American delegates asked in like manner that their system should not be subject to prior approval or veto. Mr. Stettinius, after a discussion of the problem by the American delegation, offered a formula which appeased the Latin-American delegates without sacrificing the principle of World Control. He said:

I want this to be crystal clear; that precious as our inter-American system is to us in the United States, and much as it has meant to us from a traditional point of view, the paramount consideration in our

minds is to do nothing that will interfere with the success and prestige of the world organization. We'll try to find a solution that will not destroy the Pan-American system or circumscribe it unduly until the world organization has proved itself effective.

The problem was referred to a sub-committee composed of the Big Five and Australia, Chile, Colombia, Czechoslovakia, Egypt, Mexico, and Norway. The American delegation proposed a plan which was meant to satisfy the objection of the Latin-American delegates to the right of the veto power to check action against the aggressor. The plan was to amend the Dumbarton Oaks Proposals so as to give countries with a tradition of collective action, "as is contained in the principles and objectives of the Act of Chapultepec," the right to defend themselves in case the security Council failed to maintain peace. This proposal satisfied the Arab delegates who, in like manner, asked for a specific reference to the Arab League as their regional agency. The British delegation objected to specific references to any regional agency,<sup>48</sup> and the compromise plan was to cut out references to the Act of Chapultepec—which naturally meant that, likewise, no reference was made to the Arab League—and the final draft, as it appeared in the San Francisco Charter, emphasized the primary authority of the Security Council. The text, it is to be noted, remained almost as it was in sections A and C of Chapter VIII of the Dumbarton Oaks Proposals but added a new paragraph at the end of section B, which became Article 51 of the Charter, as follows:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a member of the United Nations until the Security Council has taken the measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

On May 27, 1945, Secretary of State Stettinius said, after consulting President Truman, that the United States shared the desire of the Latin-American Republics for the maintenance of the inter-American system intact and that this system had been brought, through the Charter, within the larger framework of the world organization. He added: "The United States intends to negotiate in the near future a treaty with its American neighbors which will put the Act of Chapultepec on a permanent basis, in

<sup>48</sup> It is reported that the British delegation "pointed out that if [a] specific reference were made to the Act of Chapultepec, the Arab League would want a specific reference to its regional arrangement, with the possible consequence that the Palestine issue would be stirred up and the Security Council's authority menaced": Clifford Hulme, *San Francisco Conference*, London, 1945, p. 36.

harmony with the World Charter." It is reported that such a treaty will be negotiated in the Brazilian capital in order to bring the inter-American system, as a regional system, in conformity with the San Francisco Charter.<sup>49</sup>

No such step has been taken yet by the Arab League with a view to integrating the Arab Pact with the United Nations Charter, but it is hoped throughout the Arab World that the United Nations Organization will eventually recognize the Arab League as a regional agency which will be a factor for the maintenance of peace and security in the Near East.

The project of "regional arrangements" within the framework of the United Nations Organization has been criticised on the grounds that it may breed isolationism, encourage regional hegemony, and weaken world-wide international organization.<sup>50</sup> The Arab League, accordingly, might not, it is said, be able to maintain peace in the Near East, but, on the contrary, might be a cause of friction between rival powers. This raises the whole question of world security, especially if regional arrangements are permitted and fostered in one part of the world, such as the Western Hemisphere, while they are being denied to other parts.

There are two main approaches to world security: The regional approach and the world approach. The latter approach was tried out by the League of Nations and was found wanting in practicability under the circumstances. The former approach, it is held, starts from existing realities and develops accordingly. For we are indeed so often the prisoners of our old traditions and existing problems that it seems impossible to build up an entirely new world out of the old one. In building up a world structure, therefore, we should, in the words of Dr. Evatt, Minister of External Affairs of Australia, tackle it in sections.<sup>51</sup> This does not necessarily mean the building up of all sections simultaneously, but ensuring that each must conform to the larger world plan. Hence the idea of "regional" agencies arose from purely practical considerations, especially owing to geographical, economic, and cultural variations. Such regional arrangements help to provide regional defence systems, to maintain peace and security within limited areas of the world and to settle disputes of regional concern by peaceful means.<sup>52</sup>

Finally, it is held that the Arab League, as a Middle Eastern regional arrangement, has left outside its structure important countries like Turkey

<sup>49</sup> See Ezequiel Padilla, "The American System and the World Organization," in *Foreign Affairs*, Vol. 24 (1945), pp. 99-107.

<sup>50</sup> Quincy Wright, *A Study of War*, Chicago, 1942, Vol. I, p. 328; Vol. II, pp. 776-780, 1343; and Arthur P. Whitaker, "The Role of Latin America in Relation to Current International Organization," in *American Political Science Review*, Vol. XXXIX (1945), p. 501.

<sup>51</sup> H. V. Evatt, *Foreign Policy of Australia*, Sydney, 1945, pp. xii, 142, 213, 227.

<sup>52</sup> Pitman B. Potter, *An Introduction to the Study of International Organization*, New York, 4th ed., 1935, pp. 381-383; Sumner Welles, "The Vision of a World at Peace," in *The Virginia Quarterly Review*, Vol. 21 (1945), pp. 486, 487; H. V. Evatt, work cited, p. 227; L. C. Key, "Australia in Commonwealth and World affairs," in *International Affairs*, Vol. XXI, (1945), p. 71.

and Persia. The security of these two countries is important in the maintenance of peace throughout the Middle East. During the recent visit of Emir Abdull Ilah, Regent of Iraq, to Turkey, friendly conversations were opened in order to bring about the coöperation of that country with the Arab world. It is reported in the Turkish press that efforts were even made to persuade Turkey to adhere to the Arab Pact.<sup>53</sup> General Nuri al-Said, a former Iraq Prime Minister, who accompanied the Regent of Iraq to Turkey, declared that Iraq's efforts were rather to strengthen the Sadabad Pact, between Turkey, Iraq, Persia, and Afghanistan, which was still in force, in order to bring about coöperation among these countries and to devise practical means for the settlement of differences that might arise among them.<sup>54</sup>

## VII. CONCLUSION

We are now in a position to examine more closely the League's foundations and to what extent it satisfies existing conditions in the Arab World.

In reviewing the various forces and factors that led to the establishment of the Arab League, it may be said that several divergent, if not conflicting, national aims have determined its formation. It has been observed that such schemes have tended to reflect either an aspiration for abstract justice or ideology, a desire to realize national interests under the cloak of international reform, or a pattern in the historical development of the Family of Nations.<sup>55</sup> The Arab League is no exception to this principle.

For the idealists, or the Pan-Arab group, the League is only a step, a starting point, towards more complete union which ought eventually to lead to a real unity. The Arab Pact indeed has satisfied the idealism of that group by providing means for "closer collaboration" among member-states by concluding "among themselves whatever agreements they wish for this purpose."<sup>56</sup> Owing both to international and dynastic rivalries, the Arab League is a partial realization of the hopes of idealists, but they admit that it is capable of further development under more favorable circumstances.

From the practical point of view, however, the Arab League has been designed to realize certain national interests. There is at the moment a number of urgent and complicated problems facing the Arab countries as a whole. First and foremost there is the Palestine issue. It has been realized by Great Britain, it seems, that the Palestine imbroglio would remain a disturbing factor of peace in the Middle East for an indefinite period unless the Arab countries collectively should intervene to enforce a working solution and bear its consequences. This would relieve Great Britain from adopting a policy on her own sole responsibility. From the Arab point of view, the

<sup>53</sup> See *The Times*, London, September 21, 1945; and *al Khabar*, Cairo, Dec. 3, 1945.

<sup>54</sup> Same.

<sup>55</sup> See Pitman B. Potter, work cited, p. 325.

<sup>56</sup> Article 9.

League would offer a more solid bloc of opposition to Zionist claims in Palestine.

There is also the problem of western imperialism in the Arab world. For the Arabs any western influence in their lands has been construed as an encroachment on their national sovereignty. Union, it is held, is strength, and, therefore, is the panacea for all political ills. The Arab League, union in the embryonic stage though it is, may be a partial fulfilment of that ideal.

From the diplomatic point of view Great Britain is considered a pro-Arab Power; she is therefore bound to take into consideration the national aspirations of the Arabs. The scheme of Arab unity would not come into conflict with Great Britain's main interests in the Middle East; rather its support for that project would make her more popular in the Arab world, to the disadvantage of other rival Powers. For Great Britain, France is certainly a rival Power; the elimination of that Power by an Arab League would give Great Britain a free hand in the Arab world. Moreover, Great Britain could mobilise the whole bloc of Arab countries against the intervention of another Great Power, such as the Soviet Union, in the Arab world. It may be asked, however, how far Great Britain could maintain its influence in the Arab world. For an Arab union could, under changing circumstances, stand even in the face of Great Britain as the sole western imperialistic power in the Arab world. That will ultimately depend not only on the success or failure of British diplomacy in the Middle East, but also on the policy of the Soviet Union towards the Arab world.

Finally, the Arab League may be looked upon as a historical pattern in the development of international organization in the Middle East. Upon the rise of Islam in the seventh century of the Christian era, the Greco-Persian rivalry came to an end and the whole Middle East came under the sovereignty of one Great Power, the Arab empire. At the outset the Arabs tried to rule as the dominant race but failed;<sup>57</sup> the various elements of non-Arab races and cultures revolted and the Umayyad caliphs of Damascus gave way to the Abbasside caliphs of Baghdad to rule as Moslems, rather than as Arabs, and the empire became to all intents and purposes a Moslem empire, that is, a "universal" state, not a national state.<sup>58</sup> The unity of this Moslem empire, at least from the juridical point of view, was maintained (with local autonomy to strong governors in the provinces) until the rise of the Ottoman Turks.<sup>59</sup> When the latter established a separate sovereignty, the Moslem empire was divided between Ottomans and Persians, with the Arab world falling under Ottoman sovereignty. From the opening of the sixteenth century to the end of the nineteenth, the whole Arab world, with only small

<sup>57</sup> See Julius Wellhausen, *The Arab Kingdom and its Fall*, trans. by M. G. Weir, Calcutta, 1927.

<sup>58</sup> See Arnold J. Toynbee, *A Study of History*, London, 1934, Vol. I, p. 67.

<sup>59</sup> Majid Khadduri, *The Law of War and Peace in Islam*, London, 1941, pp. 42-43.

portions at its periphery falling under foreign sovereignties, was ruled by the Ottoman Sultans. The rise of nationalities, however, disrupted the Ottoman unity, and the Arabs, too, demanded separation. Until World War I there were only two main Moslem sovereignties in the Middle East. With the rise of the Arabs there could have been added a third sovereignty covering the whole Arab world from the Taurus to the Indian Ocean. With this ideal in mind, it will be recalled, the Arabs sided with the Allies and revolted against their Turkish masters in 1916. The peace settlement following World War I, while it maintained the integrity of Turkey (leaving outside its territory only the non-Turkish elements), divided the Arab world into various sovereignties, with ample foreign influence in most of them. Hence the Pan-Arab movement began, aiming at reuniting these divided Arab countries into one union. The Arab League, in this respect, is only a beginning. It may lead to a more intimate union, with federation as the most logical outcome. With Arab unity achieved, there will be three main Moslem powers in the Middle East, namely, Turkey, Persia, and United Arabia. These three Powers could then form a real Middle Eastern "regional arrangement," with smaller states or countries to join, such as Afghanistan and the North African dependencies.

## EDITORIAL COMMENT

### THE UNITED STATES ACCEPTS THE OPTIONAL CLAUSE

On August 26, 1946, a declaration by President Truman recognizing, on behalf of the United States, the compulsory jurisdiction of the International Court of Justice, was handed to the Secretary-General of the United Nations by Mr. Herschel V. Johnson, Acting United States Representative to the United Nations. The declaration of the President stated that, in accordance with the resolution of August 2, 1946, of the Senate of the United States of America (two-thirds of the Senators present concurring therein), the United States of America recognized as compulsory *ipso facto* and without special agreement, in relation to any other State accepting the same obligation, the jurisdiction of the International Court of Justice in all legal disputes thereafter arising concerning

A. The interpretation of a treaty; B. Any question of international law; C. Existence of any facts which, if established, would constitute a breach of international obligation; D. The nature or extent of the reparation to be made for the breach of an international obligation;

subject, however, to certain provisos. They were these. The declaration was not to apply to:

A. Disputes the solution of which the parties shall entrust to other tribunals by virtue of agreements already in existence or which may be concluded in the future; or

B. Disputes with regard to matters which are essentially within the domestic jurisdiction of the United States of America as determined by the United States of America; or

C. Disputes arising under a multilateral treaty, unless (1) All parties to the treaty affected by the decision are also parties to the case before the Court, or (2) The United States of America specifically agrees to jurisdiction; and

Provided further, that this declaration shall remain in force for a period of five years and thereafter until the expiration of six months after notice may be given to terminate this declaration.<sup>1</sup>

Proviso A acknowledges the freedom of the United States, in harmony with existing or future agreements, to have recourse to other types of "tribunals" for the adjustment of international differences when such action seems feasible and preferable to adjudication before the International Court. This is consistent with the thought expressed in Chapter VI, Article 33, of the Charter of the United Nations which states that

The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first

<sup>1</sup> See United Nations, Press Releases IC/1 and IC/2 of August 26, 1946.



of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.

The flexibility of action retained by virtue of Proviso A suggests that the United States may in fact oftentimes deem it preferable to invoke the aid of *ad hoc* tribunals for the adjustment of minor issues concerning, for example, matters growing out of claims for pecuniary indemnities concerning which controversy has arisen, and yet where questions concerning the existence of international liability, and the appraisal of damages, ought to be easily susceptible to adjustment in short order and without great expense by a relatively small body of jurists empowered to adjudicate thereon.

Proviso B with regard to matters which are "essentially within the domestic jurisdiction of the United States" as determined by itself, presents a more intriguing problem. It will be recalled that Article 2, paragraph 7 of the Charter of the United Nations announces that nothing therein shall authorize the United Nations "to intervene in matters which are essentially within the domestic jurisdiction of any State or shall require the Members to submit such matters to settlement under the present Charter"; but it is added that "this principle shall not prejudice the application of enforcement measures under Chapter VII." Chapter VII (Articles 39-51) relates to "Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression."

In the course of the development of international law, there has grown up a practice which yields to the individual State, if it be an independent one, freedom to deal as it sees fit with very many matters pertaining peculiarly to itself; and they are roughly described as lying within the "domestic jurisdiction" of such State.<sup>2</sup> Fear lest a country, such as our own, be sub-

<sup>2</sup> The writer had observed elsewhere:

There is a broad zone within which the activities of the individual State, even in respect to certain matters affecting the interests of others, have in practice been left so completely to the local control as to inspire the statement that they are not, in principle, regulated by international law. There is suggested a distinction between matters which by virtue of the law of nations a State enjoys a broad right to control, and those respecting which it enjoys unmolested freedom because they fall within a domain where international law is not deemed to be applicable. Such a distinction may be useful in portraying or identifying special activities or situations wherein a State has long been permitted to be the sole judge of the propriety of its conduct, and where the absence of outside interference has revealed the remoteness of any general international interest. It fails, however, to offer a satisfactory explanation of the latitude accorded or enjoyed. If a State is unhampered in its activities that affect the interests of any other, it is due to the circumstance that the practice of nations has not established that the welfare of the international society is adversely affected thereby. Hence that society has not been incited or aroused to endeavor to impose restraints; and by its law none are imposed. The Covenant of the League of Nations takes exact cognizance of the situation in its reference to disputes "which arise out of a matter which by international law is solely within the domestic jurisdiction" of a party thereto. It is that law which as a product of the acquiescence of States permits the particular activity of the individual State to be deemed a domestic one. (*International Law Chiefly as Interpreted and Applied by the United States*, 1945 (2 ed.), Vol. I, p. 7.)

jected to the obligation to adjudicate in an international forum a question arising out of a contention that is seemingly defiant of its exercise of a privilege acknowledged by the law of nations to be its own has been responsible for the incorporation in numerous treaties of a reservation designed to cover the point. Thus, for example, in Art. III of the arbitration treaty between the United States and France of February 6, 1928, it was declared that the provisions thereof should not be invoked in respect to any dispute the subject matter of which "is within the domestic jurisdiction of either of the high contracting parties."<sup>3</sup> This is doubtless an effective mode by which a State may free itself from the obligation to defend its conduct in an arbitral forum when that conduct is in its judgment a mere manifestation of acts which, as tested by the standards of international law, a State is generally free to commit without external restraint. Nevertheless, controversy may arise as to whether a particular dispute is within the "domestic jurisdiction" of the State that is haled before an international court. The interpretative problem may baffle adjudication and frustrate it.

As noted above, in Proviso B of the declaration of the United States accepting the optional clause, the United States itself determines whether a dispute falls within the reservation, as an instance of a matter essentially within the domestic jurisdiction of the country. By this process the problem of interpretation is to be settled by itself. It thereby asserts the right unilaterally, and regardless of the differing view of any other party to a dispute, to decide whether the issue is one which it is obliged to submit to the Court of International Justice.

It might be optimistic to assert that the United States would never abuse its privilege and never attempt to evade an obligation to adjudicate before the International Court on colorable grounds. It is to be hoped that it will never declare that an issue which another party thereto seeks to adjudicate before the Court concerns a matter which is essentially within the domestic jurisdiction, unless evidence of the law of nations as revealed in the acquiescence of States generally sustains its decision. It must be remembered, however, that the development of international relations has within the past fifty years produced changing estimates of the effect of the conduct of the individual State upon the life of the international community. In a word, matters which might in 1910 generally have been regarded as essentially

<sup>3</sup> U. S. Treaty, Vol. IV, 4180. "Disputes legal in their nature may arise between two States with regard to matters falling exclusively within the domestic jurisdiction of one of them. No State can agree to the submission to an international tribunal of matters falling exclusively within the range of its national sovereignty. Similarly, there are some political questions even of a justiciable nature as to which a country feels that for the reasons indicated in paragraph 4 the stage has not yet been reached when it can agree unreservedly in advance to submit them to an arbitration tribunal." *Observations of His Majesty's Government in Great Britain on the Programme of Work of the Committee on Arbitration and Security of the Preparatory Commission for the Disarmament Conference*, League of Nations Publications, Disarmament, 1928. IX. 3, p. 51.

within the domestic jurisdiction of a country such as our own, may, in 1948 or 1950, be regarded by the family of nations as having attained a new significance in the international life, and as having such a sinister aspect as to be regarded with real concern by States generally, and as subversive of the maintenance of justice in an international sense. The very theory and structure of the Charter of the United Nations are indicative and prophetic of fresh limitations upon the freedom of the individual State. Still, it is not believed that the American Government would at any time be disposed to press for an interpretation in the application of Proviso B that would be contemptuous of prevailing opinion.<sup>4</sup>

Proviso C is self-explanatory and calls for no comment. It is perhaps to be regretted that the declaration in behalf of the United States is to remain in force, to start with, merely for five years rather than for a longer period before the expiration of six months' notice of desired termination begins to run.

In presenting the President's declaration to the Secretary-General of the United Nations, Mr. Johnson said that the action taken was further testimony of the determination of the United States that the United Nations would fulfill the role assigned to it, which was nothing less than the preservation of world peace.<sup>5</sup> Acceptance by the United States of the optional clause is a real step forward in American diplomacy. It reflects a conviction widespread throughout the country that international controversies within a broad field should, when other methods fail, be adjudicated before a permanent international tribunal; and it attests the general confidence that the Court of International Justice is that tribunal. The existence of that confidence reveals a prodigious change in American thinking since the close of World War I. The fact, rather than the cause of it, is here noted. In plowing the soil that events made fertile for the growth of a sense of the vast desirability to the United States in obligating itself to adjudicate a broad class of differences before the Court of International Justice, there will never be forgotten the sturdy and vigorous labors of one particular plowman—the Honorable Manley O. Hudson.

CHARLES CHENEY HYDE

*President of the Society*

#### THE DRAFT TREATIES OF PEACE

The official release to the public, on July 30, 1946, of the texts<sup>1</sup> of the draft treaties of peace with Bulgaria, Finland, Hungary, Italy and Rumania, was

<sup>4</sup> See discussion in the Senate, August 2, 1946, *Congressional Record*, Vol. 92, pages 10828-10850.

<sup>5</sup> United Nations Press Release IC,2, August 26, 1946.

<sup>1</sup> The texts of the Bulgarian, Finnish, Hungarian, and Rumanian draft treaties are given in *The New York Times*, July 31, 1946 pp. 15-21, under a Washington dateline of July 30, that of the Italian treaty in a cable despatch from Paris in its issue of July 27, 1946, pp. 7-10. [These documents are not reprinted in the JOURNAL under our standing rule against printing agreements until finally concluded.—Ed.]

an event eagerly awaited throughout the world. While played up by the press as "bombshell" news, the stipulations of the texts were not surprising to anyone familiar with the terms of the Armistices.<sup>2</sup> An initial reading confirms the position taken two years ago to the effect that the armistices were in themselves preliminary treaties of peace and that the final terms would only be executory of the terms on which the defeated laid down their arms. Closer scanning of the texts reveals the common pattern of the treaties despite the considerable differences of detail which they contain. All start with a rather elaborate preamble which contains a summary of the political reasons adduced as justification of the treaty; all follow a general design as to territorial,<sup>3</sup> political,<sup>4</sup> naval, military, and air<sup>5</sup> clauses. Ensuing parts deal with the withdrawal of Allied forces,<sup>6</sup> reparation and restitution,<sup>7</sup> and economic matters.<sup>8</sup>

For the three defeated states which border on the Danube, special parts dealing with fluvial navigation<sup>9</sup> are proposed, although the Soviet Government has manifested distinct unwillingness to settle the questions concerning the Danube in a general peace conference, preferring a special and separate regime arrived at in consultation with all the riverain states.

The concluding portion of each treaty covers the "final clauses" regarding validation, interpretation, implementation and transitional arrangements.<sup>10</sup>

<sup>2</sup> Present writer, "Armistices, 1944 Style," in this JOURNAL, Vol. 38 (1944), pp. 286-296 and "Two Armistices and a Surrender," in same, Vol. 40 (1946), pp. 143-158.

<sup>3</sup> Bulgaria, Art. I; Finland, Arts. I-II; Hungary, Art. I; Italy, Part I, Secs. I-VI, Arts. I-XIII; Rumania, Arts. 1-2.

<sup>4</sup> Bulgaria, Part II, Secs. I-II, Arts. II-VI; Finland, Part II, Secs. I-III, Arts. III-XII; Hungary, Part II, Secs. I-II, Arts. II-IX; Italy, Part II, Secs. I-VIII, Arts. XIV-XXXVII; Rumania, Part II, Secs. I-II, Arts. III-X.

<sup>5</sup> Bulgaria, Part III, Secs. I-II, Arts. VII-XVIII; Finland, Part III, Arts. XIII-XXI; Hungary (military only) Part III, Secs. I-II, Arts. X-XIX; Italy, Part IV, Secs. I-VII, Arts. XXXIX-LXII; Rumania, Part III, Arts. XI-XX.

<sup>6</sup> Bulgaria, Part IV, Art. XIX; Finland, no comparable article; Hungary, Part IV, Art. XX; Italy, Part V, Art. LXIII; Rumania, Part IV, Art. XXI.

<sup>7</sup> Bulgaria, Part VI, Arts. XX-XXI; Finland, Part IV, Arts. XXII-XXIII; Hungary, Part V, Arts. XXI-XXII; Italy, Part VI, Secs. 1-2, Arts. LIV-LV, with an added section of great import to Italy, involving Renunciation of Claims, Arts. LVI-LVII; Rumania, Part V, Arts. XXII-XXIII.

<sup>8</sup> Bulgaria, Part VI, Arts. XXII-XXXI; Finland, Part V, Arts. XXIV-XXVI and six annexes; Hungary, Part VI, Arts. XXIII-XXXII and six annexes; Italy, Part VII, Secs. I-III, "Property Rights and Interests"; Part VIII, General Economic Relations; and Part X, Miscellaneous, embracing together Arts. LXVIII-LXXIV and eight annexes; Rumania, Arts. XXIII-XXIV.

<sup>9</sup> Bulgaria, Part VII, Art. XXXII; Hungary, Part VII, Art. XXXIII; Rumania, Part VII, Arts. XXXII-XXXIII.

<sup>10</sup> Bulgaria, Part VIII, Arts. XXXIII-XXXVI and annexes; Finland, Part VI, "Legal Clauses"—a verbalism apparently intended to cushion the effects of the content upon the Finns—Arts. XXXII-XXXIII and 6 annexes; Hungary, Part VIII, Arts. XXXIV-XXXVI and 6 annexes; Italy, Part XI, Arts. LXXV-LXXVIII and 9 annexes.

Save for the Italian treaty, where French is also made an official language, Russian and English are recognized on a parity. This marks a further ascent of the Russian language in the diplomatic scale.

When the treaty texts are compared with each other that with Italy reveals itself as the most complex, whereas the treaty with Finland is the briefest and most general in its provisions. In the light of the antecedent armistices there is, with the exception of the economic clauses noted below, little that is fundamentally new. Obviously the specific definition of new frontiers, such as those between Italy and France on the one hand, and between Italy and Yugoslavia on the other, calls for minute description and special arrangements, those concerning Trieste being the most controversial. The prior status of Italy being higher than that of any of the other countries, her loss of status entails proportionately greater renunciations—*vis-à-vis* France, Greece, Albania, Yugoslavia, Ethiopia, and China, not to mention the colonies,<sup>11</sup> mandated territories, and other matters. The frontier changes in the other treaties make concrete and specific the areas ceded or promised by the respective armistices.

The economic clauses have constituted the principal area in which fundamental conceptions of the economic order have directly clashed. In general the position of the United States, the United Kingdom, and France has been that it is entirely legitimate to regulate by treaty stipulations, as was done in the Paris settlement of 1919-1920, the transfer of title to public and private property, insurance, and similar matters, and the succession to debts and obligations of pre-war contracts of a public, mixed, or private law character. The position of the USSR has been that private law relationships are not appropriate subjects for inclusion in a treaty of peace.<sup>12</sup> This formula would reduce the economic clauses to broad, generic statements of policy. In the presence of so novel a doctrine agreement will not be easily reached, since the interests involved on the non-Soviet side are appreciable and will be tenaciously supported. In the whole body of Soviet treaty-law there has heretofore been no analogous situation, for in the peace settlement at Brest-Litvosk it was the Central Powers who determined the rules, and the RSFSR which submitted to "imperialist" exactions. In the peace settlements of 1920-1921 with her immediate neighbors Russia made no

<sup>11</sup> Italy, Arts. VI-XXXVI.

<sup>12</sup> This objection is raised in the Italian draft treaty to civil aviation (Art. LXXI, Par. 1, D), property rights of Italian nationals and corporations in ceded territory, and privately owned railways (Annex 3, Par. 5, 6, 10), and is voiced in the last case mentioned (Par. 10) as follows: "The USSR delegation considers that there is no reason for the inclusion in the peace treaty of the French delegation's proposal, because a peace treaty should not contain provisions dealing with particular private companies." It also applies to institution of civil proceedings for recovery of industrial, literary and artistic property rights (Annex 5, Par. 4), patent rights (same, Par. 6), insurance (Annex 6B), contracts, prescriptions and negotiable instruments (Annex 7). This view is reiterated in the draft treaties with Bulgaria, Art. XXVIII D Annex 4, P. 4, Annex 5; Finland, Annexes 4 and 5; Hungary, Art. XXIII, Par. 9; Annex 4, B, Par. 3, Annex 5; and Rumania, Art. XXX 1, C.

attempt to insist on so general a doctrine, particularly as the Soviet Government was doing most of the renunciation. In the draft clauses of the present treaties the international effects of the Soviet economics are carried further, diminishing private rights previously held inviolate by the canons of international law.

The Paris Conference is faced with the ineluctable task of effecting a working symbiosis, at the international level, between sharply differing, if not always frontally opposed, conceptions of public—and private—international law. The ultimate grist of this protracted milling may well determine whether the two systems are or are not compatible with the basic concepts on which the United Nations Organization was established.

MALBONE W. GRAHAM

#### THE ADMINISTRATIVE PROCEDURE ACT AND THE STATE DEPARTMENT

The Administrative Procedure Act<sup>1</sup> was signed by President Truman on June 11, 1946, having passed both the Senate and the House of Representatives without a dissenting vote. It became effective as to most of its provisions on September 11, 1946. This important piece of legislation will have significance not merely for internal administration but also for many administrative agencies whose business it is to regulate our international intercourse in its various manifestations. The ever growing extension of administrative rules and regulations has been reflected also in the complexity of the relations of both the citizen and the alien with the authorities of the Government. Agencies having to deal with the determination of citizenship, the interpretation and application of treaty provisions, the enforcement of immigration laws, and many other matters will be affected by the new law.

The people of the United States are brought face to face with new forms and methods of government at the same time that executive power, often uncontrolled, is growing by leaps and bounds in many foreign countries. While Constitutional safeguards remain inviolate, the scope of administrative activity has grown so rapidly that the individual is often no longer able to inform himself readily of the nature of the rules and orders applicable to his conduct. Officials of government are themselves often unable to find their way in the labyrinth of regulations accumulated in different bureaus without adequate systematic registration or publication.

The provisions of the new Administrative Procedure Act clearly apply to many of the functions within the jurisdiction of the State Department, and it is, therefore, of great importance in the conduct of our foreign affairs. It is not our purpose here to review the Act as a whole. A brief outline will suffice. Its provisions apply to every "agency" of government, which is defined as "each authority (whether or not within or subject to review by another agency) of the Government of the United States other than Congress, the courts, or the possessions and Territories, or the District of Co-

<sup>1</sup> (1946) Public Law 404, 79th Congress.

lumbia." Military and naval authorities and war authorities functioning under temporary or named statutes are, of course, excepted.

Every agency is required to state, and currently publish in the Federal Register, a description of its organization and the places where the public may secure information and make submittals or requests, the requirements of formal and informal procedures and the substantive rules and general policy adopted by the agency.

Perhaps the most important provisions of the Act are those which relate to the right of judicial review. Section 10 (a) provides as follows:

Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

The statute does not apply where legislation otherwise precludes a judicial review or where an agency has acted in a matter confided to its discretionary power. The statute does not, however, abridge any Constitutional rights or remedies which would otherwise be enjoyed. It would be difficult to appraise at this early date the scope of the Act with reference to administration within the jurisdiction of the State Department. The language of the statute is very comprehensive. It is manifest that many rules and regulations contained in isolated records or departmental circulars will have to be stated and currently published in the Federal Register so as to be accessible to the public.

Even though it was not the intent of Congress to take away discretionary power formerly enjoyed it is reasonable to conclude that Congress intended a wider measure of control than has heretofore existed. For example, the function of the State Department with reference to the issuance of passports must not be arbitrary or capricious or exercised in a manner not in accordance with the law. Even where the power is discretionary the facts upon which it is based must be supported by substantial evidence. A judicial review is certainly indicated where there has been an erroneous interpretation of a law or treaty. The Supreme Court has held that it would not undertake by *mandamus* to compel the issuance of a passport, or to exercise judicial control by a declaratory judgment on a matter within the discretion of the Secretary of State. On the other hand, where the refusal of a passport had been made solely on the ground that the applicant had lost his or her status as a native-born American citizen, the court would assume jurisdiction where this conclusion was found not warranted by law.<sup>2</sup>

Under the provisions of the Administrative Procedure Act, the courts are required to determine all relevant questions of law and the meaning or applicability of any agency action. The courts are also expressly enjoined to act affirmatively so as to compel action unlawfully withheld or unreasonably delayed. They must hold unlawful any action which they find to be arbitrary or in abuse of discretion or otherwise unlawful upon the facts or the law.<sup>3</sup>

<sup>2</sup> *Perkins, Secretary of Labor et al. vs. Elg* (1939), 307 U.S. 325, 327-328, 349-350.

<sup>3</sup> See *American Bar Association Journal*, July, 1946, p. 377.

One is reminded of the many cases in which arbitrary acts of immigration authorities have caused extreme hardship without recourse to the courts. Under the guise of administrative power persons claiming to be native-born citizens of the United States have been excluded after a temporary sojourn abroad without recourse to the courts on the status of their citizenship, essentially a question of law.<sup>4</sup> Another effect of the new statute may be the adoption of a policy of implementing many of our treaties by the elaboration and publication of administrative regulations. It has been pointed out that this is a function too often neglected by reason of the peculiar character of our fundamental law which declares all treaties made under the authority of the United States to be "the supreme law of the land." The scope and effect of many treaties are thus left in doubt by reason of the reliance upon their self-executory character. This is particularly unfortunate with respect to some multipartite treaties.<sup>5</sup>

The effect of the new statute will be welcomed as a salutary reform of our procedure in the conduct of foreign affairs, as in all other branches of the Federal administration. De Tocqueville pointed out that "the true friends of liberty and the greatness of man ought constantly to be on the alert to prevent the power of government from lightly sacrificing the private rights of individuals to the general execution of its designs."<sup>6</sup> The unanimous adoption of the new statute by Congress proclaims the firm intent of the American people, notwithstanding the jungle-growth of administrative regulation, to insure the maintenance of "a government of laws and not of men."

ARTHUR K. KUHN

#### THE LEGAL POSITION OF THE SECRETARY GENERAL OF THE UNITED NATIONS

The intervention by Secretary General Trygve Lie of the United Nations in the Iranian case, pending in the Security Council, has brought up again the problem of the range of his competence under the Charter. The problem is not only important as far as the UN is concerned but also interesting from the point of view of the development of international organization. As the makers of the Charter carefully took into consideration the law and the experience of the League of Nations it may be helpful to start with a brief sketch of the legal position of the Secretary General of that organization.

The Secretary General of the League of Nations was primarily the chief administrative officer of the League. He had, first, to organize the Secretariat, and to act as its chief. In this capacity he had broad powers. He was the superior of all the staff members. He made all appointments to the staff; the approval of the Council, under Article IV, par. 3, of the Covenant,

<sup>4</sup> *United States vs. Ju Toy* (1905), 198 U.S. 253. See *Proceedings of the American Society of International Law*, 1911, pp. 210-212.

<sup>5</sup> See Henry Reiff, "The Enforcement of Multipartite Administrative Treaties in the United States," this JOURNAL, Vol. 34 (1940), p. 661.

<sup>6</sup> A. De Tocqueville, *Democracy in America*, Chap. VII.



was, to a large extent, a formality and was given once for all, as far as all the lower posts were concerned, at an early date. He alone was responsible to Assembly and Council for the work of the Secretariat. He had important functions concerning the budget of the League. He acted as Secretary General at all meetings of the Assembly and the Council. He had specific duties under Article I, par. 1, Article XVIII, and Article XXIV, par. 2, as well as under Article XI, par. 1 and Article XV, par. 1 of the Covenant. He had to prepare the work and to execute the resolutions of the various organs of the League. He had administrative and technical functions, specified in the Rules of Procedure of the organs of the League, under the Statute of the Permanent Court of International Justice, with regard to the International Labor Organization, and under special treaties. He represented the League to a certain extent. His emoluments were adequate and he enjoyed full diplomatic privileges and immunities.

Developments in the League caused certain difficulties however. The pressure brought by Members for the appointment to higher staff posts of their nationals handicapped his freedom of choice and the dangerous trend to regard these officials rather as the representatives of their countries than as true international civil servants threatened to compromise the international character of the Secretariat. The Secretary General also had to struggle for the adoption of his budget and the Supervisory Commission of the League rose from its original modest task of assisting the Secretary General to a role of supervising and controlling him.

The political functions of the Secretary General were severely restricted by the Covenant. This had already been suggested by the history of the drafting of the Covenant. The title originally proposed for this office, that of "Chancellor," was lowered to "Secretary General." The original "and" in Article II, putting the Secretariat on the same level as Assembly and Council, was changed into "with."<sup>1</sup> The fact that the Secretary General was "appointed" (*nominé*) pointed in the same direction. At the very beginning of the League the Noblemaire Report<sup>2</sup> insisted urgently that the Secretariat should not extend the sphere of its activities beyond preparing and executing the decisions of the various organs of the League, without suggesting what these decisions should be. It was the time when orators in Geneva frequently found it necessary to emphasize that the League was not a "super-State." But as late as 1930 the Report of the Committee of Thirteen<sup>3</sup> stated emphatically that the Secretariat had no political initiative and formed only an administrative organism.

Most students of the League have, nevertheless, concluded that the Secretariat was more: Ray wrote in 1930 that the position of the Secretary

<sup>1</sup> Still more indicative the equally authentic French text: *Assistés d'un Secrétariat permanent*. Jean Ray, *Commentaire au Pacte de la Société des Nations*, Paris, 1930, p. 237: *Le Secrétariat apparaît ainsi, dès le début, comme un organisme subordonné.*

<sup>2</sup> League of Nations Document C.424. M.305. 1921. X.

<sup>3</sup> Doc. A.16. 1930.

General was considerable, although badly defined juridically.<sup>4</sup> Schücking-Wehberg pointed in 1931 to the permanency of the Secretariat, to the fact that it was the central point of all incoming information, the guardian of the tradition of the League and the adviser of all the delegations and concluded that it was not merely a technical, but also a political organ.<sup>5</sup> And this view was shared in 1938 by Göppert.<sup>6</sup> Ranshofen-Wertheimer in 1945 recognizes the limitations and restrictions put by the Covenant upon the external powers of the Secretary General but points also to the personality of the two Secretaries-General of the League: "the two Secretaries-General kept scrupulously, even over-scrupulously, within the constitutional limits and did not even avail themselves as fully as they could have done of the marginal possibilities for action and influence open to them,"<sup>7</sup> e.g. to address the Assembly and the Council; "they fell short of international leadership."<sup>8</sup> He suggests that a future international organization should give political powers to the Secretary General, who should be chosen rather from statesmen than civil servants.

It is against this background and experience that the legal position of the Secretary General of the UN has to be studied. The Dumbarton Oaks Proposals<sup>9</sup> contained already *in nuce* the relevant provisos of the Charter of the United Nations.<sup>10</sup> The Secretary General of the UN has also functions under the Statute of the International Court of Justice.<sup>11</sup> The Preparatory Commission of the UN, set up by the Interim Arrangements adopted at San Francisco,<sup>12</sup> sat in London from November 23 to December 28, 1945, and its *Report*<sup>13</sup> deals in Chapter VIII with the Secretariat. The First Part of the First General Assembly of the UN met in London from January 10 to February 14, 1946, and it was its Fifth Committee<sup>14</sup> which dealt with the problems of the Secretariat. The excellent work done by the Preparatory

<sup>4</sup> Work quoted, above, n.k., pp. 231, 248-249, 250.

<sup>5</sup> *Die Satzung des Völkerbundes*, Berlin, 1931 (3rd ed.), Vol. I, p. 542.

<sup>6</sup> *Der Völkerbund*, Stuttgart, 1938, p. 140.

<sup>7</sup> Egon F. Ranshofen-Wertheimer, *The International Secretariat*, Washington, 1945, p. 38.

<sup>8</sup> Same, p. 429.

<sup>9</sup> *Department of State*, Bulletin, Vol. XI, No. 276 (October 8, 1944), pp. 363-374; (Chapter IV, 1, d, and Chapter X, par. 1-3. See also the Amendments proposed by the four sponsoring Powers at the San Francisco Conference on May 5, 1945 (same, Vol. XI, No. 306, May 6, 1945), pp. 851-855).

<sup>10</sup> The same, Vol. XII, No. 313 (June 24, 1945), pp. 1119-1134 (Art. 7, par. 1, Art. 12, par. 2, Art. 20, 97-101, 104-105). See Leland M. Goodrich and Edvard Hambro, *Charter of the United Nations, Commentary and Documents*, Boston, 1946, pp. 32-33, 90, 100-101, 114-116, 268-276.

<sup>11</sup> Same, pp. 1134-1142 (Art. 5, par. 1, Art. 7, Art. 13, pars. 2 and 4, Art. 18, par. 2, Art. 40, par. 3, Arts. 67 and 70).

<sup>12</sup> Same, pp. 1142-1143.

<sup>13</sup> Report of the Preparatory Commission of the United Nations. P/C20, 23 December 1945. Chapter VIII (pp. 81-103).

<sup>14</sup> Administrative and Budgetary; Chairman: Faris Al Khuri (Syria); Rapporteur: Aghnides (Greece).

Commission made it possible for the Fifth Committee to adopt, to a great extent, the proposals of the Preparatory Commission, without substantial change.<sup>15</sup>

The title of "Secretary General" was retained as in the Covenant. The word "elected" in the Dumbarton Oaks Proposals had been changed to "appointed" in the Charter. Under Art. 97 the appointment has to be made by the General Assembly, by a simple majority of votes, upon the recommendation of the Security Council. This recommendation needs seven votes, including the concurrent vote of the five permanent members, who, therefore, have the right of veto. The General Assembly is not bound to appoint the person recommended, but, if it does not, it must wait for a further recommendation by the Security Council. As determined by the General Assembly, nomination and appointment are to be made in private meetings and the vote taken by secret ballot. It further determined that the appointment of the first Secretary General should run for five years, renewable for a further five year term.

The recommendation by the Security Council was a matter of compromise between an Eastern European, sponsored by the Soviet Union, and the Canadian Ambassador in Washington, sponsored by this country and Great Britain, but whose nomination the Soviet representative threatened to veto. On January 29, 1946, the Security Council unanimously agreed on Trygve Lie for Secretary General.<sup>16</sup> The appointment was made by the General Assembly by secret ballot, with 46 votes in favor and three against. The installation of the Secretary General took place in the 22nd Plenary Meeting on February 2, 1946,<sup>17</sup> and he took an oath of loyalty, absolutely identical with the oath taken by the Secretary General of the League of Nations. Contrary to the practice under the League, the appointment of the Foreign Minister of Norway as Secretary General brought a statesman of a small Power, not a civil servant of a Great Power, into this office.

The Secretary General of the UN is, in first place, the "chief administrative officer of the United Nations" (Art. 97); he is the Secretary General of the General Assembly, the Security Council, the Social and Economic Council and the Trusteeship Council (Article 98). He has to present an annual report on the work of the Organization to the General Assembly (Article 98). Specific administrative and executive functions are given to him under the Provisional Rules of Procedure of the General Assembly.<sup>18</sup> He has to prepare the agenda, convoke the sessions, provide the necessary staff, prepare the minutes and other documents of the various organs of the UN. He is the channel of communication with the UN and all of its organs. He is responsible for the preparation of the work of the various organs and for the execution of their decisions. He has wide responsibilities concerning the

<sup>15</sup> Reports of the Fifth Committee: A/11, 23 January 1946 (3 pages); A/41, 8 February, 1946 (31 pages); A/44, 11 February 1946 (32 pages).

<sup>16</sup> *Journal of General Assembly, UN* (London), No. 18, p. 355, No. 20, p. 369.

<sup>17</sup> *Journal*, No. 22, February 4, 1946, p. 402.

<sup>18</sup> A/4, 10 January 1946.

financial administration of the UN. He is the head of the Secretariat and appoints all staff members (Article 101). He alone is responsible to the other principal organs of the UN for the work of the Secretariat. His emoluments are adequate; he enjoys full diplomatic privileges and immunities. He is strictly an international officer; he may not seek or receive instructions from any authority external of the UN; each member undertakes fully to respect the exclusively international character of his responsibilities (Article 100).

The Report of the Preparatory Commission emphasized the "Key position of the Secretariat in the UN." The Report of the Fifth Committee states that it was guided by the consideration "to enable a man of eminence and high attainment to accept and maintain the position." It is fully recognized that "his choice of staff and his leadership will largely determine the character and efficiency of the Secretariat as a whole,"<sup>19</sup> that "the manner in which the Secretariat performs its tasks will largely determine the degree in which the objectives of the Charter will be realized."<sup>20</sup>

With regard to these administrative and technical functions, his position is analogous to that of the Secretary General of the League. But the Preparatory Commission and the General Assembly in London took measures to enhance the prestige of his position and to guard against the handicaps of which the Secretary General of the League became the victim. The Fifth Committee proposed, that, as the Secretary General is the confidant of many Governments, members will not offer him positions, at least immediately after his retirement, nor will he accept them, in which his confidential knowledge might be a source of embarrassment to other members. This proposal, no doubt, was inspired by the fact that the first Secretary General of the League had become British Ambassador to Fascist Italy. To prevent such happenings, the financial position of the Secretary General after retirement must be secured.

The General Assembly insisted that the Secretary General should have a completely free hand to set up and organize the Secretariat, to choose his collaborators, appoint the members of the staff, prepare the rules for the staff, set up classification schedules and salary scales. The Preparatory Commission and the General Assembly have also seen to it that the Secretary General should formulate and present the annual budget of the UN to the General Assembly and that the proposed Advisory Committee for administrative and Budgetary Questions be an assisting body and may not develop into an organ of control like the Supervisory Commission of the League.

Contrary to the Covenant, Article 99 of the Charter, under which "the Secretary General may bring to the attention of the Security Council any matter which in his opinion may threaten the maintenance of international peace and security," certainly gives the Secretary General an important and far-reaching right of political initiative, the exercise of which is left entirely

<sup>19</sup> P/C 20, 23 December 1945, p. 86.

<sup>20</sup> Same, p. 85.

to his discretion. The Report of the Preparatory Commission<sup>21</sup> states that "the responsibility which Article 99 confers upon the Secretary General will require the exercise of the highest qualities of political judgment, tact, and integrity" and points out that Article 99 "confers a special right which goes beyond any power previously accorded to the head of an international organization"; it states at the same time that "it is impossible to foresee how this article will be applied."

Already Rule 48 of the Provisional Rules of Procedure of the General Assembly gives the Secretary General the right, at any time, upon invitation by the President, to make to the General Assembly either oral or written statements—whereas the Secretary General of the League could only "address" the Assembly—, concerning any question which is being considered by the General Assembly. But the problem of the range of Article 99 came really up in the Iranian case. This article certainly does not give the Secretary General a right to make the policy of the UN. In his first speech as Secretary General Trygve Lie had said: "Your Secretary General is not called upon to formulate the policy of the UN."<sup>22</sup> In his letter to the Security Council<sup>23</sup> the Secretary General suggested that the Council may have no authority to retain the Iranian case on its agenda. We are here not concerned with the contents of this letter, but merely with the fact that it was presented, involving the problem of the Secretary General's competence under the Charter.

The motives of this intervention were differently interpreted; the press hinted even at the possibility of a desire on the part of the Secretary to be agreeable to the Soviet delegation, which had supported Trygve Lie first for President of the General Assembly, then for Secretary-General. But such a motive is surely out of the question; perhaps the Secretary General wanted to make use of the first opportunity to test the range of Article 99. Gromyko (Soviet Union) and Lange (Poland)<sup>24</sup> took a strong stand in favor of this competence of the Secretary General under Article 99. On the other hand, it was reported in the press that the American representative (Stettinius) had questioned Lie's authority to intervene and that perhaps one or two more members of the Security Council were of opinion that the Secretary General had overstepped his powers in the Council. Trygve Lie defended his right to intervene under Article 99 and urged a clear and definite decision.

The Report of the Council's Committee of Experts<sup>25</sup> was unanimously adopted in the meeting of June 6, 1946 and under it "the Council recognizes that the Secretary General may make oral or written statements to the Council regarding any matter submitted to it for consideration." The Council, further, granted authority to the Secretary General to participate in the discussions of the Atomic Energy Committee, the Military Staff

<sup>21</sup> P/C 20, 23 December 1945, p. 87.

<sup>22</sup> *Journal*, No. 22, 4 February 1946, p. 404.

<sup>23</sup> *Journal of the Security Council*, No. 27, 18 May 1946, pp. 522-524.

<sup>24</sup> Same, p. 530.

<sup>25</sup> Same, No. 37, 12 June 1946, pp. 721-722.

Committee and any other subsidiary organ of the Council. It was, moreover, decided that the Council "could, if it and Mr. Lie chose, appoint the Secretary General as a rapporteur or mediator in any controversy in the Council." Finally, the same powers were granted to the Secretary General's deputy (Arkady Sobolev), when acting on behalf of the Secretary General.

It was reported that the Secretary General would reorganize his "Cabinet" so that it should consist of persons of highest rank, with the intention of delegating more authority to them, as far as administrative and technical functions are concerned, so that the Secretary General might devote the greater part of his time and energy to his political functions. The legal position of the Secretary General of the UN, therefore, transcends by far that of the Secretary General of the League.

JOSEF L. KUNZ

"AS DETERMINED BY THE UNITED STATES"

The reservation relating to domestic questions which was attached to the acceptance by the United States of the obligatory jurisdiction of the International Court of Justice is subject to widely varying interpretation as to the reasons for its adoption, its aim or intention, and its probable effect.<sup>1</sup> Although the question of the effect of the reservation may arise only at a somewhat later date, if ever, it is desirable to try to assess the consequences of the action taken while the matter is still fresh. We can then await the results with a certain amount of assurance that we know where we stand. The two questions first mentioned are not without interest and importance in connection with both the present case and similar cases which will arise in the future, but they will not be discussed here.

The decisive question is that of the probable effect of the reservation. And in estimating this effect in advance extremes must be avoided and practical realities kept closely in view. Thus there seems to be no ground for the fear that this reservation will be used to nullify completely—as it might, logically, be interpreted as doing<sup>2</sup>—the acceptance of obligatory jurisdiction. As has been noted elsewhere, it will be the Executive who will act, if anyone acts, under this reservation, and this is some assurance of greater prudence and responsibility than was manifested in the adoption of the reservation.<sup>3</sup> What is still more to the point, the particular variety of self-determination envisaged by the reservation involves a very old and very fundamental principle of international law and relations which no brave—or are they timorous?—words can overthrow, the principle, namely, that at no point may an individual state, not even in dealing with matters left to its domestic jurisdiction, let alone in determining what those matters are, decide things for itself entirely, this either practicably or in legal principle. Political prudence, right reason, and aroused public opinion may all throw

<sup>1</sup> For text and interpretation see article by Francis O. Wilcox, above, p. 699.

<sup>2</sup> See article by Lawrence Preuss, above, p. 720.

<sup>3</sup> Same.

their weight in the right direction here; in addition certain well-established precedents may be cited in support of this view.

This is the situation, for example, with regard to substantive national action in matters left to domestic jurisdiction such as the tariff, immigration, and title to property. In acting upon these subjects the national state is still required to observe certain restrictions such as that proscribing arbitrary discrimination among other countries, that requiring it to receive and consider reasonable diplomatic representations relating to the action in question, and so on.<sup>4</sup> These are marginal considerations which leave the jurisdiction in substance intact, but they eliminate or destroy any picture of complete national discretion at this point.

In another matter the lack of power of the individual state to decide international questions for itself emerges still more sharply. This is in connection with denunciation of treaty obligations on the ground of altered circumstances. There is no doubt that some such right exists, but the discretion of the state denouncing obligations in this manner is far from complete. The mere assertion of a state that circumstances have so altered as to destroy the equity and the binding legal force of an earlier agreement is not conclusive. That state may and infallibly will be called upon to substantiate its assertion.<sup>5</sup> There may or may not exist any facilities for compelling it to submit its assertion to the decision of another body, but both in law and in practical politics its unilateral assertion is and will be subjected to scrutiny by the other interested state or states, and this is the case likewise in a large number of similar items of international law and relations, or indeed as a general principle.

Finally the discretion of a state to decide upon measures necessary for its self-defense has also been regarded in this light. Such an attitude would follow on grounds of principle but one concrete case may serve as a vivid illustration.<sup>6</sup> It will be recalled that during the negotiation of the Pact of Paris the right of self-defense was cited as a limitation upon the effect of that document. At once hypercritical students of international relations said just what they are saying now of the Connally reservation, namely that "this constitutes a loophole through which anything can pass, thus nullifying the main agreement entirely." To such an oversimplified and actually unsound view Mr. Kellogg, one of the fathers of the Pact, replied. He had admitted the right of self-defense as a limitation or qualification on the general principle of the Pact, and he unwisely, as it seems, refused to admit a definition of that right (or of aggression, its opposite) into the Pact. But he recognized the right of other states to discuss any assertion of the right

<sup>4</sup> On these two examples see materials cited in Potter, *Manual Digest*, p. 140, note 53 and p. 155, note 126.2.

<sup>5</sup> See Chesney Hill, *The Doctrine of Rebus Sic Stantibus in International Law*, 1934, p. 78.

<sup>6</sup> See article by present writer "International Regulation of National Action for Self-Defense" in *Southwestern Political Science Review*, Vol. X, No. 3 (December, 1929), p. 279.

of self-defense by one signatory. Having admitted, in strong terms, that "every nation . . . alone is competent to decide whether circumstances require recourse to war in self-defense" he immediately added: "If it has a good case the world will applaud and not condemn its action," thus in turn admitting the possibility of international denial of the national assertion and, still more, of international consideration and discussion thereof. Here as in the denunciation of treaty obligations for altered circumstances it may be true that no international jurisdiction will be empowered to pass upon the contention of the individual state, but that is not the whole story. Presumably the United States has a strict right to withdraw its assent to the principle that other states are entitled to a voice in settling any question affecting their interests, including that of the limits of domestic jurisdiction, although this approximates a denial of the existence of an international juridical community entirely. Presumably other states will refrain from drawing the logical conclusion here and ostracizing the United States in return. Presumably, finally, the International Court of Justice will be inclined to respect the United States' reservation. In view of all other facts and considerations, however, it will be very surprising if the reservation has much practical effect. Any Government of the United States would hesitate to apply it in any seriously debatable case knowing that it would at once be called upon to make its contention good in the international forum, as, for instance, the General Assembly or Security Council of the United Nations.

PITMAN B. POTTER

*Managing Editor*



## CURRENT NOTES

### REGIONAL MEETINGS AUTHORIZED BY EXECUTIVE COUNCIL

The Executive Council of the Society voted at a meeting held in Washington on September 28 to authorize regional meetings to be held in New York, Chicago, San Francisco, and in any other localities where members of the Society might wish to hold such meetings, and President Hyde was authorized to invite particular members of the Society to organize such meetings. It was indicated that, in order to serve the purpose of contributing to the program of the annual meeting in April, such meetings should be held as soon as possible, and preferably within the next three months. This action was taken as the result of a proposal made by President Hyde for a meeting to be held in New York on November 9, on the basis of the heavy vote in favor of regional meetings in the replies to the third item on the questionnaire distributed in July. The purpose of the meetings should be to discuss the program of activities of the Society as well as current problems of international law and relations, as touched upon in items one and two of the questionnaire. The question of the formation of local chapters of the Society, a step recently taken by the Federal Bar Association, might also be discussed. The regional meetings should draw upon the territories surrounding the place of the meeting although the Washington area should probably not be involved in other regional meetings.

P. B. P.

### GENERAL NOTE ON THE LAW OF WAR BOOTY

Partly as a consequence of action taken under the Potsdam Declaration,<sup>1</sup> and partly due to misapprehensions relative to property seizures in the various zones of occupation in Germany, confusion has arisen in thought and language on the subject of war booty to an extent indicating that many have lost sight of the principles which define rather sharply the orbit of operation of this concept.

The concept of war-booty as understood in that part of the law of nations relating to the conduct of warfare on land, embodies three basic postulates which must be kept constantly in mind in determining the validity of a given seizure of property. These postulates or criteria are: (1) The private property of enemy subjects in territory under belligerent occupation may not be confiscated; a similar protection is accorded private property found on the field of battle with certain special exceptions to be indicated later. (2) Moveable state, or public, property which can be used for military operations may be appropriated by the occupying state; if found on the battlefield it is subject to seizure as booty even though not usable in military

<sup>1</sup> For text see this JOURNAL, Vol. 39 (1945), Supplement, p. 245.

operations. (3) Immoveable state, or public, property is subject to use and administration but may not be appropriated by the occupant; this specific limitation upon confiscation is a corollary of the recognized prohibition against premature annexation.

Such restrictions upon the conduct of a belligerent in occupied territory as are involved in these general criteria presuppose, however, a condition of military occupation within the meaning of international law. They do not operate where, after *debellatio* (that is, annihilation of the enemy's armed forces together with destruction of its government resulting in disappearance of the enemy state as an international person), sovereignty over the territory in question is assumed and exercised by the victor.<sup>2</sup> In the second situation, which involves considerations of state succession (whether with or without formal annexation), the new sovereign may take such measures as he sees fit with respect to property within his new domains, untrammelled by the Hague Regulations, which deal only with his authority over the territory of a hostile state.<sup>3</sup> Here, however, a different set of principles may operate to curb his freedom of action relative to property seizures, namely the established principle of general international law (which operates even in time of peace) that the private property of aliens may not be confiscated without adequate and effective compensation.<sup>4</sup> In this respect a foreign subject may enjoy better treatment than is accorded to a state's own citizens, for while the property of citizens may be confiscated in the public interest without any restriction under international law, alien owners must be given compensation.<sup>5</sup>

It is not within the compass of this note to examine whether the authority exercised by the victorious governments in Germany, or by the Allied Control Council, necessarily implies the assumption of sovereignty (through creation of a condominium or several independent sovereignties) with the consequent vesting of full sovereign powers in the Allies,<sup>6</sup> or whether, if such a construction of the present situation be disputed, the legality of measures taken relative to property rights and reparations while a state of war exists may be challenged as premature in the absence of a peace settlement. Suffice it to observe that international law knows only two categories of occupation by a conquering state: belligerent occupation properly so-called

<sup>2</sup> See Oppenheim, *International Law*, 6th ed., Vol. II, pp. 466-467; Hall, *International Law*, 8th ed., pp. 680-681.

<sup>3</sup> See Articles 42 and ff. of the Regulations annexed to Hague Convention No. IV of 1907, *U. S. Treaty Series*, No. 529; Malloy, *Treaties*, Vol. II, p. 2269; TM 27-251, *Treaties Governing Land Warfare*, p. 31 and ff.

<sup>4</sup> A. V. Freeman, *The International Responsibility of States for Denial of Justice*, p. 515 and ff., and authorities cited.

<sup>5</sup> Exchange of Notes between Mexico and the United States, August 22, 1938, this *JOURNAL*, Vol. 32 (1938), p. 193.

<sup>6</sup> See Kelsen, in this *JOURNAL*, Vol. 38 (1944), p. 692, and his later discussion in same, Vol. 39 (1945), p. 518 and ff.

and assumption of sovereignty over the conquered areas. There is no in-between status. Consequently, the validity of acts performed by a victorious belligerent can only be tested, as already noted, either by the rules applicable to military occupation or by the principles which determine the prerogatives inherent in a sovereign nation. In any event, as between the victorious states themselves and the defeated nation, disposition of property rights not otherwise sanctioned by applicable principles may be legitimated by the provisions of the peace treaty.

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War booty, properly so-called, is a concept which relates to the powers of a belligerent, first, over property found on the battlefield, and, second, over property in enemy territory under military occupation as generally understood in land warfare. To use this term to describe the removal of property as reparations which are imposed by a victorious nation upon a vanquished enemy is a complete misconception of its scope.<sup>7</sup> Reparations are determined by the peace settlement and are subject to political pressure. Booty is limited by well-defined principles of international law. Furthermore, it is totally unrelated to the unquestioned right of a belligerent to seize or destroy property in the conduct of hostilities, if imperatively demanded by the necessities of war.<sup>8</sup> These recognized categories are independent of any restrictions which a belligerent may choose to adopt for its own purposes in dealing with enemy property ordinarily subject to seizure. A belligerent may, of course, elect not to exercise fully its right to seize property as booty. Such a course may be pursued because arrangements have been entered into with co-belligerents relative to the disposition of enemy property in general,<sup>9</sup> or to the restitution of certain special types of property seized by the enemy during the war. One example in point would be a government's determination to treat as "captured enemy material" in any zone only property which was owned or held for direct military use by enemy military authorities.<sup>10</sup> The more limited concept

<sup>7</sup> On March 1, 1946, the Department of State officially denied that the United States had any agreement with the Soviet Government in regard to "war booty" in Manchuria and repudiated any interpretation of that term to include industrial enterprises such as Japanese industries and equipment in Manchuria. *Department of State Bulletin*, Vol. XIV (1946), p. 364.

<sup>8</sup> FM 27-10, *Rules of Land Warfare*, par. 313; and for an application of this principle in international jurisprudence, *Hardman's case*, American and British Claims Arbitration, *Nielsen's Report*, p. 495.

<sup>9</sup> Such as under the "Liberated Areas Agreements" between the United States and various other governments, a typical example of which is the accord supplementing the agreement of May 16, 1944, between the United States and the Netherlands (official text unpublished).

<sup>10</sup> A striking illustration of American policy is furnished by the American Government's return to the Hungarian National Bank of approximately \$32,000,000 worth of gold which had been removed from Hungary by the Germans and subsequently captured by the armed forces of the United States. See *Department of State Bulletin*, Vol. XV (1946), p. 335.

embraced in a policy of this kind would obviously not prejudice the larger rights granted by international law.

The general principles governing war booty are set forth in Articles 46, 47, 52, 53, 55 and 56 of the Regulations annexed to Hague Convention No. IV of 1907 concerning the laws and customs of war on land. A survey of these articles and of the precedents afforded by their application is the only accurate means of ascertaining what is embraced by the concept of booty, inasmuch as that term is not defined either in the Regulations or in any other international instrument. The articles referred to are found in Section III of the Regulations entitled "Military Authority over the Territory of the Hostile State." Article 46 of these Regulations formally prohibits confiscation of private property, which on the contrary, must be "respected."<sup>11</sup> Article 47 forbids pillage; this injunction applying to public as well as to private property.<sup>12</sup> Article 52 permits requisitions in kind (and in the form of services) from municipalities or inhabitants, but only for the needs of the army of occupation. Contributions in kind are required to be paid for as soon as possible. The powers of an occupant with respect to the public property of the State (both moveable and immoveable) as well as certain special categories of private property, are regulated in Articles 53 and 55:

Article 53. An army of occupation can only take possession of cash, funds, and realizable securities which are strictly the property of the state, depots of arms, means of transport, stores and supplies, and, generally, all movable property belonging to the state which may be used for military operations.

All appliances, whether on land, at sea, or in the air, adapted for the transmission of news, or for the transport of persons or things, exclusive of cases governed by naval law, depots of arms, and, generally, all kinds of ammunition of war, may be seized, even if they belong to private individuals, but must be restored and compensation fixed when peace is made.

Article 55. The occupying state shall be regarded only as administrator and usufructuary of public buildings, real estate, forests, and agricultural estates belonging to the hostile state, and situated in the occupied country. It must safeguard the capital of these properties, and administer them in accordance with the rules of usufruct.

Property seized under Article 53 need not be directly usable for military operations, as in the case of ammunition, but it is sufficient if it serves that purpose indirectly.<sup>13</sup> The United States *Rules of Land Warfare* states this rule more restrictively when it declares in Paragraph 321:

All movable property belonging to the state directly susceptible of military use may be taken possession of as booty and utilized for the benefit of the invader's government. Other movable property, not

<sup>11</sup> See *Neel's Executor v. Noland's Heirs*, 166 Ky. 455, 467.

<sup>12</sup> C. C. Hyde, *International Law*, Boston, 1945 (2d ed.), Vol. II, § 634.

<sup>13</sup> M. Huber, in *Revue Générale de Droit International Public*, 1913, p. 683; H. Rolin, *Le Droit Moderne de la Guerre*, § 547.

directly susceptible of military use, must be respected and cannot be appropriated.

It is clear that property which cannot be used for military operations, directly or indirectly (a shallow test, indeed, in the present era of "total" war) is not subject to appropriation.<sup>14</sup> Such moveables as books, pictures, collections of various kinds, are exempt. Thus, to be lawful booty moveables must be (1) state owned and (2) usable in military operations.

Article 55 is incorporated word for word into the War Department *Rules of Land Warfare*, as paragraph 315, and is amplified by paragraph 313 thereof in the following terms:

The occupant does not have the absolute right of disposal or sale of enemy real property. As administrator or usufructuary, he should not exercise his rights in such wasteful and negligent manner as seriously to impair its value. He may, however, lease or utilize public lands or buildings, sell the crops, cut and sell timber, and work the mines. A lease or contract should not extend beyond the conclusion of the war.

The general exemption from seizure enjoyed by private property is extended by Article 56 to the property of municipalities, of institutions dedicated to religion, charity and education, the arts and sciences, even when such property is that of the state; and the seizure or destruction of, and wilful damage done to, these institutions, to historic monuments or to works of art and science are expressly forbidden.

It was formerly the rule that all enemy property, whether public or private, which a belligerent found on the battlefield, was lawful booty and could be appropriated. So far as private enemy property is concerned, this rule is now obsolete, except with respect to such items as military papers, arms, horses, and the like. But the rule is still valid with respect to public enemy property so found. As Oppenheim says:

Thus, not only weapons, munitions, and valuable pieces of equipment which are found upon the dead, wounded, and prisoners may be seized, but also the war-chest and state papers in possession of a captured commander, enemy horses, batteries, carts, and all other public property found on the field of battle that is of value \* \* \*. The restriction in Article 53 of the Hague Regulations that only such moveable property may be appropriated as can be used for the operations of war does not apply to property found on the battlefield, for Article 53 speaks of "an army of occupation" only. Such property may be appropriated whether it can be used for military operations or not; the mere fact that it was seized on the battlefield entitles a belligerent to appropriate it.<sup>15</sup>

Under this category of rights—rights of a belligerent engaged in actual hostilities, as distinguished from his rights with respect to property in oc-

<sup>14</sup> J. De Loutet, *Le Droit International Positif*, Vol. II, p. 301.

<sup>15</sup> *International Law*, as cited pp. 310-311; also Hyde, § 695 and Spaight, *Air Power and War Rights*, p. 329.

cupied territory—trains carrying ammunition or troops, or carts and the vehicles loaded with food or supplies can be seized as booty of war, whether privately owned or not.<sup>16</sup> But the seizure of means of transportation which is permitted under Article 53, paragraph 2, is altogether different in character. In that case the occupant's authority is limited to use, and he may not appropriate title to himself. The duty to restore such property when peace is declared and to make compensation is recognized by the United States War Department Field Manual on *Rules of Land Warfare* (FM 27-10), paragraph 331 of which incorporates the rule of Article 53, paragraph 2, of the Hague Regulations. The use there contemplated clearly includes cables, telephone and telegraph plants, radio stations, automobiles, horses, wagons, railways, railway plants, tramways, ships in port, airplanes and aviation facilities, depots of arms whether military or sporting, and in general, all kinds of war material.<sup>17</sup> While Article 53, paragraph 2, permits the seizure of privately owned arms and munitions factories and other establishments manufacturing war material, as well as the exploitation of private railroads and their equipment, the private character of this property requires that it be restored at the end of the war and excludes it from consideration as lawful booty.<sup>18</sup> The same quality prevents an occupant from taking possession of funds or securities found in the treasury of the private railroad and belonging to it.<sup>19</sup> Such was in fact the express holding of the Franco-German Mixed Arbitral Tribunal in the case of *Compagnie des Chemins de Fer du Nord v. Germany*<sup>20</sup> where seizure of the Company's railway as a means of transport was upheld as compatible with Article 53, paragraph 2, but not seizure of the Company's funds and cash. Even the German General Staff's *Kriegsbrauch im Landkriege*<sup>21</sup> acknowledged that the seizure of cash, funds, and realizable securities permitted under Article 53, is limited to those not belonging to municipalities, communes, or private individuals.

Where the ownership of property is unknown or where there is any doubt as to whether it is public or private property for purposes of seizure as war booty, the *Rules of Land Warfare* (which, it should be observed, constitute the governing doctrine for armies of the United States in the field), categorically states that such property should be treated as public property until ownership is definitely settled (paragraph 322). With this doctrine should be considered the ruling of the Hungarian-Yugoslav Mixed Arbitral Tribunal in *Collac v. Yugoslavia* to the effect that pieces of machinery, left behind at the approach of the enemy, cannot automatically be considered as war booty, but that it has to be ascertained whether they belong to a private person who, having temporarily abandoned them, has not relinquished his

<sup>16</sup> A. Latifi, *Effects of War on Property*, p. 30.

<sup>17</sup> Rolin, §§ 523, 528, and 530.

<sup>18</sup> See Ferrand, *Des Réquisitions en matière de Droit International Public*, p. 176; Mérignhac, *Le Droit des gens, et la Guerre de 1914-1918*, Vol. III, p. 608.

<sup>19</sup> Rolin, § 530.

<sup>20</sup> 9 *Recueil des Décisions des Tribunaux Arbitraux Mixtes*, p. 37, at p. 72.

<sup>21</sup> Morgan, ed., p. 160.

rights of ownership; or whether they formed part of the equipment of the enemy army or were at least in its use.<sup>22</sup>

Text-writers have generally condemned as a violation of Article 53 (and the customary principles of international law which that article codifies) Germany's action in World War I of seizing and transferring the funds of the *Banque Nationale* of Belgium, a private institution, to the German Imperial Bank.<sup>23</sup> Among other recognized German violations in that war were the seizure and carrying off to Germany of live stock, and particularly horses and cattle, in the occupied portions of France and Belgium;<sup>24</sup> the dismantling of factories and workshops in Belgium and Northern France, as well as the carrying away of machinery and tools to Germany<sup>25</sup> and the tearing up of tracks of various privately owned Belgian railroads, the rails of which were transported to Poland for construction of military railways.<sup>26</sup> Removal of the tracks of a public railroad would also violate international law, since this exceeds the mere right of usufructuary given over immoveable property.<sup>27</sup> More controversial is whether an occupant may appropriate the rolling stock of state-owned railways. Some writers take the position that railroad rolling stock is an integral part of the land, and must therefore be treated as immoveable property;<sup>28</sup> others hold that there is no obligation to restore rolling stock of this category which an occupant may have removed. Thus Feilchenfeld states:

An obligation to restore is created in paragraph 2 of Article 53 for privately owned rolling stock, but it is deliberately omitted in paragraph 1, which deals with state property.<sup>29</sup>

Such is also the viewpoint of the great Max Huber who concludes that state rolling stock may be disposed of by the enemy who seizes it, as he sees fit.<sup>30</sup> This position is corroborated by the fact that at the First Hague Conference a

<sup>22</sup> 9 *Recueil des Décisions des T.A.M.* (193C), p. 195. And see Schwarzenberger, *International Law*, Vol. I, p. 272. In *Mazzoni c. Finanze dello Stato*, the court rejected an argument that stocks and bonds which had been left behind by their owners in Italian territory occupied by Austro-Hungarian troops, were liable to seizure as *res nullius* or war booty: *Annual Digest of Public International Law Cases*, 1927-1928, Case No. 384; also G. H. Hackworth, *Digest*, Vol. VI, p. 403.

<sup>23</sup> J. W. Garner, *International Law and the World War*, Vol. II, pp. 130-131; E. Feilchenfeld, *The International Economic Law of Belligerent Occupation*, p. 38.

<sup>24</sup> Oppenheim, § 143a; and Garner, § 395.

<sup>25</sup> Garner, § 396, who points out that although Article 53 "allows, subject to restoration and indemnity for its use, the seizure of war material belonging to private persons, it does not authorize the seizure and exportation by the occupying belligerent of machinery and implements used in the industrial arts." See also note 7 above.

<sup>26</sup> Work cited, § 397.

<sup>27</sup> Rolin, § 555; Holland, *Law of War on Land*, par. 115.

<sup>28</sup> Rivier, *Principes de Droit des gens*, Vol. II p. 311; Mérignhac, Vol. III, p. 612.

<sup>29</sup> Work cited, p. 54.

<sup>30</sup> *Revue Général de Droit International Public*, 1913, p. 669. Accord: Von Stein, *Le droit international des chemins de fer en temps de guerre* in *Revue de droit international et de législation comparée*, Vol. 17, 1885, pp. 543 and ff.

proposal by Switzerland that state railway material should be returned at the end of hostilities, was rejected.<sup>31</sup>

One other vexatious problem that has arisen under Article 53 relates to the extent of the occupant's authority to appropriate "realizable securities" which are strictly the property of the state. Specie, paper money, and bullion belonging to the state can, of course, be appropriated, and the right to collect taxes, dues, and tolls is admitted. More complicated is the question of the occupant's right to collect debts owing to the legitimate sovereign when evidenced by written instruments such as bonds, negotiable instruments and similar securities, or ordinary debts not so evidenced. Bearer instruments belonging to the legitimate sovereign may be appropriated as booty by the occupant. He may not, however, sell securities payable to the legitimate government or its order since the occupant is not the legal successor to the legitimate government and is therefore incapable of passing title to such securities.<sup>32</sup>

On the collection of debts, whether evidenced by instruments payable to the legitimate government or order, or arising from a contract, there is considerable controversy. It is generally agreed, however, that the phrase, "realizable" securities refers to matured debts and that an occupant may lawfully collect all debts due to the legitimate government which have matured during the period of occupation. But payment of a debt before maturity may not be required.<sup>33</sup>

The general principles of the Hague Regulations summarily sketched above may seem in strange contrast to some of the practices followed by the belligerents during the course of the recent conflict and thereafter. When to the ordinary complexities of the booty problem are super-added the provisions of the Potsdam Declaration on reparations claims,<sup>34</sup> bewilderment is still further intensified. For example, Part IV of that Declaration specifies with respect to reparations from Germany that:

<sup>31</sup> Scott, J. B., ed., *Proceedings of the Hague Peace Conference of 1899*, p. 67.

<sup>32</sup> Westlake, *International Law*, Vol. II, p. 114; Huber, work cited, pp. 664, 665.

<sup>33</sup> Hershey, *The Essentials of Public International Law*, p. 620; Bordwell, *The Law of War*, p. 324; Huber, work cited, pp. 664, 669, 670.

<sup>34</sup> One of the primary difficulties with the Potsdam provisions on reparations is that no attempt was made to distinguish between external assets which were properly German, and those which had been seized wrongfully by the Germans from other nations during the war. For example, when the Nazis invaded Austria they appropriated most of the capital equipment of that country. At Potsdam it was provided that Soviet reparations claims were to be met by removals from the Soviet zone and "from appropriate German external assets" (IV, 1). Coupled with this was a renunciation by the United Kingdom and the United States of all claims "to German foreign assets in . . . Eastern Austria" (IV, 9). Under this language the Soviet Government has sought to justify its seizure—as German external assets—of property stolen from the Austrians by Germany. More meticulous draftsmanship might possibly have avoided both a serious source of friction and the resultant injustice to Austria. See this JOURNAL, Vol. 39 (1945), Supplement, p. 245, at pp. 251–253.



In addition to the reparations to be taken by the USSR from its own zone of occupation, the USSR shall receive additionally from the western zones:

(A) 15 per cent of such usable and complete industrial capital equipment, in the first place from the metallurgical, chemical, and machine manufacturing industries, as is unnecessary for the German peace economy and should be removed from the western zones of Germany, in exchange for an equivalent value of food, coal, potash, zinc, timber, clay products, petroleum products, and such other commodities as may be agreed upon.

(B) 10 per cent of such industrial capital equipment as is unnecessary for the German peace economy and should be removed from the western zones, to be transferred to the Soviet Government on reparations account without payment or exchange of any kind in return.<sup>25</sup>

Clearly if property disposals under these provisions are to be regarded as lawful it must be either (a) because they fall within the category of reparations properly so-called (prior, it may be observed, to the existence of formal treaty clauses thereon) or (b) because they constitute a transfer of property over which the Allies have jointly or severally acquired the sovereign right of disposition. Under no view can they be justified as an application of the international law of booty.

These considerations must be kept in mind when final appraisal is made of the Potsdam approach. Without disregarding its full legal implications, the question of general principles nevertheless remains important, for issues continually arise not only concerning the validity of seizures as between the Allies themselves and third parties but also with respect to the propriety of booty seizures by the Axis forces during their regime of occupation in Europe. As has already been observed, whatever departures from the Hague Regulations may have appeared necessary to the Allies may be legitimated, as between themselves and the vanquished powers, by specific covering provisions in the peace treaties. Such provisions would, of course, be ineffectual to extinguish the rights of non-contracting third States whose subjects may have suffered damages due to violations of international law.

ALWYN V. FREEMAN \*

#### AMERICAN MILITARY GOVERNMENT COURTS IN GERMANY

American Military Government Courts have been in operation in Germany since September, 1944. Little publicity has been given to their composition, jurisdiction, powers, and procedure. Their influence upon the democratization of Germany has probably been very great since the courts, above all German institutions prior to the Nazi regime felt the greatest impact of the National Socialist program. Particularly in the courts did the fullest

<sup>25</sup> Same, p. 252.

\* Of the Michigan Bar. Nothing in the present note necessarily represents the views of any government agency.

realization of the loss of their rights come to the German people.<sup>1</sup> Rights guaranteed by the Weimar Constitution were rendered completely meaningless by the inability of the citizen to enforce them before the Nazified courts. Equality before the law became a forgotten concept, and the group to which a person belonged determined his status before the law and public authority.<sup>2</sup>

The complete bewilderment of the average German during legal proceedings before our Military Government Courts has been commented upon by many Legal Officers in the field. The two ideas which were most startling to the defendants were the opportunity afforded them to be heard and to say what they wished, without fear or compulsion, and the right accorded them to present evidence and witnesses on their own behalf. In a very considerable number of cases in rural areas of Bavaria the only answer elicited from the defendant upon being asked "How do you plead?" was "*Ich war nie bei der Partei*" (I was never in the Party).<sup>3</sup>

Immediately after the entry of the Allied Forces into Germany in September, 1944, the Supreme Commander, General Dwight D. Eisenhower issued Proclamation Number 1,<sup>4</sup> Law Number 1,<sup>5</sup> Law Number 2,<sup>6</sup> and Ordinance Numbers 1<sup>7</sup> and 2.<sup>8</sup> Proclamation Number 1 announced the establishment of the Military Government of Germany and stated certain of the aims of the occupying forces.<sup>9</sup> It announced the vesting of supreme legislative, judicial,

<sup>1</sup> These observations are based upon the study of voluminous records of German Civil and Criminal Courts made by the author in the course of his work as a Criminal Investigator, Legal Officer, Chief of the German Courts Branch, and chief of the Military Government Courts Branch, Legal Division, Office of Military Government for Bavaria.

<sup>2</sup> W. Ebenstein, *The Nazi State*, New York, 1943, Chap. V, p. 69.

<sup>3</sup> The author made these observations during almost a year's service as member of various Military Government Courts. The reason for the average defendant's attitude becomes quite clear in view of the conditions existing in the courts under the Nazi regime. If a non-Party member commenced any type of litigation, against a Party member the Party member generally prevailed regardless of the merits. If he did not prevail the judge was generally disciplined and/or removed.

<sup>4</sup> Military Government—Germany, Supreme Commander's Area of Control, Proclamation No. 1, Military Government Regulations 23-200. Hereafter, Military Government Regulations will be cited as MGR. The Military Government Regulations supersede all other directives and manuals and constitute the governing law for the occupation of the United States Zone of Germany: MGR 1-103.

<sup>5</sup> Military Government—Germany, Supreme Commander's Area of Control, Law No. 1, "Abrogation of Nazi Law," MGR 23-201.

<sup>6</sup> Military Government—Germany, Supreme Commander's Area of Control, Law No. 2, "German Courts," MGR 23-202.

<sup>7</sup> Military Government—Germany, Supreme Commander's Area of Control, Ordinance No. 1, "Crimes and Offenses," MGR 23-214.

<sup>8</sup> Military Government—Germany, Supreme Commander's Area of Control, Ordinance No. 2, "Military Government Courts," MGR 23-215.

<sup>9</sup> "The Allied Forces serving under my command have now entered Germany. We come as conquerors but not as oppressors. In the area of Germany occupied by the forces under my command we shall obliterate Nazism and German Militarism. We shall overthrow the Nazi rule, dissolve the Nazi Party and abolish the cruel, oppressive, and discriminatory laws

and executive authority within the occupied territories in General Eisenhower as Supreme Commander of the Allied Expeditionary Forces and as Military Governor. (All German courts within the occupied territories were suspended and notice was given that Military Government Courts would be established for the punishment of offenders.<sup>10</sup> Law Number 1<sup>11</sup> abrogated certain Nazi laws, and Law Number 2<sup>12</sup> ordered the temporary suspension of German ordinary and administrative courts, as well as the dissolution of special and party courts and tribunals, and provided authority for the reopening of the ordinary civil and criminal courts when and to the extent specified by the Military Government. Ordinance Number 1<sup>13</sup> set up a series of 43 offenses against the Military Government, the first 20 of which could be punished by any sentence up to and including death.<sup>14</sup> Ordinance Number 2<sup>15</sup> established the Military Government Courts and set forth their jurisdiction, composition and powers and provided for the promulgation of rules of procedure.)

(Ordinance Number 2<sup>16</sup> established three types of Military Government Courts: Summary, Intermediate, and General. Summary Courts can impose any lawful sentence up to and including imprisonment for one year and a fine up to one thousand dollars (10,000 Reichsmarks). Intermediate Courts can impose a prison term up to and including 10 years and a fine of ten thousand dollars (100,000 Reichsmarks). General Courts may impose any lawful sentence including death.<sup>17</sup>)

and institutions which the Party has created. We shall eradicate that German Militarism which has so often disrupted the peace of the world. Military and Party Leaders, the Gestapo, and others suspected of crimes and atrocities will be tried and, if guilty, punished as they deserve."

<sup>10</sup> " \* \* \* Military Government Courts will be established for the punishment of offenders. . . . All German courts \* \* \* within the occupied territory are suspended. The Volksgerichtshof, the Sondergerichte, the SS Police Courts and other special courts are deprived of authority throughout the occupied territory. Reopening of the criminal and civil courts \* \* \* will be authorized when conditions permit."

<sup>11</sup> Above, note 5.

<sup>12</sup> Above, note 6.

<sup>13</sup> Above, note 7. This Ordinance is divided into two Articles. Article I deals with capital offenses and includes such crimes as espionage, sabotage, armed attack on or resistance to the Allied Forces, unlawful or unauthorized possession or use of firearms, ammunition, or explosives, plunder, pillage or looting, and others. Most of the prosecutions under this Article have been for unlawful possession of firearms.

Article II lists the offenses which are punishable by any penalty other than death. They include disobedience of any proclamation, law, ordinance, notice or order of the Military Government, circulation without a permit, failure to be in possession of a valid identity card, bribery, corruption or intimidation of members of or persons acting on behalf of the Military Government, unauthorized possession or control of property of the Allied Forces, knowingly making any false statements to any member of the Allied Forces in a matter of official concern, false assumption of authority from the Allied Forces or wrongful possession or control of an Allied uniform, resisting arrest, etc.

<sup>14</sup> There have actually been very few death penalties imposed by Military Government Courts. More serious offenders have been sentenced to prison terms of from ten to twenty years. . . .

<sup>15</sup> Above, note 8.

<sup>16</sup> Above, note 7.

<sup>17</sup> Above, note 8, Art. III.

Within the limits of the powers of any court both a term of imprisonment and a fine may be imposed for the same offense and a further term of imprisonment within the powers of the court may be imposed upon default of payment of the fine.<sup>18</sup> In addition to or in lieu of sentence of fine, imprisonment, or death (within its powers) a Military Government Court may make, such orders with respect to the person of the accused and the property, premises, or business involved in the offense as are appropriate and authorized by the Rules of Military Government Courts. The court has power to impound money or other objects, grant bail and accept and forfeit security therefore, order arrest, compel the attendance and order the detention of witnesses, administer oaths, punish for contempt, and such other powers as may be necessary and appropriate for the due administration of justice.<sup>19</sup> Where an offense is charged under the laws of the occupied territory, or any part thereof, the punishment which may be imposed is not limited to the punishment provided by such laws.<sup>20</sup>

All persons arrested for an offense are brought, as soon as practicable, before a Summary Court.<sup>21</sup> The Court then holds a preliminary hearing into the nature of the offense charged and directs the defendant to plead. If the defendant pleads guilty, the Court will hear such statements for the prosecution and defense and such evidence as it requires to enable it to determine the sentence to be imposed. If it has power to impose adequate punishment, it will proceed to sentence at once.<sup>22</sup> If, however, it is the opinion of the Summary Court that a sentence should be imposed in excess of its powers, it will report the case to the Legal Officer of the next higher Military Government echelon for reference to the appropriate Intermediate or General Military Government Court.<sup>23</sup> In the event of a plea of not guilty, the Court, either by way of preliminary hearing or as a part of the trial, hears such statements for the prosecution and the defense and such evidence as it requires to enable it to determine: 1. whether the case should be referred for trial to an Intermediate or General Court, either because of its own lack of power to impose adequate sentence in the event of conviction or for any other reason; and 2. whether there is sufficient substance to the charge to justify a trial thereon by any court. The Summary Court can then either dismiss some or all of the charges (whether or not it would have had power to impose sufficient punishment in the event of a conviction); report the case to the Legal Officer of the next higher echelon for reference

<sup>18</sup> Above, note 8, Art. III, par. 3(d); MGR 5-331c.

<sup>19</sup> Above, note 8, Art. III, par. 3(e); MGR 5-331d(1).

<sup>20</sup> Above, note 8, par. 3(f); MGR 5-331e. Thus where a German citizen is tried by a Military Government Court for violation of a section of the German Criminal Code, such as theft from another German, or black market activities, and the German Code provides for punishment of one year for that offense, the Military Government Court is not bound by the limitation contained in the German Code, but may impose any sentence within the limits of its own powers.

<sup>21</sup> MGR 5-324.1.

<sup>22</sup> MGR 5-325.

<sup>23</sup> Above, note 22, par. b.

to the appropriate Intermediate or General Court; or it may retain the charges and proceed with the case.<sup>24</sup>

A brief discussion of how this system actually operates in terms of a case might prove helpful in explaining it. Let us assume that a defendant is arrested and charged with the unlawful possession of a firearm. He is brought before the next session of the nearest Summary Court in that jurisdiction. At the preliminary hearing the court would only be interested in the testimony of the arresting police officer, whether civilian or military, with respect to the circumstances of the arrest:—the receipt of information to the effect that defendant possessed a weapon; the house search and subsequent discovery of the weapon hidden in the barn, and defendant's failure to have a permit to be in possession of this weapon. Since this is a type of case which falls among the capital crimes listed in Ordinance Number 1,<sup>25</sup> and since there may be a possible security threat to the occupying forces, the case is clearly one in which the Summary Court has insufficient power to sentence. On the other hand, if a defendant is charged with black market operations of a serious nature, the action taken by the Court may vary with the circumstances. For example, if black market operations are very infrequent in the area where the court is sitting, the Court may decide that a sentence of six months imprisonment will suffice. If, however, there are a large number of black market operations and the situation is getting out of control, the Court may decide that the one year limitation upon its power is insufficient to set a proper example. The case will then be referred to a higher court, generally an Intermediate Court in such case, where a sentence of up to 10 years may be imposed.

Military Government Courts have jurisdiction over all persons within the occupied territory except members of the United States Forces, members of the Forces of the United Nations, recovered military personnel of the United Nations who are subject to their respective service laws, and such other persons as may be specifically removed from their jurisdiction by the order of a Director of a Regional (State) Office of Military Government or higher authority.<sup>26</sup> They have concurrent jurisdiction with Courts martials and

<sup>24</sup> MGR 5-326b, c. The court, even if it decides to report the case for reference to a higher court, may receive evidence for the record if there is doubt of the future availability of witnesses. This provision is important, since there is often a considerable lapse of time between the preliminary hearing in the Summary Court and the trial in the higher court. Having perpetuated the testimony in the Summary Court, the higher court can proceed with the trial of the accused before it, even though important witnesses are no longer available. MGR 5-328 provides that the record of any evidence taken in the Summary Court will be made available to the Intermediate or General Court, and if any witness is unavailable, the Intermediate or General Court may, after hearing the prosecution and defense, receive in evidence the record of his testimony in the lower court.

<sup>25</sup> Above, note 8.

<sup>26</sup> MGR 5-300.2. To clarify the chain of command, the Military Governor, who is also the Theater Commander, is the supreme authority in the United States Zone of Germany. His authority is delegated to the Directors of the Regional or State Offices of Military Gov-

military commissions over civilians serving with the United States forces who are subject to military law.<sup>26a</sup>

American Military Government Courts have relinquished jurisdiction to try Soviet citizens living in the United States Zone.<sup>27</sup> Except where the offense is committed against United Nations nationals or property or where it is of such a nature that an immediate trial must be held in order to maintain law and order, all liberated Russian nationals who commit an offense, too serious to be dealt with administratively,<sup>28</sup> must be delivered, together with a file showing the charges and evidence against them, to the nearest Soviet Repatriation Representative for disposition.<sup>29</sup> If such persons are tried by a Military Government Court, after final action has been taken on the case, the offender must then be delivered to the nearest Soviet Repatriation Representative with a copy of the case record.<sup>30</sup>

Military Government Courts have jurisdiction over all offenses committed in the United States Zone against the legislation enacted by the Military Government,<sup>31</sup> the existing German law, and the laws and usage of war.<sup>32</sup> Although the Military Government Regulations make no mention of the jurisdiction of Military Government Courts over German civil litigation, it is submitted that they would have such jurisdiction if the Theater Commander chose to exercise it.<sup>33</sup> However, it is readily apparent that Military Government Legal Officers are not equipped to determine disputes

ernment, of which there are three—Greater Hessen, Württemberg-Baden and Bavaria. Recovered military personnel of the United Nations are former prisoners of war of the German army. See below, note 34.

<sup>26a</sup> MGW 5-300.2.

<sup>27</sup> MGR 5-383.1.

<sup>28</sup> In some instances, Repatriation Officers and UNRRA officials in charge of Displaced Persons Camps impose administrative penalties upon recalcitrant inmates, usually by way of depriving them of certain privileges, such as passes.

<sup>29</sup> Above, note 27. At the Yalta Conference it was agreed that Russia would relinquish its jurisdiction over American nationals in its zone and the United States would afford like treatment to Russian nationals in the United States zone.

<sup>30</sup> Above, note 27. Displaced Persons, other than Soviet Citizens who commit offenses, may be tried and punished by an appropriate Military Government Court. MGR 5-383.2.

Displaced Persons are defined as "civilians located outside the national boundaries of their own country by reasons of war who are: a) desirous but unable to return home or to find homes without assistance; or b) to be returned to ex-enemy territory": MGR 20-100. United Nations Displaced Persons are displaced persons of the United Nations and associated nations: MGR 20-100.1. Persecutees assimilated in status to United Nations Displaced Persons are 1. persons whose loyalty to the Allied cause is established; 2. neutral displaced persons as authorized; and 3. stateless persons, MGR 20-201a.

<sup>31</sup> Military Government legislation consists of proclamations, laws, ordinances, notices, directives, orders, and regulations. MGR 5-100a-h.

<sup>32</sup> MGR 5-300.3.

<sup>33</sup> "At his discretion, the theater commander may confer Jurisdiction upon military . . . courts to hear and determine civil cases or may establish separate courts for such cases . . .", War Department Field Manual 27-5, December, 1943, "Military Government and Civil Affairs," par. 42e, pp. 53, 54.

arising out of German Civil Law, and no attempt has been made to exercise such jurisdiction except in cases where the determination of some provision of the German Civil Code was necessary to a finding of guilt or innocence. This has arisen in connection with charges of theft, where a determination of the title to property was necessary in order to determine the guilt or innocence of the defendant. Recently the Military Government Courts' jurisdiction has been enlarged to include civil controversies arising out of the ownership or operation of automobiles by American nationals.<sup>34</sup> However, the exercise of this jurisdiction has been temporarily held in abeyance due to technical problems which must first be resolved.<sup>35</sup>

All members of Military Government Courts must be officers of the Allied Forces or civilian Military Government officials of United States citizenship.<sup>36</sup> Ordinance Number 2<sup>37</sup> provides that General Military Courts shall consist of not less than three members. Intermediate and Summary Courts consist of one or more members.<sup>38</sup> As a matter of practice, Summary Courts consist of only one member and Intermediate Courts are composed of two and sometimes three members, except where a member of the court is a lawyer, he may sit alone. General Courts are composed of three lawyers, where they are available. Otherwise one member of the court is always a lawyer and serves as legal adviser to the president.<sup>39</sup>

Any officer, enlisted man, or civilian acceptable to the court or to the appointing authority may serve as prosecutor.<sup>40</sup> For the purpose of computing the number of members necessary for a quorum of any court as provided in Ordinance Number 2,<sup>41</sup> the prosecutor is not considered a member of the court, nor can persons serving as prosecutors be members of the

<sup>34</sup> On May, 21, 1946, the Military Government promulgated Ordinance No. 6, which set up a Military Government Court for Civil actions to adjudicate controversies arising out of the ownership or operation of automobiles by American nationals. This court, composed of three lawyers, will have headquarters at Stuttgart, but will sit in various places as the occasion demands. See "Monthly Report of the Military Governor, Military Government of Germany, U. S. Zone," 20 June 1946, No. 11, A. 6.

<sup>35</sup> The immediate problem involves currency and exchange difficulties.

<sup>36</sup> Above, note 8, Art. IV, par. 4.

<sup>37</sup> Above, note 8.

<sup>38</sup> Above, note 8.

<sup>39</sup> There is generally a Summary Court in each County in the United States Zone. Since all cases come before this court in the first instance for a preliminary hearing the work of the Summary Court is far greater in volume than that of the other two courts. Two or three Intermediate Courts and one General Court usually sit in the same area as twenty-five to thirty Summary Courts. The latter have a larger personnel but this advantage is reduced by the stricter evidentiary requirements and the necessity for formal records in the Intermediate and General Courts.

During the period from October 10, 1945, to January 31, 1946, 35,318 persons were tried by Summary Courts in the United States Zone, exclusive of Berlin. Of this number, 29,300, or 83 percent, were convicted. During the same period Intermediate Courts tried 921 persons, of whom 606 or 64 percent were convicted, and General Courts tried 229 persons, of whom 137, or 60 percent, were convicted. *Monthly Report of the Military Governor, U. S. Zone, Legal and Judicial Affairs*, 20 April 1946, No. 9, p. 4.

<sup>40</sup> Above MGR 5-30c.

<sup>41</sup> Above, note 8.

court at that particular trial. A member of the court who serves as prosecutor cannot take part in any of the court's deliberations in that proceeding.<sup>42</sup>

All types of courts may be appointed by the Director of any Regional (State) Office of Military Government.<sup>43</sup> Previously, Regional Directors had delegated their power to appoint Summary Courts to the commanding officers of *Regierungsbezirk*<sup>44</sup> detachments. Since June, 1946, however, all appointments are made directly by the Regional Headquarters.<sup>45</sup>

Ordinance Number 2,<sup>46</sup> which guarantees certain rights to accused persons, provides that every accused shall be entitled to have, in advance of trial, a copy of the charges upon which he is to be tried; to be present at his trial, to give evidence and to examine or cross-examine any witness; to consult a lawyer before trial and to conduct his own defense or to be represented at the trial by a lawyer of his own choice, subject to the right of the court to debar any person appearing before the court; in any case in which a sentence of death may be imposed, to be represented by an officer of the Allied Forces, if he is not otherwise represented; to bring with him to his trial such material witnesses in his defense as he may wish, or to have them summoned by the court at his request, if practicable; to apply to the court for an adjournment where necessary to enable him to prepare his defense; to have the proceedings translated, when he is otherwise unable to understand the language in which they are conducted; and in the event of conviction, within the time fixed by the Rules of Military Government Courts, to file a petition setting forth the grounds why the finding and sentence should be set aside or modified.<sup>47</sup>

Every Military Government Court case record, where review is not required, is administratively examined by a Legal Officer on the staff of the Appointing Authority for the purpose of securing proper functioning of the courts and uniformity of procedure and sentences and recommending review of cases requiring corrective action.<sup>48</sup>

<sup>42</sup> MGR 5-333.1.

<sup>43</sup> MGR 5-301.1.

<sup>44</sup> A *Regierungsbezirk* is an intermediate governmental district which, under German governmental procedures, enforces locally the State and National policy. Since no national government now exists in Germany, the State is the highest level of government. Military Government echelons were created at both State and *Regierungsbezirk* level.

<sup>45</sup> Effective June 30, 1946, *Regierungsbezirk* functional Military Government teams have ceased to exist and legal functions previously performed at that level were transferred to the Regional or State Offices or Military Government.

<sup>46</sup> Above, note 8.

<sup>47</sup> These rights are printed on the reverse side of the summons and charge sheet forms, copies of which are served upon the accused in advance of trial.

It is worthy of note that an accused is not permitted to be sworn, either during his preliminary hearing or when he takes the stand, if he elects to testify: MGR 5-327, 354.6. However, he has no privilege against self-incrimination and the Court is not permitted to warn him that he is not required to answer questions when put to him. He will not be compelled to answer questions nor may he be sentenced for contempt for refusing to answer. Upon a refusal to answer any questions the Court may draw an unfavorable inference: MGR 5-354.5.

<sup>48</sup> MGR 5-310.1.



There is no provision for appeal, as such, from the judgment of a Military Government Court. The accused is, however, entitled to a review in every case where the sentence imposed is imprisonment in excess of one year or a fine, forfeiture, or other deprivation of property exceeding 10,000 Reichsmarks; where the death sentence is imposed; where a petition for review has been filed; and in any other case in which the Legal Officer on the staff of the Appointing Authority recommends review.<sup>49</sup>

The Appointing Authority (Regional Director) is the reviewing authority for every Military Government Court case for which review is required.<sup>50</sup> He generally designates the Chief Legal Officer on his staff to act for him in the exercise of all or part of his powers as Reviewing Authority, except the power of review in cases where a sentence of death has been pronounced.<sup>51</sup> The usual procedure is for the Reviewing Authority to submit every record of trial to be reviewed to a Military Government Legal Officer on his staff before he acts upon it.<sup>52</sup> The Theater Commander can review any case at any time and his confirmation is required before a death sentence can be carried out.<sup>53</sup>

The American Military Government Courts are functioning efficiently in Germany at present. Their future success is largely dependant upon a steady flow of qualified legal personnel. That the continued efficient administration of these Courts in Germany can do more to make the German people realize and appreciate the benefits of a democratic way of life than lectures, publications, radio-broadcasts and similar propaganda mediums.

ELI E. NOBLEMAN \*

#### THE LEGAL STATUS OF GERMANY

In *Rex vs. Bottril, ex parte Küchenmeister*,<sup>1</sup> the King's Bench Division of the British High Court of Justice<sup>2</sup> had to decide the question whether Germany still existed as a state, whether there was still a German nationality, and whether there still was a state of war between that country and the United Kingdom.<sup>3</sup> The facts of the case were that an interned German national, who had resided in England for some time, but had never been naturalised, applied for a writ of *habeas corpus*. His contention was that as the German Government had ceased to exist there was no German

<sup>49</sup> MGR 5-311.1. A permanent Clemency Board was set up in June, 1946, with authority throughout the U. S. Zone to grant pardon, parole, or amnesty. See "Monthly Report of the Military Governor", Military Government of Germany, U. S. Zone, 20 June 1946.

<sup>50</sup> MGR 5-311.2.

<sup>51</sup> Above, note 50.

<sup>52</sup> Above, note 50.

<sup>53</sup> Above, note 50; MGR 5-312.1, 312.2.

\* Department of Justice; nothing in this note should be regarded as representing the views of the United States Government or the Department of Justice.

<sup>1</sup> [1946] 1 All E.R. p. 635.

<sup>2</sup> Lord Goldard, L.C.J., Croom-Johnson and Linskey, J.J.

<sup>3</sup> See Kelsen, "The Legal Status of Germany according to the Declaration of Berlin", in this JOURNAL, Vol. 39 (1945), No. 3, p. 518.

state, and, therefore, there was no one with whom Great Britain was at war.<sup>4</sup> The present legal status of Germany was relevant because it is an established rule of English law, which was also followed in the present case, that an alien enemy interned by the Crown was debarred from applying for a writ of *habeas corpus*, and the court had no power to grant a writ.

The Attorney-General, who appeared for the Crown, furnished the court with a certificate from the Foreign Secretary of the United Kingdom which stated:—

- (1) Under paragraph 5 of the preamble to the declaration dated June 5, 1945, of the unconditional surrender of Germany, the Governments of the United Kingdom, the United States of America, The Union of Soviet Socialist Republics, and France, assumed "supreme authority with respect to Germany, including all the powers possessed by the German Government, the High Command, and any state, municipal or local government or authority. The assumption for the purposes stated of the said authority and powers does not affect the annexation of Germany."
- (2) That in consequence of this declaration Germany still exists as a state and German nationality as a nationality, but the Allied Control Commission are the agency through which the government of Germany is carried on.
- (3) No treaty of peace or declaration of the allied powers having been made terminating the state of war with Germany, His Majesty is still in a state of war with Germany, although, as provided in the declaration of surrender, all active hostilities have ceased.

The Court held that it had no right to go behind the certificate and that it was bound to take it that "at this present moment" (the case was heard on April 3, 1946) there was a state of Germany, the government of which was being conducted by the allied powers, but that Great Britain was still in a state of war with Germany.

Counsel for the applicant submitted that matters of law arose upon the Foreign Secretary's Certificate and that it was for the court to decide whether or not Germany still existed as a State. The well-known case of *Duff Development Co. Ltd. vs. Government of Kelantan*<sup>5</sup> was, however, authority for the proposition that the statement by the Executive was binding on the court. In that case Lord Finlay had said:<sup>6</sup>

There is no ground for saying that because the question involves considerations of law these must be determined by the courts. The answer of the King, through the appropriate department, settles the matter whether it depends on fact or on law.

EGON SCHWELB\*

<sup>4</sup> Same, at p. 521.

<sup>5</sup> [1924] A.C. 797.

<sup>6</sup> Same, p. 815.

\* Of the Prague bar; author of works on international and military law; sometime member of the Czechoslovak Legal Council in London.

## LOCAL ENEMY ASSETS AND THE PARIS AGREEMENT ON REPARATION

In any agreement between the Allies on the allocation of reparation benefits the value of enemy assets in each Allied country must be taken into account if the assets are retained as reparation. The Paris Agreement on Reparation from Germany,<sup>1</sup> which proceeds on this assumption, provides accordingly. Under the Agreement, signed by eighteen countries, the United States, Great Britain, France, Albania, Australia, Belgium, Canada, Czechoslovakia, Denmark, Egypt, Greece, India, Luxembourg, the Netherlands, Norway, New Zealand, South Africa, and Yugoslavia, each Government is to charge against its reparation share the German enemy assets within its jurisdiction.<sup>2</sup> Because of the amount of assets involved, the accounting is of material importance.

The Paris Agreement, in addition to stating the principle, specifies how the charge is to be made. The local assets are to be charged

net of accrued taxes, liens, expenses of administration, other *in rem* charges against specific items and legitimate contract claims against the German former owners of such assets.<sup>3</sup>

Two kinds of debts may thus be deducted: *in rem* charges and contract claims. Deduction of *in rem* charges would be justified even without express permission. The part of assets absorbed by such charges cannot be called an "asset" for accounting purposes.<sup>4</sup> The delimitation of *in rem* charges will be governed by the law of the situs of the assets, in accordance with well established principles of the law of Conflict of Laws.<sup>5</sup>

With regard to the other deductible item: "legitimate contract claims against the former owners of the assets," the situation is more complicated. It was natural to permit the deduction of claims in the accounting for local enemy assets, as most of the signatory countries permit the payment of such claims. Of these countries there is not one, however, which has limited the privilege to "contract claims," as does the Paris Agreement for the accounting. Claims will therefore be paid which cannot be deducted under the Agreement.

The question arises why the Paris Agreement has singled out "contract claims" and refused deduction of other claims. Tort claims are not less legitimate than contract claims. The explanation for the restrictive rule may perhaps lie in the fact that in the countries of the English Common

<sup>1</sup> Text in *Department of State Bulletin*, Vol. 14, No. 343 (Jan. 27, 1946), p. 114; below, Supplement, p. 117.

<sup>2</sup> Agreement, Part I, Art. 6 A.

<sup>3</sup> Same.

<sup>4</sup> See Feilchenfeld, Elrick, and Judd, "Priority Problems in Public Debt Settlements," in *Columbia Law Review*, Vol. 30 (1930), p. 1115, at p. 1120.

<sup>5</sup> Restatement, Conflict of Laws (1934), Sec. 265; Bustamante Code of Private International Law, Secs. 135, 420. See Nadelmann, "Bankruptcy Treaties," in *University of Pennsylvania Law Review*, Vol. 93 (1944), p. 58, at p. 76.

Law, for historical rather than rational reasons, unliquidated tort claims have long been excluded from consideration in the settlement of estates and in bankruptcy distributions.<sup>6</sup> English bankruptcy law still excludes from admission in bankruptcy "unliquidated damages arising otherwise than by reason of a contract, promise, or breach of trust."<sup>7</sup> The American law has freed itself from the old rule. Since 1934 awards under a workman's compensation act are admitted and also tort claims based on negligence when an action has been instituted prior to the filing of the bankruptcy petition.<sup>8</sup> Leading American authors feel that even this does not go far enough.<sup>9</sup> In Civil Law countries tort claims, even when unliquidated, have never been excluded from proof.

Whatever the reason for the limitation of deductible claims to "contract claims," it is now necessary to define "contract claim" for the application of the Paris Agreement. Some of the questions which will arise will lead to substantial difficulties of interpretation. Are quasi-contractual claims "contract claims"? Judgment claims based on an action in tort, are they not deductible? Which is the correct decision when a claim is classified as "contract claim" in one legal system, but not in another? One may think of claims for unjust enrichment, for example. Their classification varies in the different legal systems and even in countries belonging to the same system.<sup>10</sup>

For the purposes of the Agreement, what law determines the meaning of "contract claim"? The law of the situs of the assets does not govern this question. If for "*in rem*" charges the law of the situs is controlling, it is because of the legal relationship between *in rem* charges and assets. No such relationship exists in regard to unsecured claims. For the application of the Agreement, "contract claim" can have but one meaning.

The Agreement is made in two languages, the English and the French. Both texts are equally authentic. The French text uses *droit contractuel* for "contract claim."<sup>11</sup> If one gives "contract claim" the meaning it has in the countries of the common law and *droit contractuel* the meaning prevailing in civil law countries, it will appear that sometimes "contract claim" and sometimes *droit contractuel* has a broader meaning when it comes to the classification of certain types of claims.

<sup>6</sup> Glenn on *Liquidation* (1935), p. 670. <sup>7</sup> English Bankruptcy Act, 1914, Sec. 30.

<sup>8</sup> U. S. Bankruptcy Act of 1898, as amended, Secs. 63 (a) (6) and (7), 52 Stat. 873 (1938); 11 U.S.C.A. Sec. 103 (Supp. 1945). Collier on Bankruptcy, 14th ed., 1941, Vol. III, Sec. 63.25.

<sup>9</sup> So Glenn, at p. 672.

<sup>10</sup> *Bathiyany v. Walford*, 36 Ch. D. 269 (1887); Woodward, *Quasi Contracts* (1913), p. 4; Planiol et Ripert, *Droit Civil Français*, Vol. VII, Secs. 752, 767; Gutteridge and David, "The Doctrine of Unjustified Enrichment", in *Cambridge Law Journal*, Vol. V (1934), p. 204; Gutteridge and Lipstein "Conflicts of Law in Matters of Unjustifiable Enrichment", in *Cambridge Law Journal*, Vol. VII (1939), p. 80.

<sup>11</sup> For the French text, see, *Canada Treaty Series*, 1945, No. 23.

With regard to differences in the meaning of two treaty texts which are both authentic, the Permanent Court of International Justice, in the case of the Mavrommatis Concessions, stated that "where two versions possessing equal authority exist one of which appears to have a wider bearing than the other, it is bound to adopt the more limited interpretation which can be made to harmonize with both versions and which, as far as it goes, is doubtless in accordance with the common intention of the parties."<sup>12</sup> This rule may control when it appears that "contract claim" and *droit contractuel* do not have the same bearing. The issue would be even more involved if it should develop that "contract claim" did not have the same meaning in all English speaking countries and that the law of the other countries differed on the meaning of *droit contractuel* or its equivalent.

The signatories of the Paris Agreement were well aware of possible difficulties in the application of the provisions of the Agreement which deal with external enemy assets. The Agreement itself prescribes the formation of a "Committee of Experts in Matters of Enemy Property Custodianship" with the assigned task to overcome practical difficulties of law and interpretation.<sup>13</sup> Recourse may possibly be had to this Committee for the definition of "contract claim"—*droit contractuel*.

Each Government, under the Agreement, has the obligation to give to the Inter-Allied Reparation Agency created by the Agreement all information for which the Agency asks as to the value of the local assets and the amounts realized by their liquidation.<sup>14</sup> One may expect that the accounting will be required to be made with specification of the deductions, as otherwise no control would be possible.

The formal allocation of German reparation benefits is made by the Assembly of the Inter-Allied Reparation Agency. The Assembly allocates "in conformity with the provisions of the Agreement."<sup>15</sup> Any controversy over the deductibility of a claim would have to be brought before the Assembly, as the deduction of a non-deductible claim would improperly reduce the share of the other countries in reparation benefits. Decisions of the Assembly are taken by majority vote, each Government having one vote.<sup>16</sup>

It is a matter of conjecture whether the accounting for the local enemy assets will lead to differences of consequence. Compared with the amounts involved in the allocation of other reparation items, the question of the deductibility of a claim may appear unimportant. This should not detract, however, from the fact that the rule which limits deductible claims to "contract claims," is an unhappy one. Not founded in any generally recognized

<sup>12</sup> Judgment No. 2 in the Case of the Mavrommatis Palestine Concessions, P.C.I.J., Ser. A, No. 2, p. 19 (1924). See Hyde, *International Law*, Boston, 1945 (2d. ed.), Vol. II, p. 1493.

<sup>13</sup> Agreement, Part I, Art. 6 F.

<sup>14</sup> Part I, Art. 6 B.

<sup>15</sup> Part II, Art. 5.

<sup>16</sup> Part II, Art. 6.

principle of law, the rule is bound to create difficulties. Therefore an effort should be made to obtain acceptance of a better rule for the agreement on reparation from Japan which is still to be concluded.

The Paris Agreement on Reparation from Germany, in declaring deductible "legitimate contract claims against the German former owners of the assets," has made no distinction with respect to the nationality or place of residence of the holders of such claims. At the time of the Agreement this was in accord with the status of the law in the various countries on the payment of claims out of local enemy assets.<sup>17</sup> In the United States, under the Trading with the Enemy Act of 1917, claims may be filed irrespective of nationality or place of residence of the holder of the claim.<sup>18</sup> This principle has now been abandoned in the United States. The recent amendment to the Trading with the Enemy Act provides that debt claims allowable under the Act shall include only those of citizens of the United States and of residents of the United States.<sup>19</sup>

Strong criticism of the exclusion of claims of non-resident friendly aliens can be anticipated, abroad and in the United States, but particularly in the countries signatories of the Paris Agreement. At the Paris Conference a unanimous resolution was adopted promising equal treatment to the nationals of all signatory countries "in the administration of reconstruction or compensation benefits for war damage to property."<sup>20</sup> Whether or not this covers the admission of claims against local enemy assets, the Conference has gone clearly on record in favor of "equality of treatment" in reparation matters. To exclude claims of non-resident creditors from countries signatories of the Agreement, is not in accordance with the spirit of the Resolution.

It may well be doubted that the new law is in the interest of American creditors in general, as they now face the risk of being excluded in distributions abroad as a measure of retaliation. What may be gained here by the exclusion of claims of non-resident friendly aliens, is insignificant. The amount of such claims is less than two per cent of the total amount of claims.<sup>21</sup> Particularly inopportune is the exclusion of claims of creditors from countries which have signed the Paris Agreement, as these claims are deductible under the Agreement.

<sup>17</sup> Rabel, "Situs Problems in Enemy Property Measures", in *Law and Contemporary Problems*, Vol. 11 (1945), p. 118, at p. 132; also *In re Wiskemann*, 92 L. J. Ch. 349 (1923).

<sup>18</sup> Trading with the Enemy Act of October 6, 1917, No. 9 (a), 40 Stat. 411 (1917), 50 U.S.C.A., App. No. 9.

<sup>19</sup> New Section 34 (a) of the Act added by An Act to Amend the First War Powers Act, 1941, Public Law No. 671, 79th Congress, 2d session (August 8, 1945). Drafted before the adoption, at the Paris Conference, of the Resolution on "Equal Treatment". First introduced, as H. R. 5089, Dec. 20, 1945, *Congressional Record*, 79th Congress, First Session, Vol. 91, No. 227, p. 12668.

<sup>20</sup> Unanimous Resolution No. 3, *Department of State Bulletin*, Vol. 14, No. 343 (Jan. 27, 1946), p. 122.

<sup>21</sup> Sen. Rep. No. 1839, 79th Congress, 2d Session (1946), p. 4.

The Resolution on "Equal Treatment" adopted by the Paris Conference, already mentioned, provides:

In view of the fact that there are many special problems of reciprocity related to this principle, it is recognized that in certain cases the actual implementation of the principle cannot be achieved except through special agreements between Signatory Governments.

No guaranty exists, regarding the disposition of local enemy assets, that American creditors will receive their equal share everywhere. Some countries may not permit payment of claims at all, others may give local creditors preferential treatment. Some countries outside the Paris Conference group, as Argentina,<sup>22</sup> still retain in their general law local priority rules.<sup>23</sup> The unconditional admission in the United States of claims of foreign creditors, resident or non-resident, therefore, appears unadvisable. A proper way to deal with the situation, it seems, would be the admission of claims of friendly aliens on a reciprocity basis.

KURT H. NADELMANN \*

#### ARBITRATION BETWEEN THE NETHERLANDS AND UNITED STATES POSTAL ADMINISTRATIONS

A dispute between the Postal Administration of the Netherlands and that of the United States concerning maritime transit rates applicable to mails carried by Dutch steamships in 1920-1923, was recently settled by arbitration.<sup>1</sup> Article 25(1) of the Universal Postal Convention, signed at Madrid on November 30, 1920,<sup>2</sup> provides that "in case of disagreement between two or more members of the Union as to the interpretation of the present Convention, or as to the responsibility imposed upon an Administration by the application of this Convention, the question in dispute is settled by arbitration (*juge ment arbitral*). To that end each of the Administrations concerned chooses another member of the Union which is not directly interested in the matter."<sup>3</sup>

The dispute arose out of the application of contracts made in 1904 and

<sup>22</sup> Bankruptcy Law No. 11.719 of 1933, No. 7.

<sup>23</sup> See Nademann, "Legal Treatment of Foreign and Domestic Creditors," in *Law and Contemporary Problems*, Vol. 11 (1946), p. 696; same, "Once Again: Local Priorities in Bankruptcy", in this JOURNAL, Vol. 38 (1944), p. 470.

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<sup>1</sup> A dispute between the United States and Norway concerning sea transit charges, claimed by the latter for services rendered in the years 1914 to 1919, was settled by arbitration in 1926; see Manley O. Hudson, "American-Norwegian Postal Arbitration," in this JOURNAL, Vol. 20 (1926), p. 534. That award was applied to similar pending disputes with Sweden and Denmark: Henry Reiff, "Enforcement of Multipartite Administrative Treaties in the United States," in this JOURNAL, Vol. 34 (1940), pp. 661, 673.

<sup>2</sup> Text in G. Fr. de Martens, *Nouvel Recueil General de Traites*, 3d ser., T. XV (1926), pp. 722, 737; see Manley O. Hudson, *International Legislation*, Washington, 1931—, Vol. I, p. 520.

<sup>3</sup> The Convention of 1920 was later revised (at Stockholm in 1924; at London in 1929, and at Buenos Aires in 1939). The last version (54 U. S. Stat. at Large, Part 2, p. 2049) embodies in Art. 11 corresponding provisions for the arbitration of disputes.

1909 by the Netherlands Government with two steamship companies for the conveyance of mails from the United States, the Royal Dutch West India Mail Line and the Holland American Line, both subsidized by the Netherlands Administration. The charges due for the conveyance of mail were reckoned according to the real weight of every mail actually carried. The contracts concluded under the regime of the 1906 Convention of Rome were replaced by others in 1922, partly retroactive to 1920 in effect. They stated that the steamship companies had the right to receive the transit charges due to the Netherlands pursuant to the Universal Postal Convention of Madrid of 1920. This Convention provided in Article 3, par. 2, identical with Article 3, par. 2, of the Convention of Rome, that in the absence of any contrary arrangement (*d'noins d'arrangement contraire*) the direct sea conveyance between two countries by means of vessels maintained by one of them is considered as a third service, and that such conveyance is governed by the provisions of Article 4 (transit rates). This Article 4, par. 7, provides that the general liquidation account for transit charges for such conveyance are based on statistics prepared once in every six years during a period of 28 days. The Netherlands Administration did not accept checks paid by the United States Administration in 1922, as they were not based on statistics of May, 1921 but on the real weight of the mail. After the U. S. Administration refused to make additional charges of frs. 962,562.02 for the period of 1920-1923, the Netherlands Administration, by letter of January 3, 1925, proposed that the controversy be settled by arbitration. The parties agreed that charges for the mails conveyed since January 1, 1924, should be reckoned according to the conventional statistics of October-November 1924.

A *compromis d'arbitrage* having been concluded on July 23, 1934, the Swiss and Canadian Postal Administrations were nominated as arbitrators, the first by the Netherlands, the second by the U. S. Postal Administration. The exchange of eight statements by the parties ended in 1937; the examination of the facts of the dispute commenced in 1938, but the continuation thereof was hindered by wartime conditions. An award was rendered in 1945 in favor of the Netherlands Administration to the amount of 100,000 gold francs.<sup>4</sup>

As both the Rome and Madrid Conventions reserved arrangements contrary to the regulation of transit service, the arrangement providing charges based on the real weight of the mail was derogatory to the provisions of the Universal Postal Convention; as the parties had not agreed on the duration of that arrangement, it had consequently no fixed term of validity. In demanding in 1922 the payment of the transit charges on the basis of the statistics prepared according to the provisions of the Convention the Netherlands Administration, in the opinion of the arbitrators, "cancelled the old

<sup>4</sup>The award (in French, with translations into English, German, and Spanish) is published in *L'Union Postale*, Vol. 71 (1946), pp. 11-25.



'contrary agreement' applied by the two parties and for which no term of validity had been specified. By this action the provisions of the Convention, according to which the transit charges are to be reckoned on the basis of statistics, became automatically applicable."

In fixing the amount of the indemnity the arbitrators felt bound to take into account "that the parties had neglected, at their risk and peril, to substitute satisfactory regulations for the system prescribed by the Convention." The parties had not determined details of that arrangement nor had they ever fixed when and how the arrangement should come to an end. "They are consequently bound to bear, at least in part, the consequences of the risk they assumed." In view of the payments already received the arbitrators corrected fairly (*équitablement*) the difference between the actual weights and those based on the statistics, by awarding *ex aequo et bono* 100,000 gold francs to the Netherlands Administration, in full settlement of the dispute submitted to arbitration.

MARTIN DOMKE \*

#### INTER-AMERICAN ACADEMY OF COMPARATIVE AND INTERNATIONAL LAW

The Inter-American Academy of Comparative and International Law will hold its second annual session at Habana, Cuba, February 8-28, 1947. The following courses are scheduled:

Trusts in American Comparative Law, by Dr. Ricardo J. Alfaro, Minister of Foreign Affairs of Panama.

Sources of International Law, by Mr. George A. Finch, President of the Academy.

Banking Law, by Lcdo. Germán Fernández del Castillo, Rector of the Free Law School of Mexico.

Principles of the Common Law, by Mr. Phanor J. Eder, of the New York Bar.

Principles of Latin-American Civil Law, by Dr. Luis Machado, Executive Director of the International Bank of Reconstruction and Development.

Formation of American Nationalities, by Dr. Víctor A. Belaúnde, Professor of the University of San Marcos, Lima.

Evolution of the Idea and Policy of Continental Solidarity and Defense, by Senator Alberto Ulloa, member of the Bar of Lima.

It is also expected that Judge Manley O. Hudson will give a course on the International Court of Justice.

The courses will be delivered from 9:00 A.M. until noon each weekday in classes of one hour each. Those by Dr. Machado, Judge Hudson, and Mr. Finch will be delivered in English; the others in Spanish. On several afternoons each week round tables will be conducted on topics of public and private law. Selected leaders will conduct the round tables and registered students of the Academy will be eligible to participate.

\* International Vice President and Legal Research Director, American Arbitration Association.

Admission to the Academy is open to holders of degrees of LL.B., A.B., or B.S. from colleges or universities in the United States and Canada, or with equivalent training in colleges or universities of any of the Latin American countries.

The Academy was inaugurated at Habana in January, 1945, by the Cuban Government. The establishment of an American Academy of International Law was recommended in a resolution adopted by the Inter-American Conference for the Maintenance of Peace at Buenos Aires on December 16, 1936. Steps toward carrying out this recommendation were initiated by Dr. Antonio S. de Bustamante, of Habana, and the late Dr. James Brown Scott. The establishment of the present Academy was recommended by the Inter-American Bar Association at its first conference at Habana in 1941. It is intended that the Academy shall hold annual sessions. The second session was planned to be held early in 1946 but had to be postponed because of transportation and other difficulties. Definite arrangements have now been made to hold the second session in February.

The registration fee is \$25.00. Registration may be made by mail from December 1, 1946, to January 31, 1947, and in person from January 15 to January 31, 1947. The registration office is in the Habana Bar Association, Lamparilla 114, Habana, Cuba. Tuition scholarships are available for award by the Inter-American Bar Association, 1129 Vermont Ave., Washington 5, D. C., and the Carnegie Endowment for International Peace, 700 Jackson Place, N.W., Washington 6, D. C. The Endowment is cooperating with the Cuban Government in holding the second session.

G. A. F.

#### LAWYERS OF THE AMERICAS WILL MEET IN LIMA

Leaders of the bar of this hemisphere will attend the Fifth Conference of the Inter-American Bar Association at Lima, Peru, on April 6-18, 1947. This organization has held four previous highly successful meetings: in Havana (1941), Rio de Janeiro (1943), Mexico City (1944), and Santiago (1945). Although considerable difficulties existed on account of war conditions affecting communication and transportation, over five hundred delegates assembled at the opening session of the Santiago Conference last year, including over fifty lawyers from the United States. It is expected that a greater number of attorneys will participate in the Lima Conference since passenger ships will now be available for transportation, and the rates of airlines have been considerably reduced and their equipment greatly increased.

The Fifth Conference will function through the following seventeen Committees or Sections: 1. Committee on Immigration, Nationality and Naturalization; 2. Committee on Taxation; 3. Committee on Administrative Law and Procedure; 4. Committee on Commercial Treaties and Customs Law; Sub-Committee on Commercial Treaties; Sub-Committee on Customs Law; 5. Committee on National Centers of Legal Documentation

and Bibliographical Indices of Law Materials; 6. Committee on Comparative Constitutional Law; 7. Committee on Communications; 8. Committee on Industrial, Economic, and Social Legislation; 9. Committee on Penal Law and Procedure; 10. Committee on Territorial Waters and Ocean Fisheries; 11. Committee on Admiralty Law; 12. Committee on Activities of Lawyers, Associations; 13. Section on Intellectual and Industrial Property; 16. Section on Municipal Law; 17. Committee on Post-War Juridical Problems.

The *Colegio de Abogados de Lima* has also arranged an interesting program of entertainment, including receptions by the Judges of the Supreme Court and other officials, visits to points of historic interest, and a trip to the region occupied by the Incas.

As the American Society of International Law is a member of the IABA it is entitled to send delegates to the Conference. Persons interested in attending the meeting should communicate with Charles Cheney Hyde, President of the Society. Additional information may be obtained by communicating with William Roy Vallance, Secretary-General, 314 Portland Building, 1129 Vermont Avenue, N. W., Washington, D. C.

WILLIAM ROY VALLANCE

#### MISCELLANEOUS NOTES

A meeting of jurists interested in criminal law was held in Nuremberg on May 18 last to consider establishment of an international organization. The meeting was opened by Professor Donnedieu de Vabres, of France, and presided over by Mr. Francis Biddle, of the United States, in the absence of Count Carton de Wiart, of Belgium, the President of the International Association of Penal Law. Mr. V. V. Pella, Secretary-General of the International Bureau for the Unification of Criminal Law, was also present. It was felt that the organizations existing in the field failed any longer to meet the needs of the time; there was, however, no question for the moment of suppressing the existing organizations, which might profit from the new developments. It was desired to continue the collaboration of criminal lawyers begun at Nuremberg and compare experiences of criminal lawyers from all over the world, Anglo-Saxon and Slav as well as Latin. The organization to be established should be unofficial in character and should probably have its seat in Paris. The question of a Central Committee and National Committees was discussed, the question of the publication of a Review, the holding of a periodic Congress, and the preparation of codes of criminal law and procedure. A Commission was created to study the whole problem and perhaps draft a Statute for the organization.

Word has come that the Italian Institute for Legislative Studies in Rome has succeeded in maintaining its activities and something of its normal program throughout the war and is prepared to carry forward in the future the work carried on during the past twenty years. Former collaborators are urged to complete any studies undertaken and transmit them to the

Egypt, provided a military alliance were set up. Text of British statement: *N. Y. T.*, May 8, 1946, pp. 1, 2; *London Times*, May 8, 1946, p. 4. Treaty negotiations opened in Cairo, May 9. *N. Y. T.*, May 10, 1946, p. 11; *London Times*, May 10, 1946, p. 4. Egypt presented British mission with a draft treaty on July 8. Summary of draft: *London Times*, July 10, 1946, p. 5. Discussion of provisions: *N. Y. T.*, July 22, 1946, p. 8. The Union Jack was hauled down and the Egyptian flag was raised over the Cairo Citadel marking the end of a 64-year British occupation. *N. Y. T.*, Aug. 10, 1946, p. 5.

10-August 14 PALESTINE. Arab League handed *note-memoire* to U. S. demanding the right to be heard on the recommendations of the Anglo-American Committee of Inquiry. *N. Y. T.*, May 17, 1946, p. 1. Text: p. 6. U. S. note of May 17 promised consultation. *N. Y. T.*, May 18, 1946, p. 9. Text: *D. S. B.*, May 26, 1946, p. 917. On May 20 the U. S. and Great Britain requested Arabs and Jews to submit by June 20 their formal views on the Committee's report. *N. Y. T.*, May 21, 1946, p. 12. Text of the request: *N. Y. T.*, May 22, 1946, p. 8; *D. S. B.*, June 2, 1946, pp. 956-957. Arab Higher Committee's memorandum to Great Britain and the U. S. urged withdrawal of all foreign troops, establishment of an Arab state in Palestine, abrogation of the League of Nations mandate over Palestine, etc. *London Times*, May 25, 1946, p. 4. On June 11 President Truman appointed a Cabinet Committee on Palestine and Related Problems, composed of the Secretaries of State, War and Treasury. Text of Executive Order 9735 establishing the Committee: *D. S. B.*, June 23, 1946, pp. 1089-1090; 11 *Federal Register* 6481. Foreign Minister Bevin rejected June 12 the Committee of Inquiry's proposal for immediate immigration of 100,000 Jews. *N. Y. T.*, June 13, 1946, p. 1. Arab League sent note to Great Britain and the United States challenging the right of the U. S. to take action in Palestine prior to presentation of the case to the United Nations. Summary: *London Times*, July 9, 1946, p. 4. By notes of June 19 and 25 respectively, the Iraqi and Egyptian Governments demanded that the British install a new régime in Palestine and abide by terms of the British White Paper of 1939. The texts of these notes were sent to the United Nations Secretariat for communication to members and were released July 23. *N. Y. T.*, July 24, 1946, pp. 1, 4. Texts: p. 4. Experts, representing the U. S. Cabinet Committee on Palestine arrived in London July 12 for discussions which closed July 27. *London Times*, July 13, 1946, p. 4; *N. Y. T.*, July 28, 1946, p. 29. U. S. members of the group: *D. S. B.*, July 2, 1946, p. 107. British White Paper accusing Jewish organizations of instigating recent violence in Palestine was presented to Parliament July 24. *N. Y. T.*, July 25, 1946, pp. 1, 9. Text: p. 8. Anglo-American Cabinet Committee's report was understood to recommend a federalist constitution for the country, with Arab and Jewish provinces. *N. Y. T.*, July 26, 1946, pp. 1, 4. Map: p. 1; and July 28, 1946, sect. 4, p. 4. Arab Higher Executive in a communiqué stated its refusal to participate in a conference where the Zionists were represented and announced its opposition to a partition of Palestine. *N. Y. T.*, July 28, 1946, p. 1. The White House announced July 31 that the members of the American group had been recalled to Washington for consultation. *London Times*, Aug. 1, 1946, p. 4. They will probably return to London for further work. *N. Y. T.*, Aug. 1, 1946, p. 1. Text of statement: pp. 1, 10. On July 31 the British Government announced its acceptance of the recommendations of the Anglo-American expert delegations. *London Times*, Aug. 1, 1946, p. 4. Summary of recommendations p. 4. It was announced Aug. 2 that Saudi Arabia, Trans-Jordan, Syria and Lebanon had accepted the British invitation to the London conference on Palestine. *N. Y. T.*, Aug. 3, 1946, p. 8; *London Times*, Aug. 3, 1946, p. 4. Jewish Agency Executive rejected the Anglo-

- American proposals for dividing Palestine. *N. Y. T.*, Aug. 6, 1946, p. 1; *London Times*, Aug. 6, 1946, p. 4. Vice President of Arab Higher Executive rejected invitation to a conference in which the basis of discussion would be the proposed federal plan. *London Times*, Aug. 9, 1946, p. 3. British Government announced Aug. 12 its decision to bar all "illegal" immigration to Palestine and to trans-ship to Cyprus those entering against regulations. *London Times*, Aug. 13, 1946, p. 4. Seven Arab League Foreign Ministers announced acceptance of invitation to a conference in London on the future of Palestine. *N. Y. T.*, Aug. 14, 1946, p. 2. Maps showing areas of partition proposed by Anglo-American Cabinet Committee and Jewish agency for Palestine: *N. Y. T.*, Aug. 18, 1946, sect. 4, p. 5.
- 16 ALIEN PROPERTY. President Truman issued Executive Order designating the Alien Property Custodian to administer the return of property seized under the Trading with the Enemy Act, as amended, and to allow restitution on condition that the return is in the interest of the United States. *N. Y. T.*, May 17, 1946, p. 13.
- 16 BELGIUM—NETHERLANDS. Signed cultural relations agreement at The Hague. *N. Y. T.*, May 17, 1946, p. 6.
- 16/June 1 REFUGEES & DISPLACED PERSONS. Russian member of the United Nations Special Committee on Refugees and Displaced Persons stated that his country would probably not join a recommended new refugee organization unless the other countries agreed to a census of displaced persons. *N. Y. T.*, May 17, 1946, p. 5. On June 1 the Committee issued a report in which the term refugee was defined. *N. Y. T.*, June 2, 1946, p. 33.
- 16-July 24 UNITED NATIONS. Security Council. Adopted May 16 certain rules of procedure. *N. Y. T.*, May 17, 1946, p. 1. Text: *D. S. B.*, June 2, 1946, pp. 942-945. On May 20, Mr. Ala of Iran notified the Council that his Government had been unable to investigate conditions in Azerbaijan. *N. Y. T.*, May 21, 1946, p. 1. Text of letter: p. 6. No trace of Russian troops or equipment in Iran was reported by that country's delegate May 21. *N. Y. T.*, May 22, 1946, p. 1. Text of letter: p. 2. Voted May 22 to keep the Iranian case on the agenda indefinitely. *N. Y. T.*, May 23, 1946, p. 1. Mr. Lie made public on May 28 the Siamese appeal for United Nations assistance in re-establishing peace between France and Siam. *N. Y. T.*, May 29, 1946, p. 1. Text: p. 8. The Subcommission's report on the Franco Government in Spain was made public June 1. Text: *N. Y. T.*, June 2, 1946, p. 32. The resignation of Edward R. Stettinius was accepted by President Truman June 3. *N. Y. T.*, June 4, 1946, p. 9; *D. S. B.*, June 9, 1946, p. 989. Senator Warren R. Austin, named to succeed Mr. Stettinius, will take office at the expiration of his term in the Senate. *N. Y. T.*, June 6, 1946, p. 1. The Spanish Government's declaration denied United Nations' jurisdiction in Spain's internal affairs, pp. 1, 2. Voted June 6 to permit the Secretary General to intervene in any Council debate. *N. Y. T.*, June 7, 1946, pp. 1, 9. Voted June 10 to permit Canada to participate without vote in the Council's deliberations on international control of atomic energy. Mr. Gromyko tried to veto this but was overruled on the grounds that it was a procedural question. *N. Y. T.*, June 11, 1946, pp. 1, 3. Russia voted June 18 against the proposal to send the Spanish question to the General Assembly at its next session. *N. Y. T.*, June 19, 1946, p. 1. Adopted resolution June 26 keeping the question of the Franco régime on the agenda. The Chairman ruled that all five Great Powers must consent to the Council's vote that a matter was not subject to the veto; thus deciding whether the subject under discussion was a matter of "procedure" or "substance." *N. Y. T.*, June 27, 1946, pp. 1, 3. Voted to extend by 20 days

from July 15 the period in which new applications for membership may be considered. This extension is made possible by the postponement of the General Assembly from Sept. 3 to 23. *N. Y. T.*, July 25, 1946, p. 3.

- 16-August 12 INDIA. British Cabinet Mission to India prepared proposal for an independent union of all India, with common conduct of foreign affairs, defense and communications, with the federal government having tax authority in those fields. Local governmental affairs would be left to the individual states. *N. Y. T.*, May 17, 1946, p. 1. Text of White Paper: p. 2; *London Times*, May 17, 1946, p. 3; *Cmd.* 6821. Mr. Jinnah of the Moslem League issued statement May 22, expressing doubts of plan. *N. Y. T.*, May 23, 1946, p. 2. Moslem League's Council accepted plan June 6. *N. Y. T.*, June 7, 1946, p. 1. Executive Committee of the Congress Party rejected June 13 the plan for an interim government. *London Times*, June 14, 1946, p. 4; *N. Y. T.*, June 15, 1946, pp. 1, 8. Nominations of members of an interim government were presented by Great Britain June 16. Text of British Viceroy's and Cabinet Mission's statement: *N. Y. T.*, June 17, 1946, p. 8; Govt. of India. Information Services (Washington) [Release] June 18, 1946, pp. 1-2. Congress Party rejected June 24 British proposals for a temporary government pending the drafting of a new constitution. *N. Y. T.*, June 25, 1946, p. 1. Moslem League accepted interim government plan June 25. *London Times*, June 26, 1946, p. 4. Text of official statement on plans for the interval preceding the interim government: *London Times*, June 27, 1946, p. 4. The Viceroy named a "caretaker" government of eight men to serve on his Executive Council. Members: *N. Y. T.*, June 30, 1946, p. 14; *London Times*, July 1, 1946, p. 4. Moslem League announced July 9 it was preparing to re-examine the British long-term plan which it had previously accepted. *N. Y. T.*, July 10, 1946, p. 4. British Government issued July 10 two White Papers on the negotiations. *N. Y. T.*, July 11, 1946, p. 3; *London Times*, July 11, 1946, p. 3. Texts: *Cmd.* 6861 and 6862. Chart of machinery and procedure to formulate new constitution: *D. S. B.*, July 7, 1946, pp. 22-23. On July 29 the Moslem League, reversing its decision of June 6, refused the Cabinet Mission's plan, and set up a committee to organize the Moslems for a struggle to be launched "as and where necessary." *London Times*, July 30, 1946, p. 4; *N. Y. T.*, July 30, 1946, pp. 1, 8. On Aug. 10 the Indian Party Working Committee re-affirmed its acceptance of the proposals and appealed to Moslems to cooperate in making the Constituent Assembly a success. *N. Y. T.*, Aug. 11, 1946, p. 16. Viceroy Lord Wavell announced that the All-India Congress Party had accepted an invitation to form a government to rule India until a constitution has been drawn up. *London Times*, Aug. 13, 1946, p. 4.
- 17 ARGENTINA—GREAT BRITAIN. Signed air transport agreement. Discussion of terms: *N. Y. T.*, July 14, 1946, p. 11. Text, with annexed exchange of notes: *Argentina No. 1* (1946), *Cmd.* 6348.
- 17/28 GERMAN OCCUPATION. Coordinating Committee of the Allied Control Authority appointed a four-power disarmament commission to visit each of the four zones to inspect the progress of German disarmament. *N. Y. T.*, May 18, 1946, p. 6. The Commission failed to reach agreement. *C. I. E. D.*, May 27/June 9, 1946, p. 316.
- 17-July 22 INTERNATIONAL MILITARY TRIBUNAL (Far East). Dismissed all defense motions attacking jurisdiction of the Court. *N. Y. T.*, May 17, 1946, p. 3. On June 4 the Allied Chief Prosecutor began his opening statement. *N. Y. T.*, June 4, 1946, p. 17. The trial of Premier Tojo and 25 other Japanese leaders accused of being war-makers opened in Tokyo June 13. *N. Y. T.*, June 13, 1946, p. 8.

- Resignation of John P. Higgins (U. S.) was announced June 25. *N. Y. T.*, June 26, 1946, p. 12. Myron C. Cramer was named to succeed Mr. Higgins July 11. *N. Y. T.*, July 12, 1946, p. 9. He was seated July 22. *N. Y. T.*, July 23, 1946, p. 4.
- 20 UNITED STATES—YUGOSLAVIA. U. S. note, replying to Yugoslav note of March 27, which protested Allied administration of Venezia Giulia, called attention to uncoöperative attitude of the Yugoslav Government in specific and general instances. Text: *D. S. B.*, Sept. 1, 1946, pp. 409-411; *N. Y. T.*, Aug. 20, 1946, p. 4.
- 20-23 BRITISH COMMONWEALTH CONFERENCE. Resumed discussions May 20 after a fortnight's recess. *N. Y. T.*, May 21, 1946, p. 4. Discussed atomic energy. *London Times*, May 23, 1946, p. 4. Closed May 23. *N. Y. T.*, May 24, 1946, p. 11. Text of official announcement issued after the final session: *London Times*, May 24, 1946, p. 4.
- 20-27 FOOD CONFERENCE. Met in Washington under auspices of the U. N. Food & Agriculture Organization, with 18 nations represented. Herbert Hoover advocated a one-man administration to direct famine relief on Sept. 1, under auspices of the F. A. O. or U. N. Security Council. *N. Y. T.*, May 21, 1946, p. 1. Text of President Truman's message: p. 10. On May 27 it ordered established within 15 days a 20-nation combined food board to control the world's food. *N. Y. T.*, May 28, 1946, p. 5.
- 21-31 AGRICULTURE CONFERENCE. 31 nations were represented at a meeting of the International Conference of Agricultural Producers in London, working to establish an international federation of food producers. Objectives: *London Times*, May 22, 1946, p. 4; *N. Y. T.*, May 22, 1946, p. 12. Voted May 31 to form a permanent federation, and the meeting resolved itself into the first meeting of the International Federation of Agricultural Producers, electing James Turner of the United Kingdom as President. *N. Y. T.*, June 1, 1946, p. 6.
- 21-June 7. INTERNATIONAL CIVIL AVIATION ORGANIZATION (Provisional). More than 40 nations were represented at the opening session of the Assembly in Montreal. U. S. urged filling the place on the Council which unofficially had been reserved for Russia. *N. Y. T.*, May 22, 1946, p. 4. M. de Brouckère of Belgium was elected president of the interim assembly. Elected 5 vice presidents. Approved Italian request for observers. Received report of Air Transport Committee. *London Times*, May 24, 1946, p. 3. U. S. delegation: *D. S. B.*, May 26, 1946, pp. 886-887. Voted June 6 to retain Montreal as permanent headquarters and admitted Ireland to the Council. *N. Y. T.*, June 7, 1946, p. 12. Adjourned June 7. *N. Y. T.*, June 8, 1946, p. 2. Summary of conference: *C. A. A. Journal* (Washington) July 15, 1946, p. 85.
- 21-June 27 GERMAN PROPERTY. U. S. Department of State announced May 21 general agreement by which the U. S., Great Britain and France would share division of German holdings in Switzerland and of gold received by Switzerland from Germany. *N. Y. T.*, May 22, 1946, p. 13; *D. S. E.*, June 2, 1946, p. 955. On May 26 France, Great Britain, Switzerland and the U. S. signed agreement in Washington giving half the Nazi German assets in Switzerland to the Allies and more than \$58,000,000 gold looted from occupied countries and stored in Switzerland. Summary: *N. Y. T.*, May 27, 1946, p. 30. The Swiss National Council and Council of States ratified the agreement on June 26 and 27. *N. Y. T.*, June 27, 1946, p. 5; June 28, p. 11. Text of agreement: *D. S. B.*, June 30, 1946, pp. 1121-1124.
- 25-June 21 UNITED NATIONS. Economic and Social Council. Met in New York. *N. Y. T.*, May 26, 1946, p. 1. Members: p. 12. Voted June 17 that members of

- all Council commissions should sit as governmental representatives. *N. Y. T.*, June 18, 1946, p. 1. Voted June 18 to extend international relief to Jews from Germany and Austria, also to foreigners and stateless persons who were compelled to go to those two countries. *N. Y. T.*, June 19, 1946, p. 3. Adopted June 20 a draft constitution of the International Refugee Organization to be set up to assist Europe's and Asia's refugees. *N. Y. T.*, June 21, 1946, p. 4. Rejected proposal June 21 to give the privileges of a non-voting member to the World Federation of Trade Unions. *N. Y. T.*, June 22, 1946, p. 6.
- 26-August 26 FRANCE—SIAM. French troops were reported May 26 to have invaded Siam. *N. Y. T.*, May 27, 1946, pp. 1, 4. French communiqué on May 30 denied aggression, but admitted some troops had crossed the line while pursuing "rebels." *N. Y. T.*, May 31, 1946, p. 6. Text of French version of the border incident: *London Times*, May 29, 1946, p. 3. In a memorandum to the United Nations on May 31, Siam accused French forces from Indo-China of looting. *N. Y. T.*, June 1, 1946, p. 5. On July 15 Siam asked the Security Council to intervene in the dispute. *London Times* July 17 1946, p. 3; *N. Y. T.*, July 16, 1946, p. 2. Text of Siamese note: p. 2. Announcement made August 7 that France "has suggested that their dispute be adjudicated by the International Court of Justice." Siam has not indicated whether this will be satisfactory. *N. Y. T.*, Aug. 7, 1946, p. 13. France notified the U. S. on August 26 of its decision to withdraw offer of arbitration by the International Court of Justice. The U. S. had been acting as intermediary in the matter. France also announced that any recourse by Siam to the Security Council would be unacceptable. *N. Y. T.*, Aug. 27, 1946, p. 12.
- 27-June 17 RUMANIA. Great Britain and the United States handed parallel notes to Rumania accusing the Government of "a form of censorship" which prevented prompt and full distribution of Secretary Byrnes' and Senator Vandenberg's addresses, of failure to call regular Cabinet meetings, of government monopoly of broadcasting facilities, etc. *N. Y. T.*, May 28, 1946, p. 10; *London Times*, June 1, 1946, p. 4. Text of U. S. note: *N. Y. T.*, June 1, 1946, p. 6; *D. S. B.*, June 9, 1946, pp. 1007-1008. Text of Rumanian reply, made public June 7: *N. Y. T.*, June 8, 1946, p. 8; *D. S. B.*, June 16, 1946, p. 1048. New Anglo-American notes were presented June 14. *N. Y. T.*, June 16, 1946, p. 8. Texts: June 18, p. 6. U. S. note: *D. S. B.*, June 30, 1946, p. 1125. British note: *London Times*, June 18, 1946, p. 3. Rumanian note of June 17 challenged U. S. and British right to question conditions in Rumania independently of Russia. *N. Y. T.*, June 20, 1946, p. 11. Text: *D. S. B.*, June 30, 1946, pp. 1125.
- 28 PHILIPPINE COMMONWEALTH. Manuel A. Roxas took office as President. *N. Y. T.*, May 28, 1946, p. 8.
- 28-August 1 FRANCE—UNITED STATES. Signed agreements providing for over-all settlement of their war accounts and an advance of additional credits to France of nearly 1½ billion dollars. *N. Y. T.*, May 29, 1946, pp. 1, 13. Texts: p. 12; *D. S. B.*, June 9, 1946, pp. 994-1000. Erratum: *D. S. B.*, June 30, 1946, pp. 1127-1128. The French Constituent Assembly ratified the agreements August 1st. *N. Y. T.*, Aug. 2, 1946, p. 3.
- 28-30 ARAB RULERS. Seven Arab kings and presidents met at Cairo. *N. Y. T.*, May 29, 1946, p. 11. The 2-day meeting closed May 29. The day after adjournment a communiqué was issued which pledged support of the United Nations, approved evacuation of British forces from Egypt and achievement of Egyptian independence, and warned that Jewish immigration into Palestine might create bad consequences. *N. Y. T.*, May 31, 1946, pp. 1, 9; *London Times*, May 31, 1946, p. 4.



- 29 **ALIEN PROPERTY.** The State and Treasury Departments and the Alien Property Custodian announced that property in the U. S. may now be released to refugees from Germany and Japan, who are not residing in Germany, Japan, Italy, Rumania, Hungary or Bulgaria. *D. S. E.*, June 9, 1946, p. 1011.
- 29 **JAPANESE OCCUPATION.** Allied Council for Japan took up the study of rural land reforms, disposal of Government property and relations of Japanese labor unions with foreign unions. *N. Y. T.*, May 30, 1946, p. 16.
- 30 **UNITED NATIONS—INTERNATIONAL LABOR ORGANIZATION.** Signed draft agreement which would make the I. L. O. a specialized agency of the United Nations. The agreement requires approval of the United Nations General Assembly and the International Labor Conference. *N. Y. T.*, May 31, 1946, p. 7.

#### June, 1946

- 1-22 **COPYRIGHT CONFERENCE.** Inter-American Conference of Experts on Copyright was held in Washington. Signed convention on the rights of the author in literary, scientific and artistic works. Spanish texts of acts and documents: P. A. U. *Serie sobre Congresos y Conferencias* No. 50 (Spanish series).
- 5 **CANADA—GREAT BRITAIN.** Signed agreements in London for the avoidance of double taxation and the prevention of fiscal evasion (1) with respect to taxes on income, and (2) with respect to duties on the estates of deceased persons. Texts: Canada. *Treaty Series*, 1946, Nos. 17-18.
- 6/July 25 **GREAT BRITAIN—UNITED STATES.** Signed protocol at Washington modifying the convention of Apr. 16, 1945 regarding avoidance of double taxation with respect to taxes on income. *D. S. B.*, June 16, 1946, p. 1052; *London Times*, June 12, 1946, p. 3. Text of protocol: *D. S. B.*, June 23, 1946, p. 1088; *Cong. Rec.* (daily) June 11, 1946, p. 6739; *U. S. No. 1* (1946), *Cmd.* 6859. Exchanged ratifications July 25 at Washington of the convention concerning taxes on income (Apr. 16, 1945) and its protocol (June 6, 1946), and of the convention concerning taxes on estates of deceased persons (Apr. 16, 1945) *D. S. B.*, Aug. 4, 1946, p. 238.
- 8-July 6 **ARAB LEAGUE.** Extraordinary session opened at Bludan, Syria, on June 8. The Grand Mufti, it was announced, had quit France. *N. Y. T.*, June 9, 1946, p. 23. Adopted June 13 resolutions threatening to arm Arabs unless Palestinian Jews were disarmed by the British and adopted a 10-point program for Palestine. *N. Y. T.*, June 14, 1946, p. 6. Ordered dissolution on June 12 of the Arab Higher Committee, and Higher Front (founded June 3) and approved an Executive Committee with the Grand Mufti as its spiritual leader. *N. Y. T.*, June 13, 1946, p. 5; *C. I. E. D.*, June 10/25, 1946, p. 359.
- 10/16 **SIAM.** King Ananda Mahidol was found dead. His younger brother was named to succeed him. *N. Y. T.*, June 10, 1946, p. 1. Parliament named on June 16 a permanent two-man regency council. *N. Y. T.*, June 16, 1946, p. 8.
- 11 **FRANCE—UNITED STATES.** State Department announced the drafting of a new treaty for the avoidance of double taxation on incomes. *N. Y. T.*, June 13, 1946, p. 2. Texts of notes exchanged May 6 and 31: *D. S. B.*, July 7, 1946, pp. 40-42.
- 11-13 **ITALY.** Results of the referendum [June 2] on the future of the government were proclaimed June 11. *London Times*, June 11, 1946, p. 4. The Council of Ministers in an order of the day June 12 authorized Premier Alcide de Gasperi to assume the powers of provisional Chief of State. *N. Y. T.*, June 13, 1946, p. 2. King Humbert departed for Portugal June 13 after signing a proclamation alleging

reserved the right to defy the law in the Russian zone. *N. Y. T.*, Aug. 10, 1946, p. 1. Russian commander in Austria issued statement that British and American support of the Austrian nationalization law was a breach of the agreements reached at Yalta and Berlin. *N. Y. T.*, Aug. 11, 1946, p. 37.

- 19-July 22 HEALTH CONFERENCE. Met in New York. *N. Y. T.*, June 20, 1946, p. 6. Chose Dr. T. C. Parran as President. Chinese delegate urged opening membership to all nations. *N. Y. T.*, June 21, 1946, p. 4. U. S. delegation: *D. S. B.*, June 23, 1946, pp. 1076-1077. Voted July 2 that the Pan American Sanitary Bureau would be gradually integrated into the new world health organization. *N. Y. T.*, July 3, 1946, p. 4. Voted July 10 that the proposed world health organization should have extensive regulatory powers. *N. Y. T.*, July 11, 1946, p. 6. Elected members of the Interim Commission of the World Health Organization. *N. Y. T.*, July 19, 1946, p. 6. 61 nations signed the constitution of the World Health Organization on July 22. Only the British and Chinese signatures are not subject to ratification. *N. Y. T.*, July 23, 1946, p. 9; *United Nations Weekly Bulletin* (N. Y.) Aug. 3, 1946, p. 4. Text: *D. S. B.*, Aug. 4, 1946, p. 211.
- 20 FOOD. International Emergency Food Council held first meeting in Washington. 19 nations have accepted membership in addition to Argentina which did not send credentials in time for its representative to participate. The new group is a successor to the Combined Food Board, a war-time agency composed of Great Britain, Canada and the United States. *N. Y. T.*, June 21, 1946, p. 3. Elected as President Dennis A. Fitzgerald of the U. S. *N. Y. T.*, June 22, 1946, p. 2. Brief summary of the meeting: *F. A. O. Information Service Bulletin* (Washington) Aug. 5, 1946, pp. 1-2. List of accepted members as of Aug. 9: *D. S. B.*, Aug. 25, 1946, p. 363.
- 21-July 11 JAPAN. U. S. Department of State made public a draft treaty on the disarmament and demilitarization of Japan. Text: *D. S. B.*, June 30, 1946, pp. 1113-1114; *N. Y. T.*, June 22, 1946, p. 3. The State Department announced July 11 receipt of favorable replies from Great Britain and China concerning the draft treaty, and stated that no reply had been received from Russia. *London Times*, July 13, 1946, p. 3; *C. I. E. D.*, July 8/21, 1946, p. 423.
- 22-August 14 CHINA. Three delegates, negotiating with General George C. Marshall on peace moves, met for the first time at Nanking. *London Times*, June 24, 1946, p. 3. On July 22 Mme. Sun Yat-sen, in a message to Secretary of State Byrnes and other government and labor leaders and the press, asked that the U. S. withdraw its forces and aid to China until a representative government is established there. *London Times*, July 23, 1946, p. 3; *N. Y. T.*, July 23, 1946, pp. 1, 5. Excerpts: p. 5. On July 27 the Chinese Minister of Information rejected a proposal of General Chou En-lai for an unconditional halt to the spreading warfare in China "because it would maintain present chaotic conditions." *N. Y. T.*, July 28, 1946, pp. 1, 24; *London Times*, July 29, 1946, p. 3. On August 10 General Marshall and Ambassador Stuart issued statement admitting failure to find peaceful settlement of differences between Chinese Government and the Communists. *N. Y. T.*, Aug. 11, 1946, pp. 1, 13; *London Times*, Aug. 12, 1946, p. 3. Text: *D. S. B.*, Aug. 25, 1946, p. 384. Text of Generalissimo Chiang's message of August 14 to the people urging national unity: *N. Y. T.*, Aug. 14, 1946, p. 12.
- 24 GREAT BRITAIN-POLAND (National Unity Govt.). Signed agreement for the settlement of the outstanding debts to Great Britain and the return of Polish gold stored in Great Britain. *N. Y. T.*, June 25, 1946, p. 7; *London Times*, June 25, 1946, p. 3. Text: *Po. and No. 1* (1946), *Cmd.* 6864.

- 24 UNITED MARITIME CONSULTATIVE COUNCIL. Closed its first session in Amsterdam. Summary of action, list of countries represented, etc.: *D. S. B.*, July 14, 1946, pp. 64-65.

26/August 9 POLAND (National Unity Govt.)—UNITED STATES. U. S. Department of State directed June 26 the restoration of the 50 million dollar credit arrangement, originally granted on Apr. 24, for the purchase of U. S. surplus property abroad. The additional credit of 40 million dollars previously agreed upon was not reinstituted however. *N. Y. T.*, June 27, 1946, p. 5. On Aug. 9 the U. S. unfroze the 40 million dollar credit after receiving the texts of hitherto secret Polish trade agreements with Russia, Hungary, Rumania, Sweden, Denmark and Norway. *N. Y. T.*, Aug. 10, 1946, p. 4; *D. S. B.*, Aug. 18, 1946, p. 335.

#### July, 1946

1-August 10 GERMAN OCCUPATION. French Government announced proposals for the future of Germany. Summary: *C. I. E. D.*, June 24/July 7, 1946, pp. 375-376. British Government decided July 16 to begin discussions on economic coöperation between British and American zones. *N. Y. T.*, July 17, 1946, p. 5. British zone was reorganized into a single district in its political structure. *London Times*, July 18, 1946, p. 3. General McNarney told the Allied Control Council that the United States would join its zone of Germany with any or all of the other zones to form an economic unit. *N. Y. T.*, July 21, 1946, p. 21. It was announced July 21 that France does not accept the proposals for the economic unification of Germany made by the U. S. because she wishes the Ruhr and west bank of the Rhine taken from Germany. *N. Y. T.*, July 22, 1946, p. 2. Summary of the French plan for internationalization of the Ruhr: *London Times*, July 22, 1946, p. 3. French military governor in Germany announced on July 22 the incorporation of 79 Rhineland districts into the Saar territory. *N. Y. T.*, July 23, 1946, p. 3; *London Times*, July 24, 1946, p. 3. M. S. Szymczak was appointed July 24 to be U. S. director in charge of rehabilitation of the German economy. *N. Y. T.*, July 25, 1946, p. 6. The Russian representative on the Control Council judged the Anglo-American plan for economic merging of their zones "unwise" and recommended that the Council appoint a 4-Power commission to investigate the question of economic unity of the zones. *N. Y. T.*, July 31, 1946, p. 14. Summary and excerpts of American plan, released on July 30: *N. Y. T.*, Aug. 1, 1946, p. 6. Formal acceptance of U. S. offer of economic collaboration was announced by the British representative on the Control Council on July 30. *N. Y. T.*, July 31, 1946, p. 14. Text of British statement of August 8 of "principles" essential for the proper carrying out of the Potsdam agreement as far as German economic unity and reparations are concerned: *London Times*, Aug. 9, 1946, p. 3. France rejected American proposal, and offered a compromise plan Aug. 10. *N. Y. T.*, Aug. 11, 1946, pp. 1, 37.

1/25 ATOMIC BOMB. U. S. Joint Task Force dropped July 1 on Bikini atoll in the Pacific Ocean the 4th bomb to be exploded. Texts of preliminary reports on the test, by Evaluation Board of Joint Chiefs of Staff and Presidential Evaluation Commission: *N. Y. T.*, July 12, 1946, p. 4; *D. S. B.*, July 21, 1946, pp. 115-117. The 5th bomb was exploded July 25. *N. Y. T.*, July 25, 1946, p. 1. Text of reports of President's civilian commission and the Army-Navy Joint Chiefs of Staff: *N. Y. T.*, Aug. 3, 1946, p. 6; *D. S. B.*, Aug. 11, 1946, pp. 272-275.

2/August 10 ALBANIA—YUGOSLAVIA. Belgrade radio announced conclusion of a friendship and mutual assistance agreement. *N. Y. T.*, July 3, 1946, p. 4; *London Times*, July 3, 1946, p. 3. Ratification by the Albanian National Assembly was announced August 10. *N. Y. T.*, Aug. 11, 1946, p. 37.

*N. Y. T.*, July 27, 1946, pp. 1, 5. Excerpts: p. 5. Text: *D. S. B.*, Aug. 25, 1946, pp. 364-377. The British summation followed. *London Times*, July 29, 1946, p. 4.

28/August 4 REPARATIONS (Hungarian). It was reported by the Budapest radio that Russia had agreed to a delay in payment of Hungarian reparations, and that Russia would be willing to take in lieu of reparations several million dollars worth of shares of the Transylvanian Petrosani coal mines, now confiscated by Rumania. *N. Y. T.*, July 29, 1946, p. 5. New schedule of annual payments, released Aug. 4 by Soviet Tass Agency, disclosed that Russia had increased her demands by \$19,800,000. *N. Y. T.*, Aug. 5, 1946, p. 6.

28-August 13 BOLIVIAN RECOGNITION. Granted to the new *junta* government by Venezuela on July 28, Uruguay on Aug. 5, United States on Aug. 12 and by Great Britain and Nicaragua on Aug. 13. *N. Y. T.*, July 30, 1946, p. 6; Aug. 6, p. 11; Aug. 14, p. 14; *D. S. B.*, Aug. 25, 1946, p. 335.

29 ATOMIC ENERGY CONFERENCE. An international conference, organized by the Atomic Scientists Association to discuss the social and political implications of atomic energy and international control, opened at Oxford, England. Great Britain, United States, France, Netherlands, India, Norway, Sweden and Switzerland were represented. *London Times*, July 30, 1946, p. 4.

29 INTERNATIONAL COURT OF JUSTICE. Announced that it had agreed on rules of procedure and was ready to act on any dispute submitted to it. *N. Y. T.*, July 30, 1946, p. 8.

29-August 12 PEACE CONFERENCE. Opened at the Luxembourg Palace in Paris, with Premier Bidault as temporary chairman. *N. Y. T.*, July 30, 1946, pp. 1, 4; *London Times*, July 30, 1946, p. 4. 21 countries participated. *London Times*, Aug. 5, 1946, p. 4; *N. Y. T.*, July 29, 1946, p. 6. Partial list of members of British delegation: *N. Y. T.*, July 20, 1946, p. 5; *London Times*, July 20, 1946, p. 4. Netherlands delegation: *Netherlands News Letter* (N. Y.) Aug. 15, 1946, p. 3. Personnel of U. S. delegation: *N. Y. T.*, July 24, 1946, p. 8; *D. S. B.*, Aug. 4, 1946, pp. 202-203. Russian delegation: *N. Y. T.*, July 27, 1946, p. 1. Rules Committee voted unanimously to open all sessions of the conference to the press. *N. Y. T.*, July 31, 1946, p. 1; *London Times*, July 31, 1946, p. 4. Texts of Messrs. Byrnes', Attlee's and Wang's addresses of July 30: *N. Y. T.*, July 31, 1946, p. 12. Summaries: *London Times*, July 31, 1946, p. 4. Texts of draft treaties of peace for Italy, Hungary, Rumania, Finland and Bulgaria were released July 30. *N. Y. T.*, July 31, 1946, p. 1. Texts of Hungarian, Finnish, Rumanian and Bulgarian treaties: pp. 15-21. Text of Italian treaty *N. Y. T.*, July 27, 1946, pp. 7-10. Summary of main provisions of treaties: *London Times*, July 31, 1946, p. 8. Mexican Foreign Office released a memorandum, dated Feb. 12, protesting its exclusion from the conference. Cuban Minister of State Alvarez stated that under the United Nations Declaration all signatories should participate in the peace conference. *N. Y. T.*, July 31, 1946, p. 14. Spanish text of Mexican demand: *El Nacional* (Mexico, D. F.) July 31, 1946. Mr. Molotov assured the conference July 31 that the U. S. S. R. opposed any attempts to impose outside interference in the economic life of the former satellites of Germany. Mr. Evatt criticized draft treaties on the ground that they assure a privileged position for Russia in the life of these countries. He set forth 4 fundamental principles for just peace making. *N. Y. T.*, Aug. 1, 1946, pp. 1, 3. Text of Molotov's speech and excerpts from Evatt's speech: p. 2. Summaries: *London Times*, Aug. 1, 1946, p. 4. Yugoslavia rejected the proposed Italo-Yugoslav boundary settlement. *N. Y. T.*, Aug. 2, 1946, pp. 1, 3. Netherlands delegate urged equality

for all states represented, p. 3. The small nations unsuccessfully tried to have all countries represented on each committee, but did receive the right to appear before all committees and the opportunity to open discussion on any topic, pp. 1, 2; *London Times*, Aug. 2, 1946, p. 4. Rules Committee agreed that the chairmanship should rotate among the 5 members of the Council of Foreign Ministers. *N. Y. T.*, Aug. 4, 1946, pp. 1, 14; *London Times*, Aug. 5, 1946, p. 4. Cuban Government circulated a note among the Big Four asking that it be admitted to the Conference on the ground that it had signed the United Nations Declaration of January, 1942. *N. Y. T.*, Aug. 5, 1946, p. 6. Text of Mr. Byrnes' remarks before the Committee on Rules of Procedure on Aug. 2, 5 and 6: *D. S. B.*, Aug. 11, 1946, p. 253; Aug. 18, pp. 314-315 and 315-318. The Italian delegation circulated on Aug. 7 four documents indicating Italy's refusal to accept certain clauses in the draft treaty concerning the Italo-French frontier. *N. Y. T.*, Aug. 8, 1946, pp. 1, 3. Mr. Molotov asked the plenary session of Aug. 8 to reject the majority voting formula recommended by the Rules Committee. Text: *N. Y. T.*, Aug. 9, 1946, p. 2. Text of Mr. Byrnes' reply of Aug. 9: *D. S. B.*, Aug. 18, 1946, pp. 318-319. Voted Aug. 9 that all recommendations of the conference would go on the agenda of the Council of Foreign Ministers, and these recommendations getting a  $\frac{2}{3}$  vote in the conference would get more serious consideration. *N. Y. T.*, Aug. 10, 1946, pp. 1, 3. Voted Aug. 9 to invite the 5 enemy states, for which treaties are now being drafted, to attend plenary sessions beginning Aug. 10. *N. Y. T.*, Aug. 10, 1946, pp. 1, 3. Text of rules of procedure adopted: p. 2. Italian Premier stated Aug. 10 Italy's views on the proposed treaty. *N. Y. T.*, Aug. 11, 1946, pp. 1, 38. Text of address: p. 39. Debate began Aug. 12 on the Italian draft treaty. *London Times*, Aug. 13, 1946, p. 4.

31-August 15 AMERICAN FARMER (S.S.). Collided with another American ship off the British coast. *London Times*, Aug. 5, 1946, p. 4. Abandoned in a leaking condition, she was taken in tow by the S.S. *Elizabete*. Later she was boarded by members of her own crew, the tow-line was cut and she proceeded to port under her own steam after being assisted by another American ship, the *American Ranger*. *London Times*, Aug. 6, 1946, p. 4; Aug. 7, p. 4; Aug. 8, p. 4. Announcement was made Aug. 15 of the issuance of a writ on behalf of the S.S. *Elizabete*, her master and crew, against the United States Lines S.S. *American Farmer*, her cargo and freight, claiming salvage remuneration. *London Times*, Aug. 15, 1946, p. 2.

#### August, 1946

- 1 LEAGUE OF NATIONS—UNITED NATIONS. Various documents were signed in Geneva relative to the transfer of the League's property and services to the United Nations. Geneva authorities were present and recorded the transfer in the land registry. *London Times*, Aug. 2, 1946, p. 3.
- 2 ARCHAEOLOGY CONFERENCE. First International Conference of Caribbean Archaeologists opened at Tegucigalpa, Honduras, with 13 countries represented. List: *N. Y. T.*, Aug. 3, 1946, p. 7.
- 2 UNITED NATIONS. Charter. Announcement was made that the Cuban representative to the United Nations had requested the Secretary General to include in the agenda of the 2d part of the 1st session of the General Assembly the convocation of a general conference to eliminate the veto privilege. *N. Y. T.*, Aug. 3, 1946, p. 1.
- 4-7 WORLD COUNCIL OF CHURCHES. International conference of Protestant church-leaders met at Cambridge, England, under auspices of the Provisional Committee of the Council. Voted to set up a commission to study international problems as

- they affect the church. *London Times*, Aug. 8, 1946, p. 2; *N. Y. T.*, Aug. 7, 1946, p. 29. American delegation: *N. Y. T.*, July 28, 1946, p. 13. Conference closed Aug. 7. *N. Y. T.*, Aug. 8, 1946, p. 8.
- 5/6 UNITED NATIONS—ALBANIA. The Greek Government presented a 12-page memorandum to the Acting Secretary General of the United Nations, protesting Albanian admission on the basis that the latter is not peace-loving and is incapable of fulfilling the Charter's obligations. *N. Y. T.*, Aug. 6, 1946, p. 12. Albanian representative denied Greek charges. *N. Y. T.*, Aug. 7, 1946, p. 6.
- 5-16 U. N. R. R. A. COUNCIL. Fifth session opened Aug. 5 at the former League of Nations palace in Geneva. *N. Y. T.*, Aug. 8, 1946, p. 4; *London Times*, Aug. 6, 1946, p. 4. U. S. delegation: *D. S. B.*, Aug. 4, 1946, p. 226. Adjourned August 16. Director General La Guardia said the organization would be integrated into the United Nations. Voted to establish an international children's fund for the care of minors in liberated countries. *N. Y. T.*, Aug. 17, 1946, p. 2; *London Times*, Aug. 17, 1946, p. 3; *D. S. B.*, Aug. 25, 1946; pp. 358-359.
- 6/11 POLAND (National Unity Govt.)—SOVIET RUSSIA. Polish-Soviet mixed demarcation commission announced Aug. 11 that administration and control of Oder River waterways had been turned over to Poland under terms of an agreement signed on Aug. 6. *N. Y. T.*, Aug. 12, 1946, p. 2; *London Times*, Aug. 13, 1946, p. 3.
- 7 DARDANELLES. Russian note to Turkey proposed revision of the Montreux Convention. Extracts: *N. Y. T.*, Aug. 14, 1946, p. 6. Summary: *London Times*, Aug. 14, 1946, p. 4.
- 7-15 GREAT BRITAIN—IRAN—IRAQ. Text of British Foreign Office's statement on the situation in the southern Persian oil area: *London Times*, Aug. 7, 1946, p. 4. Iranian Foreign Ministry announced Aug. 7 that it had protested formally the sending of Empire troops to Basra in southern Iraq. *N. Y. T.*, Aug. 9, 1946, p. 5; *London Times*, Aug. 9, 1946, p. 4. A British note, delivered Aug. 15, denied that Iranian sovereignty was endangered by British troops in Iraq. *London Times*, Aug. 16, 1946, p. 3.
- 10 UNITED STATES—YUGOSLAVIA. Yugoslav note protesting frequent flights of U. S. planes over its territory was handed to U. S. Chargé at Belgrade on Aug. 10. *N. Y. T.*, Aug. 12, 1946, pp. 1, 4.
- 15 PEACE CONFERENCE (Paris). Personnel of Secretariat Committee, U. S. delegation members of various commissions, and British members of Economic, Military and Drafting Commissions: *N. Y. T.*, Aug. 16, 1946, p. 11. Chairmen and Vice-chairmen of 5 commissions: *London Times*, Aug. 17, 1946, p. 4.
- 15 UNITED STATES—YUGOSLAVIA. United States replied to Yugoslav protest of July 16 concerning patrol clashes in the Venezia Giulia zones. Text: *N. Y. T.*, Aug. 20, 1946, p. 4; *D. S. B.*, Sept. 1, 1946, pp. 414-415.
- 16 UNITED NATIONS—MEMBERSHIP. Status of applications: *N. Y. T.*, Aug. 17, 1946, p. 2.

#### MULTIPARTITE CONVENTIONS

AGRICULTURE, INTERNATIONAL INSTITUTE OF. Protocol. Rome, March 30, 1946.

Signatures: 20 nations.

Text: 79th Cong., 2d sess. *Exec. H; Cong. Rec.* (daily) July 1, 1946, pp. 8170-8171.

List of Conventions affected by this Protocol: p. 8171.

Purpose of the Protocol is to terminate the International Institute at Rome and to transfer its functions to the Food & Agriculture Organization.

AIR SERVICES TRANSIT AGREEMENT. Chicago, Dec. 7, 1944.

Acceptance:

Argentina.

Ratification deposited:

Mexico. June 25, 1946. *D. S. B.*, July 14, 1946, p. 78.

AIR TRANSPORT AGREEMENT. Chicago, Dec. 7, 1944.

Withdrawal (intent):

United States. July 25, 1946. *N. Y. T.*, July 26, 1946, p. 21; *D. S. B.*, Aug. 4, 1946, p. 236.

AVIATION. Interim Agreement. Chicago, Dec. 7, 1944.

Acceptances:

Argentina and Bolivia (provisional).

In force:

Bolivia (provisional) *D. S. B.*, July 14, 1946, p. 78.

Reservations withdrawn with respect to Denmark:

India. July 18, 1946. *D. S. B.*, Aug. 18, 1946, p. 337.

New Zealand. *D. S. B.*, July 14, 1946, p. 78.

AVIATION CONVENTION. Chicago, Dec. 7, 1944.

Adherence:

Argentina. June 4, 1946.

Ratifications deposited:

Brazil. July 8, 1946.

Mexico. June 25, 1946.

United States. Aug. 9, 1946. *D. S. B.*, Aug. 18, 1946, p. 337.

COPYRIGHT. Washington, June 22, 1946.

Signatures:

Members of the Pan American Union. *N. Y. T.*, June 23, 1946, p. 4.

Text (Spanish): P. A. U. *Serie sobre Congresos y Conferencias* No. 50, pp. 108-114.

To replace the 1910 Convention of Buenos Aires and the Havana Revision of 1928, and all earlier inter-American copyright conventions. *N. Y. T.*, June 23, 1946, p. 4.

FISHING CONVENTION. London, April 5, 1946.

Ratification:

Great Britain. *London Times*, July 5, 1946, p. 4.

INTERNATIONAL COURT OF JUSTICE. Statute. Optional Clause. San Francisco, June 26, 1945.

Declaration signed:

Netherlands. Aug. 5, 1946. *N. Y. T.*, Aug. 6, 1946, p. 4.

INTERNATIONAL LABOR ORGANIZATION. Constitution, Instrument for Amendment of. Paris, Nov. 5, 1945.

Ratification: 20 nations. *L. Times*, Aug. 1, 1946, p. 3.

Ratification deposited:

Great Britain. June 26, 1946.

Text: *G. B. T. S.* No. 20 (1946), Cmd. 6880.

SANITARY CONVENTION. Paris, June 21, 1925. Amendment, Washington, Jan. 5, 1945.

Protocol, Washington, April 23, 1946.

Accessions:

Dominican Republic. May 29, 1946.

Honduras. July 8, 1946.

Italy. July 23, 1946.

Poland. May 28, 1946.

South Africa. July 12, 1946.

Promulgation: United States. Aug. 6, 1946.

Ratification deposited: United States. Aug. 6, 1946.

Came into force April 30, 1946. *D. S. B.*, Aug. 18, 1946, p. 337.

SANITARY CONVENTION FOR AIR NAVIGATION. The Hague, April 12, 1933. Amendment, Washington, Jan. 5, 1945. Protocol, Washington, April 23, 1946.

Accessions:

Dominican Republic. May 29, 1946.

Honduras. July 8, 1946.

Italy. July 23, 1946.

Poland. May 28, 1946.

South Africa. July 12, 1946.

Promulgation: United States. Aug. 6, 1946.

Ratification deposited: United States, Aug. 6, 1946.

Came into force April 30, 1946. *D. S. B.*, Aug. 18, 1946, p. 337.

STATISTICS OF WAGES AND HOURS OF WORK. Geneva, June 20, 1938.

Ratification deposited:

Canada. April 6, 1946.

Text: Canada. *Treaty Ser.*, 1946, No. 2.

U. N. E. S. C. O. London, Nov. 16, 1945.

Acceptance:

United States. July 30, 1946. *N. Y. T.*, July 31, 1946, p. 8; *D. S. B.*, Aug. 11, 1946, p. 259.

WORKMEN'S COMPENSATION FOR ACCIDENTS IN LOADING AND UNLOADING SHIPS. Geneva, June 21, 1929. Revision, Apr. 27, 1932.

Ratification deposited:

Canada. April 6, 1946.

Text: Canada. *Treaty Ser.*, 1946, No. 3.

DOROTHY R. DART



## JUDICIAL DECISIONS

### SCHERING, LIMITED (IN LIQUIDATION) v. STOCKHOLMS ENSKILDA BANK AKTIEBOLAG AND OTHERS

HOUSE OF LORDS\*

[November 29, 1945]

In February, 1936, a contract was entered into between a Swedish bank and a German company as principals, and an English company as surety, whereby the Swedish bank sold to the German company a large sum in Reichsmarks at a price in sterling to be paid after an interval of eight years. The English company, a subsidiary of the German company, guaranteed the performance of the contract by the German company. In April, 1936, a further contract was entered into by which the English company, as principals, contracted with the Swedish bank to purchase, at a discount on the original price, their claim against the German company by instalments paid at regular intervals over the eight years. On payment of all instalments the German debt to the Swedish bank would be extinguished. The contract was followed by a further document, being a letter signed by the English company, and addressed to the Swedish bank, stating that they held goods (afterwards sold for £25,000) which they pledged as security for their obligations.

Under the contract made in April, 1936, instalments were regularly paid by the English company to the bank until the outbreak of war. In October, 1939, no instalment was paid, and, the Swedish bank having sued for it in the King's Bench Division, the action was dismissed on the ground that the payment of the instalment would have been an offence under the Trading with the Enemy Act, 1939 (*Stockholms Enskilda Bank Aktiebolag v. Schering, Limited* (57 *The Times* L.R. 289; [1941] 1 K.B. 424). The English company in the present action claimed against the Swedish bank that the contract between them had been (1) abrogated and made illegal by the war, or (2) frustrated as being impossible of performance during the war. On appeal,

*Held* (Lord Thankerton, Lord Porter and Lord Goddard, Lord Russell of Killowen and Lord Macmillan dissenting), that the April contract, which was one between an English company and a neutral, was an executed and not an executory contract; that it fell within the exceptional class of contracts not abrogated by the outbreak of war; and that the doctrine of frustration did not apply.

This was the appeal of the plaintiffs, Schering, Limited, an English company, in voluntary liquidation, from the order of the Court of Appeal (the Master of the Rolls, Lord Clauson and Lord Justice du Parcq) reversing, in favour of the defendants, Stockholms Enskilda Bank Aktiebolag, the decision of Mr. Justice Simonds. In the Action the appellants claimed a declaration that a contract made between the parties in April, 1936, was no longer enforceable against them (the appellants), but had become (a) impossible of performance, or frustrated; and (b) that its continued existence would benefit the enemy, that it would involve commercial intercourse with him, that it would harm the interests of the plaintiffs, and that it was, therefore, illegal. Mr. Arthur William Edwards and Mr. Henry Morris, trustees holding security for the performance by the appellants of their obligations, were also defendants. Mr. Edwards and Mr. Morris were not parties to the appeal, having stated that they would abide by the decision of the House.

The following statement is taken from the opinions of Lord Thankerton and Lord Russell of Killowen:

\* 62 *Times Law Reports* 122.

The case arose out of a contract made between Schering-Kahlbaum A. G. Berlin (called the German company), a Swedish Bank, Stockholms Enskilda Bank Aktiebolag (the respondents) (called Enskilda), Schering, Limited (the appellants) (called Schering), and Schering-Kahlbaum India, Limited, a company registered in India (called the Indian company). The English company and the Indian company were subsidiaries of the German company, and dealt, in their respective spheres, in drugs and chemicals manufactured by the German company. That company was the parent company of Schering, and owned or controlled all its share capital. It was also the parent company of the Indian company.

Early in 1936 Enskilda and others owned in Germany a large quantity of Sperrmarks—which were Reichsmarks spendable only in Germany—the value of which at the current rate of exchange was £84,000. The German company desired to acquire these marks. Throughout the transaction with which this case is concerned Enskilda acted for the group of owners, who were willing to sell the marks for sterling. The German company found it convenient, owing to restrictions in Germany, to provide for the sterling payments to be made to Enskilda through its two subsidiaries, Schering and the Indian company, with whom it could settle its indebtedness by means of the manufactured goods which it supplied to them.

The contractual relations between the parties were contained in three agreements: 1. A contract in writing dated February 24 and 28, 1936 (the February contract), which was made between Enskilda of the one part, the German company of the other part, and Schering and the Indian company as sureties. 2. The April contract, dated April 16, 1936, made between Schering, the Indian company and Enskilda. 3. The April letter, also dated April 16, 1936, written by Schering to Enskilda. There was also a letter dated March 17, 1936, which Enskilda wrote to the German company modifying the terms of the contract of February in so far as those two companies were concerned, but to which Schering was not a party.

The February contract was in German, a translation of which was agreed. It was subject to German law, but for the legal relationship between the sureties and Enskilda English law was to apply. In the absence of evidence to the contrary it might be assumed that, for present purposes, the German law did not differ from the English law. The contract was headed "Contract of Debt," but it was really a contract for the sale of Reichsmarks. By clause 1 Enskilda agreed to sell "an amount in Reichsmarks to the amount of the equivalent of £84,000 sterling." Clause 2 provided that in respect of the Reichsmarks the German company was to be indebted to Enskilda in £50,400 free of interest, and that "the debt shall fall due on the expiry of eight years reckoned from the day of paying out." It was agreed that the due date became April 28, 1944. By clause 3 the English company and the Indian company constituted themselves surety for "the debt" jointly and

severally as principals "to the amount of £50,400," with the proviso that, against the liability as sureties, all payments must be set off which Enskilda would receive from the sureties, or one of them, or from the principal debtor, or from third persons for account of the sureties or of the principal debtor. The Reichsmarks were placed at the disposal of the German company on April 28, 1936.

Clause 4 began by providing that the sureties would acquire from Enskilda its claims against the German company by a series of 14 six-monthly instalments, gradually decreasing in amount, beginning  $1\frac{1}{2}$  years after April 28, 1936, with an instalment of £6,500, and ending eight years after that date with a final instalment of £1,530. The instalments made up a total of £50,400. The clause proceeded

"If, and to the extent, that the sureties do not acquire the claim at the dates specified, the remission resulting from clause 2 in conjunction with clause 1 shall, without prejudice to the provisions of clause 3, lapse rateably in respect to that amount of debt which remains in relation to Enskilda after setting off any payments which may have been made (Example: Enskilda has received £6,300 and no further payments have been made; there remains a debt of Schering to Enskilda to the amount of £73,500). With regard to the due date and repayment of the remaining amount of debt the provisions of clause 2, paragraphs two and three shall apply. The remaining amount of debt is owing free of interest."

The April contract, in relation to which the action was brought, was in English, and was addressed to Enskilda on behalf of Schering and the Indian company. It began: "In consideration of your making on our joint and several request an advance of £34,000 sterling to be made available in Sperrmarks to [the German company] we hereby jointly and severally guarantee the payment in sterling of the amount hereinafter mentioned by the German company." The amount thereafter mentioned was £50,400.

By the April contract the liability of Schering and the Indian company as sureties was not materially altered, but under clause 8 they jointly and severally undertook as "principals and not as guarantors to make the following payments to you in consideration of the assignment by you to us on the occasion of each such payment of a like sterling amount of your claim against the German company. Such payments shall be made as follows—namely:—" Then followed a list of 14 six-monthly instalments of decreasing amount, corresponding to those in clause 4 of the February contract. Clause 9 provided that each payment under clause 8 should be a satisfaction *pro tanto* of their liability as sureties, and that they should not be liable to make such payment in so far as the amount in question had been paid by the German company or any other person or company. Clause 10 provided that that provision should not prejudice Enskilda's rights of proof in a liquidation of either Schering or the Indian company.

The second part of clause 4 of the February contract did not appear in the April contract as it dealt with a matter which concerned only Enskilda and the German company.

On the same day April 16, Schering addressed the April letter to Enskilda providing for the pledging by them of goods to the value of £25,000 as security for the discharge by Schering of its obligations to Enskilda, whether as sureties or principals under the April contract.

The first four payments by the two companies mentioned in clause 4 of the February contract and clause 8 of the April contract were made and the corresponding claims against the German company were assigned. The fourth payment and assignment took place on April 28, 1939. The fifth payment and assignment fell to be made on October 28, 1939, but in the meantime, on September 3, 1939, war broke out between this country and Germany. Schering took the view that such payment would contravene the provisions of the Trading with the Enemy Act, 1939, and Enskilda brought an action in the King's Bench Division for the recovery of the amount. That action was dismissed by Mr. Justice Hawke, and its dismissal was confirmed by the Court of Appeal (57 *The Times* L.R. 289; [1941] 1 K.B. 424). The ground of the decision was that the payment would be for the benefit of the German company, and was therefore prohibited by the Trading with the Enemy Act, 1939.

Subsequently Schering went into voluntary liquidation, and its assets had been sold, but a sum of £25,000 had been placed in the joint names of Mr. Edwards and Mr. Morris to answer its obligations (if still subsisting). On January 29, 1942, Schering issued the writ in the present action claiming a declaration that the April contract could no longer be enforced against it, and an order for the release of the £25,000.

Mr. Justice Simonds held that the April contract was one the performance or continued existence of which after September 3, 1939, would benefit the enemy, and would involve intercourse with the enemy. He did not deal with frustration. He accordingly made an order declaring that the April contract had been abrogated by the outbreak of war and could no longer be enforced against the plaintiffs, and ordering the release of the £25,000.

The Court of Appeal reversed that decision, and Schering appealed.

Lord Thankerton stated the issue, referred to the three documents, and said that, though there was some argument to the effect that the price payable by the German company for the Reichsmarks was £50,400, he was satisfied, looking at the various provisions, that, on the Reichsmarks being placed at the disposal of the German company, the latter became debtors to Enskilda in the sum of £84,000, payable without interest, in effective pounds sterling on the expiry of eight years thereafter.

His Lordship referred to the April contract and the April letter, and continued: It may be noted that the second paragraph of clause 4 of the February contract does not affect the amount of the liability of the sureties; that the

remission referred to is clearly the reduction of the debt from £84,000 to £50,400; and that the effect of this paragraph was somewhat obscurely modified by a letter dated March 17, 1936, from Enskilda to the German company. But the effect of it would seem to be that the benefit of the remission was preserved to the latter, provided that the payment of the instalments, or some of them, though made after their due dates, was made before the expiry of the eight years. I will only add that the February contract is headed "Contract of Debt" and is so described at least four times in the body of the agreement.

Stripped of its somewhat intricate provisions it appears that, in substance, the contract was for the sale of commodities—namely, German Reichsmarks, for a price which was to be paid in sterling. The commodities had been supplied and accepted, and all that remained was the payment of the price, and the only provisions remaining operative related to the payment of the debt due in respect of the price, and the relative safeguards for its payment.

We had a very full citation of authorities, and the able arguments of counsel on both sides have been very helpful, but I find little need to go beyond the speeches of Lord Dunedin and Lord Sumner in the well-known case of *Ertel Bieber and Co. v. Rio Tinto Company* (34 *The Times L.R.* 208; [1918] A.C. 260), in which the earlier authorities are reviewed. Lord Kunedin said (at pp. 210 and 274 of the respective reports): "From these cases I draw the conclusion that upon the ground of public policy the continued existence of contractual relation between subjects and alien enemies or persons voluntarily residing in the enemy country which (1) gives opportunities for the conveyance of information which may hurt the conduct of the war, or (2) may tend to increase the resources of the enemy or cripple the resources of the King's subjects, is obnoxious and prohibited by our law."

In his judgment in the present case the Master of the Rolls appears to draw a distinction, on matter of principle, between contracts between a British subject and an alien enemy, and a contract between a British subject and a neutral (60 *The Times L.R.* 21, at p. 24; [1944] Ch. 13, at p. 24). In my opinion, the paramount consideration of public policy in either case is the unhampered carrying on of the war, without harmful intercourse with the enemy, or economic benefit to the enemy or economic disadvantage to this country. But the applicability of the Principle is likely to be rare in the case of contracts between a British subject and a neutral, or not so obvious as in the case of a contract between a British subject and an enemy.

As regards the consequence of this contravention of public policy, I am of opinion that the Courts have no choice between the abrogation and suspension of the contract, abrogation being the necessary consequence. I agree with Lord Sumner's statement on this point in *Ertel Bieber and Co. v. Rio Tinto Company* ([1918] A.C., at p. 286): "If upon public grounds on the outbreak of war the law interferes with private executory contracts by dissolving them, how can it be open to a subject for his private advantage to withdraw

his contract from the operation of the law and to claim to do what the law rejects, merely to suspend where the law dissolves?' The prohibition, which arises at common law on the outbreak of war, has for this purpose the effect of a statute. The choice between suspending and discharging the contract on the outbreak of war was quite deliberately made, and if occasionally the contract is said to be only suspended, or a Court refuses to dispose of a case on the ground of dissolution alone, this only brings into relief the fact that by an overwhelming preponderance of authority such trading contracts have been held to be dissolved on the outbreak of war. An appearance of authority to the contrary is sometimes found to be in truth a misreading of the language of a decision.' After reference, by way of illustration, to the language of Lord Halsbury in *Janson v. Driefontein Consolidated Mines* (18 *The Times L.R.* 796, at p. 798; [1902] A.C. 484, at p. 493), Lord Sumner proceeded: "There can be no doubt that the matter must have been considered. To many people suspension seems to have much to recommend it. Freedom of contract is challenged less; the sacrosanctity of commerce is respected more. The Courts could not have adopted the rule of dissolution unless they had reasoned that suspension would be inconsistent with this principle of the law of contract. I will quote the language of Mr. Justice Willes in *Esposito v. Bowden* ([1857] 7 E. and B. 763, at p. 792), 'In all ordinary cases, the more convenient course for both parties seems to be that both should be at once absolved, so that each, on becoming aware of the fact of a war, the end of which cannot be foreseen, making the voyage or the shipmen presumably illegal for an indefinite period, may at once be at liberty to engage in another adventure without waiting for the bare possibility of the war coming to an end in sufficient time to allow of the contract being fulfilled, or some other opportunity of lawfully performing the contract perchance arising. The law upon this subject was doubtless made, according to the well known rule, to meet cases of ordinary occurrence.' To his mind I think it is clear that the rule was one made to provide certainty at the outbreak of war, where in itself everything is uncertain; that it was one made to apply generally, although taking its form from the needs of ordinary cases; and that, for the purpose of applying it, the case must be looked at as things stood when war broke out, and not as they were ascertained to be or as they ultimately happened during the interval before the trial of the action."

The contracts which fall under this principle of public policy are clearly contracts the performance or further performance, of which after the outbreak of war may involve the consequences which the principle, by its application, seeks to avoid, but it is equally clear that there are certain well established exceptions to the contracts thus broadly defined. I may quote the speech of Lord Dunedin in *Ertel Bieber and Co. v. Rio Tinto Company* ([1918] A.C., at p. 269): "Now *Esposito v. Bowden* has been cited by learned Judges in many cases, and no doubt has ever been cast on its authority. Nor has it ever been taken as dealing with any particular contract, but it

has been held as dealing with contracts in general. So far as *Janson's* case (*supra*) is concerned, the only matter there decided was that there must be an actual state of war to determine a contract; a mere imminence of war is not enough. It is true that Lord Halsbury's *dictum*, if applied as a universal proposition, would be counter to the doctrine of *Esposito v. Bowden*. But I am satisfied not only that the *dictum* was *obiter* and not binding, but that Lord Halsbury was not dealing with or thinking of executory contracts, but of contracts under which rights had already accrued. There is indeed no such general proposition as that a state of war avoids all contracts between subjects and enemies. Accrued rights are not affected though the right of suing in respect thereof is suspended. Further there are certain contracts, particularly those which are really the concomitants of rights of property, which even so far as executory are not abrogated. Such as, for instance, the contract between landlord and tenant, of which an example may be found in the recent case of *Halsey v. Esplanade* (32 *The Times* L.R. 709; [1916] 2 K.B. 707). In other words, the executory contract which is abrogated must either involve intercourse, or its continued existence must be in some other way against public policy as that has been laid down in decided cases."

In the case of the established exceptions to which Lord Dunedin refers the necessity for intercourse with an enemy is obviated by the postponement of the right of action, and non-forfeiture of an existing right supersedes any question of an immediate or future benefit to the enemy. This is well illustrated in the order made in *Eitel Bieber and Co. v. Rio Tinto Company*, to which I will refer later. In the present case Mr. Justice Simonds applied that test at once without considering whether the case fell within the class of exceptional cases, and, coming to the conclusion that continued performance of the contract would involve both such intercourse and such benefit, he held that the contract was abrogated on the outbreak of war. The question of whether the present case fell within the class of exceptional cases was also not considered by the Court of Appeal, but, in considering the test of intercourse and benefit, they drew a distinction between the case of a contract between a British subject and an enemy subject, and the case of a contract between a British subject and a neutral subject, and this appears to have led them to differ from Mr. Justice Simonds, and they reversed his decision. As already expressed by me, I am not prepared to accept that, as a matter of principle, there is any distinction between these two classes of contract, but it is unnecessary for me to deal further with the judgment of the Courts below as I have come to the conclusion that the present case does fall within the exceptional class, and that, for that reason, the April contract was not abrogated by the outbreak of war, so that the appeal fails so far as rested on that ground.

I am inclined to agree with Sir Arnold McNair's suggestion in "Legal Effects of War" (2nd ed., 1944, p. 93), that the distinction between "executed" and "executory contracts" may not be very helpful in this connexion,

and that it may be safer to say that the effect of the outbreak of war on contracts legally affected by it is to abrogate or destroy any subsisting right to further performance other than the right to the payment of a liquidated sum of money, which will be treated as a debt and will survive the outbreak of war. In this view, I proceed to consider what is included in the phrase "a liquidated sum of money, which will be treated as a debt."

Counsel for Schering admitted that a debt payable by instalments would be so included, and that provision for discount on anticipation of the instalment dates would not alter the position, nor would express provision for the acknowledgment in writing of each sum paid affect the matter. In my opinion the fact that the creditor held security for the payment of the debt, which would fall to be restored to the debtor on payment of the debt, would make no difference even though the security had been absolutely assigned to the creditor, and would require retransfer to the debtor.

In my opinion the present case only raises one further point—namely, the fact that Schering was bound as principal to Enskilda to discharge the debt in respect of which the German company were the original principal debtors, and were therefore entitled under the April contract, on payment to the respondents of each instalment, to an assignment by the latter of a like sterling amount of their claim against the German company. I cannot think that this makes any difference to the position. Schering, under the April contract, was bound to discharge the whole debt within a period which would terminate before the lapse of the eight years, when the liability of the German company to make any payment towards the debt would first arise; in other words, Schering was bound to acquire the debt, and its being placed by assignment in the shoes of Enskilda is merely incidental to the discharge of the debt owed to Enskilda, and is not different in substance from the case of the return of securities to which I have already referred.

It is important to make clear that the principle of abrogation does not involve destruction of the contract so far as already performed. That which is abrogated is the further performance of the contract as from the outbreak of war; or, as Lord Dunedin expressed it in the passage already quoted, the continued existence of the contractual relationship is prohibited. As Lord Finlay, L.C., stated in *Hugh Stevenson and Sons v. Aktiengesellschaft Für Cartonnagen-Industrie* (34 *The Times L.R.* at p. 206; [1918] A.C. 239, at p. 244): "It is not the law of this country that the property of enemy aliens is confiscated." This important point is well illustrated by the form of order which was made in *Ertel Bieber and Co. v. Rio Tinto Company*, which related to contracts for the sale of large quantities of cupreous sulphur ore, to be delivered by instalments extending over a number of years. The order made by Mr. Justice Sankey, which was affirmed in the Court of Appeal and by this House, was in similar terms to that made in the *Zinc Corporation v. Hirsh* (32 *The Times L.R.* 232; [1916] 1 K.B. 541), which related to contracts of sale of zinc concentrates to be delivered by monthly instalments. In



both cases the contracts had been partly performed before the outbreak of war. In *Zinc Corporation v. Hirsch* Mr. Justice Bray made a declaration, which was affirmed by the Court of Appeal, that the contracts were dissolved as from the outbreak of war by the existence of a state of war between Great Britain and Germany, and that the plaintiffs as from the said time were released and absolved from any obligation at any time to supply to the defendants or their assigns any zinc concentrates. But the declaration was without prejudice to the rights of either party in respect of concentrates supplied or which ought to have been supplied before the said time, or to moneys paid to the special trust account mentioned in the agreement of December 14, 1908, or to any cause of action which had arisen before August 4, 1914. It seems clear to me that this reservation included matters involving intercourse with the enemy, but, as Lord Dunedin pointed out, the right of action is postponed. It seems equally clear it might involve substantial economic benefit to the enemy. The declaration of Mr. Justice Simonds contains no such reservation, and the result, in my opinion, is to confiscate the right of debt, which had arisen to Enskilda on the delivery of the Reichsmarks on April 28, 1936. I am not aware of any precedent for such confiscation, and it is clearly not justified under the decision of this House in *Ertel Bieber and Co. v. Rio Tinto Company*. Indeed, it is inconsistent with it. I may add that in the earlier case of *Esposito v. Bowden* the performance of the contract had not begun before the outbreak of war.

As regards Schering's alternative argument that the April contract, by reason of circumstances arising out of the war, became impossible of further performance, and that the parties were thereby excused from further performance, that argument is clearly out of place in the view which I have already expressed that all that remained to be done was the discharge of an accrued debt by instalments, subject to an assignment of the right of ultimate recourse against the German company, and I have nothing to add to the views expressed by the Master of the Rolls on this matter.

It follows that in my opinion the appeal fails, and I propose that it should be dismissed with costs.

LORD RUSSELL OF KILLOWEN, in stating the facts, referred to the relevant clauses of the February contract and continued: The other clauses need not be referred to, but it will be convenient at this stage to state my view of the true construction of this agreement, which became operative on April 28, 1936. The primary debt for which the German company became liable to Enskilda was the sum of £84,000 referred to in clause 1. I am of opinion that this must be so, notwithstanding the meaning to the contrary which would, *prima facie*, be gathered from clause 2, because any other view is not consistent with the words "to the amount of £50,400" in clause 3 and is hopelessly inconsistent with the second half of clause 4. The German company made itself liable to pay £84,000 to Enskilda at the end of eight years, but the liability might be reduced by degrees throughout the eight years

according as the sureties made some or all of the payments specified in clause 4; and might ultimately amount to no more than a debt of £50,400, owing not to Enskilda but to the sureties. The sureties, it is to be observed, whose liability as sureties is limited to £50,400 and cannot mature for eight years, assume under clause 4 a most unusual burden—namely, the obligation to pay off portions of their principal's debt before any part of it is due from the principal, and so reduce their principal's liability by an amount for which the sureties can never be liable; but this unusual feature is easily accounted for when one remembers that these sureties were bound to do whatever the principal debtor told them to do.

Notwithstanding the existence of the February contract, a further document was executed, in the English language, by Enskilda, the English company and the Indian company, which is known as the April contract. Why this document was executed has never been explained. Both sides agree that the relationship and obligations as between Enskilda and the two companies are the same as the relationship and obligations which were established as between them by the February contract, and that the latter have never been terminated and still subsist. It may be that the parties desired a record in the English language of their obligations *inter se*, or it may be that they wished to make it clear that clause 4 of the February contract was obligatory and not merely optional on the part of the two companies. But whatever the object in view, the April contract is the contract in relation to which this action is brought. Nevertheless, in my opinion, it is quite impossible to treat that contract as a matter apart and separate from the February contract; it is part and parcel of one transaction between Enskilda and the German Company, into which the two companies are introduced by the German company in order to provide sterling and thus enable the German company to achieve its object—namely, the purchase of the spermmarks.

The April contract takes the form of a document addressed to Enskilda, dated April 16, 1936, and signed by a Mr. Edwards, both as managing director of the English company and as attorney of the Indian company. [His Lordship read the opening sentence, set out above]. This opening statement may be characterized as a gentle fiction. It is clear from the February contract, and a letter of November 5, 1935, from London to Bombay, that the initiative and the request came from the German company and that the suretyship was undertaken under the German company's instructions.

His Lordship referred to the April contract and letter, the history of the case leading up to the present litigation and the decision of Mr. Justice Simonds. He continued: On appeal the order of Mr. Justice Simonds was discharged and the action was dismissed. As I read the judgment of the Court of Appeal the reasoning proceeded thus. It was admitted that further performance of the April contract during the war "must benefit the enemy";

it was also apparently agreed that a contract with a neutral the further performance of which during the war "would in fact confer an immediate or future benefit on the enemy would be abrogated by the outbreak of war"; nevertheless the Court was of opinion that the April contract, being a contract with a neutral, might continue in existence after the outbreak of war on the basis of suspension during the war. On that footing, it was said, the benefit to the German company (and therefore to the enemy) became so vague and uncertain that no valid ground existed on which a British subject could be freed from his obligation to a neutral.

I confess I feel great difficulty in following this reasoning. By the very terms of the bargain struck between all the parties in February, and formally recorded as between Enskilda and the two companies in April, the further performance by the English company during the war, either of clause 4 of the February contract (*eo nomine*), or of clause 9 of the April contract (*eo nomine*) must inevitably result in a clear and direct benefit to the German company (which was stipulated for by the German company and assented to by Enskilda in order to obtain sterling)—namely, a large reduction in the German company's indebtedness of £84,000. The four payments made before the war had already reduced it to £42,000, leaving outstanding a liability of £42,000. The carrying out of the April contract during the war according to its terms would relieve the German company from a further liability of £16,800. But the axe falls when war breaks out. At that moment there was nothing vague or uncertain about the benefit to the enemy which would result from carrying out the very terms of the bargain. All the necessary conditions existed for abrogation under the common law rule. Illegality does not suspend; it dissolves: see *per* Lord Sumner in *Ertel Bieber and Co. v. Rio Tinto Company* (34 *The Times*, L.R. 208; [1918] A.C. 260, at p. 285). What justification then can there be for saying, we will not declare this contract to be abrogated because it is a contract with a neutral, but we will declare it to be only suspended, and then suspension will only involve a vague and uncertain benefit to the enemy, insufficient to justify freeing a British subject from his obligation to a neutral? I know of none, and can imagine none. Indeed, a fatal difficulty seems to arise. If a contract, the further performance of which (like this one) requires acts to be done on or before fixed dates, from the doing of which on those dates stated consequences clearly beneficial to the enemy are to flow, is *prima facie* abrogated at common law on the outbreak of war, it can be no answer to say that the contract need only be suspended during the war if the benefit to the enemy thereby becomes vague and uncertain, for you would by the suspension be substituting a new and different contract into which the parties had never entered; see, for example, *Distington Hematite Iron Company v. Possehl and Co.* (32 *The Times* L.R. 349; [1916] 1 K.B. 811).

The case for Enskilda on the appeal before this House was argued on different grounds. It was conceded that contracts the further performance

of which would confer on the enemy an immediate or future benefit or involve intercourse with the enemy are abrogated on the outbreak of war. [His Lordship quoted Lord Dunedin in *Ertel Bieber and Co. v. Rio Tinto Company* (34 *The Times L.R.* at p. 210; [1918] A.C., at p. 274) and continued:] It was also conceded that the same principle would apply to a contract between British subjects, or between a British subject and a neutral if according to its very terms further performance of it would give the opportunity or tend to the increase indicated above. It was, however, contended that this contract fell within certain exceptions to the rule. That certain exceptions do exist is well established. To quote Lord Dunedin once more—he stated the exceptions thus in *Ertel Bieber and Co. v. Rio Tinto Company* ([1918] A.C., at p. 269): “There is indeed no such general proposition as that a state of war avoids all contracts between subjects and enemies. Accrued rights are not affected, though the right of suing in respect thereof is suspended. Further there are certain contracts, particularly those which are really the concomitants of rights of property, which even so far as executory are not abrogated. Such as, for instance, the contract between landlord and tenant of which an example may be found in the recent case of *Halsey v. Lowenfeld*” (32 *The Times L.R.* 709; [1916] 2 K.B. 707).

Thus a contract which is completely executed on one side, and by which nothing remains to be performed except payment to be made by the other of a liquidated sum whether already due, or *debitum in praesenti solvendum in futuro*, is unaffected by the outbreak of war. The payment cannot in fact take place between enemies in war time; so long as the war lasts the payment is suspended. Nor is enemy property confiscated at common law by the outbreak of war, and consequently contractual rights and obligations incidental to the ownership of property are not put an end to at common law by the outbreak of war. The enforcement of them during the war may be impossible, but they will survive the war.

It was first contended that the April contract fell within the exceptions because the April contract was a contract wholly executed by Enskilda and under which nothing remained to be done by the English company except the payment of money. This was the main contention advanced by Enskilda before us, and it is this contention which is adopted by those of your Lordships who favour the dismissal of this appeal. But they reach this conclusion on two grounds, concerning the construction and effect of the April contract, which appear to me fundamentally wrong, and I feel bound to state in detail my reasons for so thinking.

One ground is of this nature:—The payments to be made by Schering under the April contract are treated as payments made at the request of the German company, and it is then said that Schering would, independently of the provisions of clause 8, and whether it paid as a surety or a principal, be entitled to reimbursement. Equity, it is said, would transfer to the English company the right vested in Enskilda to recover from the German company

the amounts paid. The April contract added nothing in this respect; clause 8 conferred on Schering no right which it would not have obtained by the mere fact of making the specified payments.

Surely this view is misconceived. That Schering entered into both the February contract and the April contract in obedience to the instructions of the German company no one can doubt. But the right in Enskilda to receive, and the obligation on the English company to pay, the instalments rest on the April contract. They are payments which will become payable by Schering to Enskilda before anything is payable to Enskilda by the principal debtor at all. Nor are they made by Schering as a surety, or at the request (express or implied) of the German company. They are made by Schering as a principal under compulsion of the April contract. Even if the pre-war instalments could (contrary to my view) be treated as being payments made at the request of the German company, no post-war instalment could possibly be treated as having been made at the request of an enemy. But for the existence of the April contract there would have been no obligation on Schering to pay any of the "instalments": any such payment would have been a purely voluntary act creating no right, legal or equitable, in the payer.

Even if the first portion of clause 4 of the February contract was not (as between the parties to the April contract) superseded by clause 8 of the April contract, but still remained binding, the legal position would remain unchanged. Schering would make the payments not as a surety, or at the request of someone who was indebted to the payee, but as a principal under the compulsion of a contract with the payee.

The other ground is of this nature:—It is said that the provision in the April contract for the assignment of Enskilda's rights against the German company is only a provision as to the method of payment, that the April contract had been wholly executed by Enskilda before the outbreak of war, that Enskilda had then an accrued cause of action in debt for each instalment, that the tender of an executed assignment by Enskilda was a mere formality, and that Enskilda could sue for an instalment, if unpaid on the specified date, on an allegation that Enskilda was always ready and willing to execute an assignment on payment.

I cannot agree. It is, in my opinion, impossible to treat clause 8 as a mere agreement to pay fixed amounts on stated dates, constituting debts to be paid on those dates, subject to the fulfilment by Enskilda of conditions. It is a contract to pay the instalments (I quote the words) "in consideration of the assignment by you to us on the occasion of each such payment of a like sterling amount of your claim against the German company." This is nothing but a contract for the sale and purchase of a number of choses in action on specified dates. As was pointed out in the judgment of the Master of the Rolls in the earlier litigation to which I have referred—see (57 *The Times* L.R. 289, at p. 290; [1941] 1 K.B. 424, at pp. 435, 436)—

the remedy thereunder would be not by action for debt, but by proceedings for specific performance of the contract of purchase, after execution and tender of a proper assignment of the subject-matter of the purchase. When war broke out no cause of action had accrued to Enskilda in respect of post-war instalments. The only obligation to pay is on receipt of a tendered executed assignment of the property agreed to be sold; the only obligation to part with the property sold is on receipt of the purchase price. A "ready and willing" plea may well be a proper and necessary plea in an action for breach of a contract for the purpose of alleging and establishing that the plaintiff who sues for breach is not himself in breach. But we are here considering the position in relation to an action for the enforcement of this contract, not in relation to an action for its breach. In order to enforce it Enskilda would have to sue for specific performance, and, except on allegation and proof of execution and tender of an assignment of the property sold, there would be no cause of action for the purchase money. In other words, the April contract, so far from having been fully performed by Enskilda before the outbreak of war, remained completely executory on both sides in relation to the post-war instalments. On each instalment date each party had to complete the sale and purchase, Enskilda by delivering an assignment of the properties sold in exchange for the purchase money, Schering by paying the purchase money in exchange for an assignment of the property sold.

Another argument advanced on behalf of Enskilda was to the effect that, so far as concerns that part of the April contract which deals with suretyship, Enskilda had wholly performed its part. It had complied with the request of the two companies, and had made over the marks to the German company which constituted the consideration for the suretyship, and the carrying out of that obligation involved neither intercourse with nor benefit to the enemy. I have already drawn attention to the fact that, in sober truth, no consideration for the suretyship has moved from Enskilda to the two companies, who had made no request. But assuming the truth of this fiction, it is in my opinion impossible to sever the April contract and to treat it as if there were two separate and independent contracts, one for suretyship and the other for the sale and purchase of Enskilda's claims against the German company. The April contract is one entire and essential constituent of a transaction between Enskilda and the German company. In order that the German company might induce Enskilda to let it have the Reichsmarks for the reduced price of £50,400 sterling it was necessary that the two companies should, under instructions from Germany, both guarantee the larger price up to £50,400 and agree to buy Enskilda's claims against the German company at prices in sterling sufficient to provide in sterling the reduced price of £50,400. Unless this twofold liability had been undertaken by the two companies (as it was undertaken both in the February contract and the April contract) the bargain between Enskilda and the German company could not have been struck.

Reliance was also placed on the exception which was described by Lord Dunedin in these words in *Ertel Fieber and Co. v. Rio Tinto Company* ([1918] A.C., at p. 269): "Further, there are certain contracts, particularly those which are really the concomitants of rights of property, which even so far as executory are not abrogated." I am not sure that I understood correctly one argument on this contention. I think that it was said that the April contract was a concomitant of the right of property which Enskilda had acquired by its contract with the German company. But that is not the kind of property to which Lord Dunedin referred. He was not referring to choses in action or contractual rights. He was referring to contracts such as covenants running with the land, the right to enforce which belongs to the owner for the time being of the land. The interest in the land is not confiscated at common law by the outbreak of war; the power to enforce the covenant cannot be exercised during the war, but when the war ends the power of enforcement revives. It may be difficult to define with exactitude or exhaustively the class of "concomitants." Each case must be considered when occasion arises. But I am of opinion that the present case cannot be treated as a contract which is a concomitant of rights of property within the exception.

Finally, it was suggested that the existence of the security created by the April letter brought the case within this exception. This appears to me an argument which must fail. So far from the April contract being a concomitant of the right of property created by the security, it is the security which is a concomitant of or ancillary to the April contract; and the argument when brought to bedrock comes to this, that obligations which (if unsecured) would be abrogated at common law are saved from this fate by the fact that security has been given for their performance. That will not do. With the disappearance of the obligations the security for their performance necessarily disappears as well.

I am in agreement with the views of Mr. Justice Simonds on this part of the case. I agree with him when he says that the simple question is whether the performance of the April contract after September 3, 1939, would benefit the enemy by increasing his resources or crippling those of his Majesty's subjects. That it must do so is, as he and the Court of Appeal thought, and as I think, plain; and I will add that it is equally plain that the pecuniary benefit to the German company was one of the very objects for which, in the first instance, the February contract, and subsequently the April contract, were entered into.

Whether the performance of the April contract would involve intercourse with the enemy is a point with which I need not deal, but the course of dealing between the parties in the days of peace affords strong support for the view expressed by Mr. Justice Simonds. I express no view of my own, however, nor do I say anything on the question of frustration.

One cannot but regret the unsatisfactory outcome of the argument in this

House. The appeal fails for reasons which differ from those which prevailed in the Court of Appeal and which differ *inter se*. To me, two decisive points stand out crystal clear, unanswered, and, I venture to think, unanswerable: (1) the April contract, if performed in war time, confers a distinct and immediate benefit on the enemy; and (2) as regards post-war instalments, it was at the outbreak of war wholly executory.

I would allow the appeal and restore the order which the Court of Appeal discharged.

LORD MACMILLAN delivered an opinion stating that he would allow the appeal.

LORD PORTER and LORD GODDARD delivered opinions stating that they would dismiss the appeal.

### THE TOLTEN

PROBATE, DIVORCE, AND ADMIRALTY\*

[December 3, 1945]

This was an action *in rem* by United Africa Company, Limited, against the owners of the motor vessel *Tolten*, a British ship registered at Newport. The amended endorsement on the writ was for damage caused to the plaintiffs' pier and wharf by the *Tolten* through the negligence of her owners, their servants, or agents.

In the statement of claim the plaintiffs stated, *inter alia*, that they were the owners and occupiers of a wharf known as Bulk Oit Wharf, situated at Apapa, in the harbour of Lagos, Nigeria, and they alleged damage to the wharf through the negligent navigation of the *Tolten*. The shipowners, in their defence, denied that the plaintiffs were the owners or occupiers of the wharf in question, and contended that, on the facts set out in the statement of claim, the Court had no jurisdiction to adjudicate thereon.

By order of the Registrar the question of jurisdiction was tried as a preliminary point of law.

MR. JUSTICE BUCKNILL read a judgment in which he stated the issues, and continued: Counsel were unable to cite any Admiralty action *in rem* which is a direct authority on the point. Counsel for the shipowners relied mainly on *The Mary Moxham* (1875), 1 P.D. 43, and on appeal 1 P.D. 107, the facts in which were similar to those in this case, except that there the pier was in Spain. The defence by the shipowners in that action, which was *in rem*, alleged, in substance, that the Court had no jurisdiction; that the pier formed part of the land of Spain; and that by the law of Spain the masters and mariners were alone answerable for the damage caused by the negligent navigation of the ship. The plaintiffs moved the Court to strike out that part of the defence which alleged that the Court had no jurisdiction and that by the law of Spain only the master and mariners of the ship were liable for the damage. At the hearing of the objection before Sir Robert Phillimore

\* *Times Law Reports* 378.



it appeared that the *Mary Moxham* had been arrested in Spain in respect of the damage to the pier, and that, to procure her release, the defendants agreed with the plaintiffs that the liability of the defendants should be determined by proceedings in the English Courts. In the face of that agreement the defendants did not pursue the point that there was no jurisdiction. There was argument by Mr. Butt, Q.C., and Mr. Benjamin, Q.C., on behalf of the plaintiffs, in support of the jurisdiction of the Court—presumably before the agreement referred to was brought to the attention of the Court—and Sir Robert Phillimore ruled (at p. 45): "The inclination of my mind, subject to any argument on the point I might have heard from the counsel of the defendants, is that the Court has jurisdiction over the case. In these circumstances I shall treat the case not as coming before me by consent, but as one within the ordinary jurisdiction I possess to entertain suits arising out of collisions in foreign waters where no circumstances by which such jurisdiction might be ousted has been brought to my notice." The Court then heard argument, on the question whether Spanish or English law applied with reference to the liability of the shipowners for the damage to the pier. Sir Robert Phillimore decided that Spanish law was not applicable and that the damage must be taken to have been inflicted by a British ship within the ebb and flow of the tide on a pier in the territory of Spain.

The case went to the Court of Appeal, but the question of jurisdiction was not argued, the only question being whether the law of Spain applied in reference to the liability of the shipowners. Lord Justice James, however, said (1 P.D., at p. 109) that it was a very novel action and that "very grave difficulties indeed might have arisen as to the jurisdiction of this Court to entertain any action or proceedings whatever with respect to injury done to foreign soil." Lord Justice Mellish said (at p. 112): "Whether the rule as to wrongful acts to real or immovable property in a foreign country does not go still further and prevent an action being brought at all is a question which it is not necessary to determine in this case, because, having regard to the consent of the parties and the agreement that has been entered into, no such objection to the jurisdiction could be taken in this case."

The House of Lords in *British South Africa Company v. Companhia de Mocambique* (10 *The Times* L.E. 7; [1893] A.C. 602) finally decided that the Supreme Court of judicature has no jurisdiction to entertain an action *in personam* to recover damages for a trespass to land situated abroad. In the course of the argument counsel who supported the proposition, which the House of Lords subsequently affirmed, cited *The Mary Moxham* as a case which showed that actions affecting real property are strictly local in their character and cannot be tried here when they affect foreign countries. Lord Herschell quoted the passage in Lord Justice James's judgment (cited above) and continued (10 *The Times* L.R., at p. 9; [1893] A.C., at p. 622): "The distinction between matters which are transitory or personal and those which are local in their nature, and the refusal to exercise jurisdiction as regards th

latter where they occur outside territorial limits, is not confined to the jurisprudence of this country." I presume, therefore, that Lord Herschell considered that Lord Justice James was right when he said that there were very grave difficulties as to the jurisdiction of the Court in *The Mary Moxham* (*supra*). That *dictum* of Lord Justice James and the contrary *dictum* of Sir Robert Phillimore are the only authorities cited to me which directly bear on the point.

In Williams' and Bruce's Admiralty Practice (3rd ed. (1902), p. 74) it is stated: "Damage done by a ship to a pier or breakwater has been held to fall within section 7 of the Admiralty Court Act, 1861, and it must now be considered as settled law that under section 6 of 3 and 4 Viet., c. 65, the Admiralty Court acquired jurisdiction to entertain a claim for damage received by a ship by collision with a pierhead within the body of a county." A reference then follows to *The Mary Moxham* in the following note: "But it seems to be open to doubt whether the Court can entertain an action for damage done to a pier in foreign territory except pursuant to the agreement of the parties." That was written in 1901 after *British South Africa Company, Limited v. Companhia de Mocambique* had been decided. In my opinion, the matter is one of considerable doubt, and it is doubtful whether the plaintiffs in the present action could sue the owners of the *Tolten in personam* in England in respect of the damage to a pier in Nigeria in their occupation. I do not think that they need prove a legal title to the pier. In any case this is an action *in rem* and not *in personam*.

Counsel for the plaintiffs argued that section 22 of the Supreme Court of Judicature (Consolidation) Act, 1925, gave the High Court admiralty jurisdiction over any claim for damage done by a ship. That enactment did not extend the jurisdiction of the High Court, but merely transferred to it the jurisdiction formerly exercised by the High Court of Admiralty. Lord Gorell made that clear in the case before the Privy Council of *Bow, McLachlan and Co., Limited v. The Ship Camosun* (25 *The Times L.R.* 833, at p. 835; [1909] A.C. 597, at p. 608) where he said: "The Judicature Acts of 1872 and 1875 . . . amalgamated the English Courts and transferred to the High Court all the jurisdiction which had been previously exercised by the different Courts, so that every Judge of the High Court can exercise every kind of jurisdiction possessed by the High Court, but these changes conferred no new Admiralty jurisdiction upon the High Court, and the expression 'Admiralty jurisdiction of the High Court' does not include any jurisdiction which could not have been exercised by the Admiralty Court before its incorporation into the High Court, or maybe conferred by statute giving new Admiralty jurisdiction. It is sure that a Judge of the High Court sitting in the Admiralty Division thereof, may, as Judge of the High Court, exercise any jurisdiction which is now possessed by a Judge thereof, but he does so by virtue of the general jurisdiction conferred upon him, and not by virtue of any alteration in his Admiralty jurisdiction."

I must, therefore, look back at the Acts of 1840 and 1861 to see what jurisdiction the Court of Admiralty had before the Judicature Acts were passed. The Admiralty Court Act, 1861, enacted that the High Court of Admiralty should have jurisdiction over any claim for damage done by any ship, and that that jurisdiction might be exercised by proceedings *in rem* or by proceedings *in personam*. The words of the statute are clear and simple, and I think that they must be given the widest possible interpretation. The Act of 1840 dealt with damage received by a ship on the high seas or within the body of a county, but the Act of 1861 does not limit the locality in any way; it simply states that the High Court of Admiralty shall have jurisdiction over any claim for damage done by a ship. That Act has been held to apply to damage done by a ship to a pier in British waters, and to damage by collision between ships in foreign waters. To limit the jurisdiction as suggested by the shipowners seems to me to lead to this strange result: If the *Tolten* had collided with a ship belonging to the plaintiffs moored alongside the pier in question and the pier had been damaged as a result, the plaintiffs could sue the *Tolten* here in respect of damage to their ship, but they could not include in their claim damage done to the pier as a result of the collision.

Unless I am precluded by an authority binding on this Court I see no reason why a case of this kind should not be included within the plain words of the statute. So far as any hardship is concerned—if the Court is entitled to consider that—there is no hardship on the shipowners if they have to defend the action here, for they are resident in this country. On the other hand, if the plaintiffs are not entitled to arrest the ship except in Nigeria, their remedy against the ship, which has left Nigerian waters, has gone. The High Court exercising Admiralty jurisdiction may be considered as an international Court in the sense that it exercises jurisdiction *in rem* over foreign and British ships alike in respect of damage done by such ships, whether the damage has been done in British waters or on the high seas or in foreign waters. To limit the plain words of the statute so as to exclude a claim of this kind seems to me to impose a fetter on the jurisdiction of the Court to which the Court should be slow to submit, and to limit unduly the right of the plaintiffs to arrest the ship which has done the damage.

For these reasons I reject the plea on demurrer, and there will be judgment for the plaintiffs on the preliminary point.

## BOOK REVIEWS AND NOTES

*International Law*. Volume I. By George Schwarzenberger. London: Stevens & Sons, 1945. Pp. xlv, 645. Tables. Appendixes. Index. £ 3.

This volume by the Sub-Dean of the Faculty of Laws and Lectures in International Law and Relations at University College, London, is the first of a series of three volumes on International Law. The present volume deals with International Law as applied by International Courts and Tribunals. The second volume will present international law as shown in British State practice and the third will cover international law as expounded in the decisions of courts within the British Commonwealth and Empire.

The author takes a positivist attitude toward the subject of international law, in the sense that he looks to judicial decisions for the development of the principles of international law by the use of the inductive method, rather than to the presentation of the subject by abstract principles illustrated by court decisions and state practice. He rightly regards judicial decisions as "evidence of international law of a very much more persuasive and authoritative character than any other available in this sphere." He changes the emphasis from "national attitudes and subjective views of writers to the certainty provided by the decisions of International Courts and Tribunals."

Contrary to the treatment of the matter in Article 38 of the Statute of the World Court, the author correctly submits that "rules which have actually been applied by Courts can claim a higher degree of authority than doctrines propounded by writers of text books, however eminent, or views upheld—and at convenience disregarded—in the diplomatic exchange of Foreign Offices." He holds that "though generally speaking legal opinions expressed in State practice, the views held by Municipal Courts and the treaties concluded in individual States can not convey the same certainty of International Law as may be claimed for principles accepted by the jurisprudence of International Courts, these sources of International Law prominently represent International Law in the making."

As the value of a decision depends on the statute of the tribunal, he gives preëminence to, and a systematic survey of, the work of the World Court, and he points out that although the decisions under its Statute can not be considered as binding precedents, their strength rests on the quality of the bench and its exposition of the law. The World Court decisions are "supplemented primarily by reference to the decisions of the Permanent Court of Arbitration." Where these two sources leave gaps, awards of bilateral Arbitration Tribunals, Claims Commissions and Mixed Arbitral Tribunals have been introduced. The Author says he has been at pains to point out conflicting decisions, which leave matters "still in state of flux." In as-

sessing the meaning and value of decisions the author has admittedly tried to avoid too narrow or too broad interpretations and conclusions therefrom.

The method of treatment assumes an elementary knowledge of international law and therefore this is not a book to be recommended for the beginner in this field, but for advanced students and practitioners. The author suggests first a reading of Brierly's introduction to the "Law of Nations." Readers will find this volume quite different from the ordinary text on international law. Topics are treated only slightly from the historical or abstract point of view and are chiefly limited to views expressed by international tribunals in their opinions directly or obliquely.

It must be confessed, however, that a too severe limitation of discussion to court decisions does not give a well rounded idea of the system of international law as it exists. Probably the *lacunae* will be supplied by the other volumes of the triad. Moreover the carving of a decision into segments and the distribution of them under various headings makes it difficult to determine at times whether some of the extracts are merely passing comments of the judges or actual decisions on the points at issue. It is believed that the general impressions of the reader would be clearer had the author stated more frequently the principles to be drawn, by the inductive method proposed, from the decisions cited, quoted, and summarized.

At times the reader will wish that the facts were more fully stated, so as to bring out the issues to which the individual quotations from decisions are applicable. This is particularly true when the decisions relate to international treaties or conventions whose provisions are not always quoted or easily available.

It is impossible in the space of a review to deal adequately or comprehensively with a multitude of topics and decisions, here marshaled under more than 350 particular headings. These headings are grouped in the seven Parts of the volume dealing, respectively, with Foundations of International Law, International Personality, State Jurisdiction, Objects of International Law, International Transactions, War and Neutrality, and Law of International Institutions. The topics are generally introduced by brief orientation remarks which prepare the reader for the exposition which follows. In place of a detailed description of the contents of these several Parts it may be said that the decisions of the World Court and the International Court of Arbitration, supplemented by decisions of other tribunals, have been arranged and quoted in such a form as to be conveniently referred to by students and practitioners. There are numerous cross references to other sections of the volume where allied discussion occurs. The reader will find some authoritative statement on almost every phase of international law.

Special mention might be made of Part Seven, the largest in the book, which deals with the Law of International Institutions. Written before the United Nations Charter was finally drafted it considers international institutions as they existed prior to the Charter, very largely as set up by the

League Covenant and interpreted by the World Court. It is difficult to point to a more cogent discussion of the principles involved. A review cannot give an adequate idea of this analysis which covers the types, functions, and principles of international institutions and their operation. The Judicial Institution is given two thirds of the space and includes such topics as judicial legislation, prerequisites of jurisdiction, estoppel, *stare decisis*, limitations of judgment, *res ad judicata*, revision of judgment, and of course advisory opinions.

Administrative International Institutions are reviewed in the light of the World Court decisions interpreting their jurisdiction, rights and duties, their relation to the territorial sovereign, their subjection to instructions and their rule of voting. In these matters the court appears to apply the functional test as one of the guiding rules of interpretation.

The final sections relate to general international institutions such as the League of Nations and the quasi-international ILO. It would seem that the World Court should belong in this category. The legal principles governing the League as a peace-preserving organization and a center of international coöperation are discussed. Also explored are the implicit limitations on state sovereignty of members of the League, the nature of the Covenant as a collective treaty, the legal consequences of a conflicting bilateral treaty and the imposition of burdens on a non-member without its consent.

The ILO is merely an auxiliary body created to consider and make recommendations to improve conditions of labor as an instrument of peace. It has no coercive powers and no recommendation can be applied in any country that does not see fit to adopt it. Moreover, its activities fall solely within the realm of domestic jurisdiction. The few decisions relating to the ILO are reviewed and explained. The question whether a state not a member of the League can join the ILO is discussed in the decisions quoted.

The appendices contain seven international decisions of particular significance to each of the seven Parts of the book. There are also reprinted the Hague Convention on International Arbitration, and the Statute and Rules of the Permanent Court.

L. H. WOOLSEY

*Of the Board of Editors*

*Istoriya Mezhdunarodnogo Prava*, vypusk I (ot drevnosti i do kontsa XVIII veka) Posobie k Lektsiyam [History of International Law, vol. I (from ancient times to the end of the XVIII century) Lecture Aid] By Prof. E. A. Korovin. Moscow: Military-Juridical Academy of the Red Army and Advanced Diplomatic School of the Ministry of Foreign Affairs, USSR; 1946. Pp. 106.

Professor Korovin's first post-war book inaugurates what will be a series of volumes to be used by Soviet lecturers in preparing courses in interna-

tional law. The volume under review traces the development of international law from ancient times to the end of the feudal period. Korovin explains that he begins with ancient times because he feels that the usual practice of beginning with Grotius and Westphalia seems groundless. He finds international law appearing, even though primitive in form, with the rise of class societies and states. He decries the western custom of limiting research to the Mediterranean basin on the ground that other areas are "non-historical." He starts his own history with a Chinese manuscript of 2357 B.C., setting forth obligations to foreign states. He then approaches the ancient cultures of India, Babylon, Assyria, Judea, and Egypt to find examples of relationships governed by international agreement and custom. He adopts the thesis that some nations, such as Germany, cannot be compared with Russia in their contribution to the welfare of mankind and international law. For that reason he gives more attention to the Russian experience than to any other, making his book valuable to western readers who will search in vain for such information in the usual treatises.

Marxist principles are used in evaluating each period. For example, the absence of a general system of international law, as opposed to isolated aspects, in ancient society is found to be due to the fact that economic development was so limited that the great international links of markets, credits, international strife, and coöperation had not yet appeared. The emphasis during the Middle Ages upon the detailed regulation of war by law is found to be due to the fact that under feudalism before the advent of commodity-money relationships war was the sole means available to increase land ownership. Korovin avoids a mistake of which early Soviet historians have been accused. He points out that other factors besides economic ones bear examination, as, for instance, the psychological factors such as the Christian Church and Canon and Roman law. The flowering of international law at the end of the feudal period is laid to the appearance of capitalism, seeking to advance its development within the confines of feudalism, and requiring law to do so.

Prussian absolutism is given as an example of all the negative features of the end of the feudal period. It is contrasted with its counterpart in Russia, which, although severe, is found to be progressive in the sphere of international relationships. Peter I's manifesto of 1702 extending broad rights to foreigners is given as an example of this tendency. Professor D. Kachenovsky's statement of 1863 is quoted with approval to the effect that Russia, even in the pre-Peter period, had an understanding of international law which was quite well defined and very close to the European conception of the time.

Western readers will find this book tantalizingly short but valuable, not only for its account of the Russian development of International Law but also because it gives some indication of what is being taught Soviet diplomats of the future. The emphasis upon the Russian contribution may be startling to some but it is probably justified by the underemphasis among

western scholars in the past. Such an approach is one more bit of evidence of the growing Soviet pride in the accomplishments of the Russian people and of the feeling which might almost be described as a grievance against the west that it has ignored these accomplishments for so long.

JOHN N. HAZARD

*Columbia University*

*O Direito Internacional E A Democracia.* By Levi Carneiro. Rio de Janeiro: A. Coelho Branco Fo.; 1945. Pp. 408. Index.

This volume contains a collection of essays, studies, and addresses on various subjects in the fields of law and international relations by a Brazilian jurist. The dates of their writing or delivery range from 1922 to 1945. Many of them reveal a broad and detailed familiarity with modern writings, especially of Latin American jurists and scholars but also those of Europe and the United States. Some of the items included deal particularly with the foreign relations of Brazil and reveal a constant desire on the part of the author to promote friendship with Brazil's neighbors. There are also frequent references to the orientation of Brazilian foreign policy toward the United States, in which connection the distinguished services of Joaquim Nabuco are naturally recalled.

The central core of the book (pages 97 to 110) dealing with present aspects of international law is of special interest to the international lawyer. In it as well as in some of the preceding addresses, the views of the author appear. They may be characterized as inspired by a forward-looking point of view, welcoming such developments in international law as the protection of the rights of the individual, and, on the organizational side, the improvement of international procedures and machinery for the promotion of peace based on law. The author sees the current diminution of the concept of sovereignty in the interest of the development of international interdependence. He recognizes that internal conditions of states are not matters of indifference to the international community. He seems to regret that the Charter of the United Nations did not make more progress along these lines. But he traces with sympathetic approval the development in the Inter-American conferences of the restrictions on intervention by any single state and welcomes the progress which has been made toward the processes of consultation and joint action. There are interesting sections reviewing recent policies and practices as well as theories concerning the recognition of states and governments, including the Tobar and Estrada Doctrines and the recently expressed views of Lauterpacht and Fenwick. The author is a warm advocate of the Pan-American system and believes that it should not be sacrificed in an attempt to build a more general world organization.

It is not possible within the limits of this review to do justice to all the topics covered in this collection, but it may be noted that the reader will



find here numerous valuable surveys of the development of Latin-American thought in the fields of law and politics. The concluding paper contains a most useful analysis of trends in opinion concerning the codification of private international law and the attempts to secure unification of branches of private law. Mention should also be made of an interesting opinion on the question whether criminal proceedings could be brought against the Ecuadorian Minister of Foreign Relations for signing the treaty of 1942 with Peru which brought an end to the conflict between those two countries.

PHILIP C. JESSUP

*Of the Board of Editors*

*Human Rights and Fundamental Freedoms in the Charter of the United Nations.* By Jacob Robinson. New York: Institute of Jewish Affairs; 1946. Pp. iv, 166. Appendixes. Index. \$2.

Some years ago Dr. Robinson attacked the problem of human rights in his *Minorities in a Free World*. In 1935 his fundamental work, *Commentaries on the Statute and Convention of Klaipeda (Memel) Territory* was published in two volumes. It was of great service for the Lithuanian administration in developing its government in the territory and port of Klaipeda until Hitler took this region from Lithuania in 1939.

Now Dr. Robinson presents to the American public a new work. This is a well-grounded commentary in the matter of human rights and fundamental freedoms proclaimed in the United Nations Charter. It is very pertinent at the present time, especially if we recall the total negation of elementary human rights during the recent war in the extermination of Jews, Poles, Lithuanians, Estonians, Latvians, Ukrainians, Balkans, and other peoples by the totalitarian regimes. Today the peoples and individuals suffering from oppression have placed their hopes in the UN. Will they be disappointed?

The Charter proclaims one of the purposes of UN to be to "Achieve international coöperation in promoting and encouraging respect for human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion." This provision will not, as Dr. Robinson points out, assure by itself the realization of human rights and fundamental freedoms for all people. The provision is not made enforceable by any international machinery. The responsibility rests with the member governments to carry it out. Member states are bound to accept and carry out the decisions of the Security Council relating to the maintenance of peace, but in regard to actions of the Assembly and the Economic and Social Council they are merely pledged to coöperation, with the understanding that this coöperation will not involve any interference in their domestic affairs. And human rights and fundamental freedoms undoubtedly belong to this category, except in cases of enforcement measures by the Security Council relating to the maintenance of peace.

No doubt, as the author emphasizes, the direct competence of the organs of UN in the field of human rights is restricted. It falls within their jurisdiction to draft generally applicable rules for the conduct of member states (either in the form of an international bill of rights or of a treaty, both subject to the consent of the members) and to debate, under certain conditions, the behavior of the members in the field of human rights.

The main value of the work of the United Nations, Dr. Robinson believes, will be that for the first time in history the development of human rights will be subject to an influence of greater potency than a vague public opinion within a given country or beyond, namely, of a powerful international organization whose views and decisions cannot be neglected by any state in the world. "Under the United Nations Charter means are at our disposal that never before existed for mobilizing the peoples of the world in the cause of human rights. We have now to use this opportunity, and to use it at full," said the United States delegate, Edward R. Stettinius.

The inevitable question regarding the future of the evolution of human rights under the aegis of UN cannot be divorced from the basic problem of the future of UN itself. Only from a strong and effective UN can we expect help in the promotion of human rights. Such are the main contentions of this small volume.

Dr. Robinson's work is a serious scientific study made with the intention to help oppressed peoples and minorities and even individuals.

VLADAS JUDEKIA

*S. Benedict's College, Atchison, Kansas*

*The United Nations Economic and Social Council.* By Herman Finer. Boston: World Peace Foundation; 1946. Pp. 121. Appendix. \$.50. *The Bill of Social Rights.* By Georges Gurvitch. New York: International Universities Press; 1945. Pp. 152. Appendixes. \$2.00.

These two small volumes are both concerned with the improvement of the social and economic position of mankind. The two approaches are vastly different and the content is by no means the same, but both reflect the growing insistence upon the necessity for improvement, through law and organization, of existing social and economic conditions. Gurvitch, whose visit to the United States from France during the war years made his writings in the field of sociological jurisprudence more familiar to American readers, is concerned with the condition of the common man and deals only occasionally with the international side of the picture. His book, with its philosophical and historical approach, contains a draft of a Bill of Social Rights to be adopted as the domestic law of states and designed to enable social democracy to supplement political democracy. Like Finer, he believes in international economic planning and Gurvitch believes that "Among the different aspects of sovereignty, economic sovereignty has the greatest chance of being internationalized." His viewpoint should be considered by those

interested in human rights who tend to confine their attention to the political sphere. Professor Finer's book includes descriptions of the new international machinery which the United Nations are in course of erecting to grapple with the world's economic and social problems. World interdependence in these fields is a keynote of the book and the conclusion is soundly drawn that the various international agencies, from ILO through International Bank and Fund and FAO to the Economic and Social Council itself, must coördinate their efforts. Like Gurvitch, Finer lays stress on freedom of movement of peoples, although his emphasis is more on the general economic position of communities than on the freedom of the individual spirit in which Gurvitch is greatly interested. Finer also urges the freeing of channels of commerce and suggests the need for still other international organizations to aid in the process. Both authors are concerned with the protection of the consumer and the worker more than of the producer but Finer is more concerned with the structural and procedural devices which will enable the economic and social life of the world to function smoothly. There are suggestions for the functioning of both national governments and international secretariats which will well repay study by those concerned with the management of these problems

PHILIP C. JESSUP

*Of the Board of Editors*

*International Cartels.* By Ervin Hexner. Chapel Hill: University of North Carolina Press; 1945. Pp. xiv, 555. Appendixes. Indexes. \$6.00.

*National Interest and International Cartels.* By Charles R. Whittlesey. New York: Macmillan Co.; 1946. Pp. vi, 172. Index. \$2.50.

*A Cartel Policy for the United Nations.* Ed. by Corwin D. Edwards. New York: Columbia University Press; 1945. Pp. vi, 124. Index. \$1.25.

These volumes come at a time when we are in a position to consider the international cartel problem with somewhat greater objectivity and more extensive data than was previously possible. What is perhaps more important, the end of the war which smashed so many of the old economic forms and concepts, the eclipse of the German cartels (which were in many respects at the core of the international cartel problem), and finally an apparent disposition on the part of many nations to recast their international trade policies and practices in a more coöperative spirit together make it possible to get a fresh start with the cartel problem and to coördinate such action with far-reaching measures in other aspects of world trade. The authors of these books are not novices in the field. Hexner has had first-hand experience in European cartels and has written authoritatively on the subject. Whittlesey has previously studied governmental control of rubber, and the authors of the Edwards book have all dealt with cartels as officials of the Federal government.

Hexner has written a well-documented book which should be useful even

to those who do not share his approach to the problem. The greater part of his volume consists of some one hundred-odd case studies of international cartels and texts of important documents relating to cartels; this material, together with the indexes of commodities, companies, and authors cited help to make it an excellent reference book. In his discussion Hexner analyzes the various cartel concepts, offers his own definition, discusses the practices and structures of international cartels, and examines governmental commodity agreements and government trade restrictions in relation to the problem. He argues that there is no evidence that cartels are in themselves threats to national and international peace and security. He indicates that there has been too little study of the actual operation and economic effects of international cartels to warrant generalizations as to the undesirability of this form of entrepreneur activity from the economic point of view, and he does not accept theoretical considerations as sufficient guides to policy. He makes the point that if we abolish cartels outright we do not thereby necessarily restore competition and we may deprive ourselves of a tool which can be used for socially desirable ends. He freely admits the abuses, actual and potential, to which cartels lend themselves, and he proposes to deal with these by requiring registration of cartels, by revising patent legislation, and by international agreements to outlaw certain cartel practices, among other measures.

Whittlesey begins by facing the issue of cartels and a free economy; the key to the solution for him is that "either we believe in competition and economic democracy or we do not," which seems to this reviewer to be an oversimplification that is unworthy of the careful thinking which Whittlesey offers in some other respects in this book. He deals in turn with the security aspect of the question, agreeing generally with Hexner, then with the supposed necessity for American exporters to enter cartels, which he denies, and with patent reform, which he would welcome but which he regards as a highly uncertain possibility. After examining various proposals for dealing with the cartel problem, he presents his own. This involves the creation of an international agency of the type of the ILO to study cartels, establishment of supervisory, informational, and enforcement agencies in the Federal government, patent reform, reëxamination of the Webb-Pomerene Act, and legislative application of the Sherman Act philosophy to American business practice abroad. The reviewer cannot help but feel that this is a somewhat uneven book. While a good deal of the discussion is very worthwhile, the author's reasoning is not always clear and there are some apparent inconsistencies.

The Edwards book is a collection of lectures delivered at Columbia University in 1945 by Corwin D. Edwards, Theodore J. Kreps, Ben W. Lewis, Fritz Machlup, and Robert P. Terrill. Their general thesis is that cartels are bad and should be fought by the United States, preferably in

concert with other governments. Readers will find useful information here and some carefully developed and interesting reasoning, but it should be borne in mind that these papers do not constitute a comprehensive and impartial discussion. The authors have a cause to promote, and they tackle the problem in that light.

ALEXANDER F. KIEFER

*Washington, D. C.*

*American Foreign Policy.* By Edwin Borchard. Indianapolis: National Foundation Press; 1946. Pp. vii, 69. \$1.00.

This volume would be too slender to deserve more than passing notice if it were not that it bears the name of one of the distinguished international lawyers of the United States whose writings in certain technical fields have been permanent contributions to the development of the science of international law.

Judging by its title and by the fact that it appears under the auspices of the National Foundation for Education in American Citizenship the reader might expect the volume to be an impartial historical survey of American Foreign Policy. The expectation is met for half of its brief length. After that the story becomes a mere recital of the well-known isolationist views of the author, views so cleverly presented and so persistently argued in the years between the First and Second World Wars that it is difficult to understand how the National Foundation could have expected the author to change his role and become a detached commentator of recent developments. In any case he has not done so. It is not merely that he sees more acutely than the rest of us the obstacles that confront us in attempting to establish a new international organization; he has no faith in the ideal, no hope in the ultimate possibility of attaining the objective. Hence his statement of the three alternatives with which the international organization is faced leaves the reader bewildered, none of the three representing what the proponents of the organization sought to attain and none representing what the United States actually agreed to at San Francisco.

It would be a futile task to enumerate one by one the fundamental errors in the form of half-truths that appear on almost every page of Parts II and III of the volume. That on p. 51 is typical, that "under the San Francisco agreement, neutrality is actually to become a thing of the past." The author still cherishes the illusions of neutrality in spite of the experience of the recent war, and in spite of the atomic bomb which to him is not a challenge to international coöperation but merely something "which threatens to put a quietus on all further argument." International law is limited to a relatively minor role in international relations and any attempt to extend it so as to control the use of force would "play havoc" with such sacred rules as non-intervention, recognition, and neutrality.

Professor Borchard owes it to his own reputation as a scholar to write a fairer story of American foreign policy even from the isolationist point of view; and the National Foundation owes it to the public to present something more in line with their purpose of "education in American citizenship."

C. G. FENWICK

*Of the Board of Editors*

#### NOTES

*Law Training in Continental Europe, Its Principles and Public Function.* By Eric F. Schweinburg. New York: Russell Sage Foundation; 1945. Pp. 129. \$1.00. This excellent analysis of law training in Europe contains numerous pertinent comments on the comparative and contrasting practices in the legal education of the United States. It is centered upon the Austrian system with supplementary comment on France, Germany, and the Soviet Union. The point of central interest to those having an academic concern with the teaching of international law lies in the discussions of the relative place of law and political or social science and of professional and non-professional training in the education of lawyers and government officials. The book inspires further reconsideration of the American system of sharp differentiation between law and administration and between professional training and research.

PHILIP C. JESSUP

*Of the Board of Editors*

✓ *The Absolute Weapon: Atomic Power and World Order.* By Frederick S. Dunn, Bernard Brodie, Arnold Wolfers, Percy E. Corbett, and William T. R. Fox. New York: Harcourt, Brace; 1946. Pp. 203. Index. \$2.00. Ever since August 6, 1945, there have been frequent appeals addressed to the "political scientists" to provide answers to the problems raised by the advent of the atomic bomb. The physical scientists, clearly appalled by their creation, have been especially demanding. It has often seemed that they expect the students of politics to produce magic formulas for world ills with a readiness and dispatch which assuredly do not characterize the careful physicist or chemist in his laboratory.

This volume, produced by the well-known group of distinguished scholars in international relations who are members of the Yale Institute of International Studies, does not attempt to provide the final answer or formula so clamorously demanded. Rather it approaches the problem objectively, dispassionately, utilizing tools of logic and political sophistication in ways which may be compared to that of the physical scientist with his own weights and measures and his knowledge of chemical reactions.

The implications of the atomic bomb for the world are so overwhelmingly horrible, its nature so difficult to comprehend, that people are driven to demand simple and immediate means of controlling or preventing its future use. Hardly daring to think of the probable results of a large-scale atomic war, many are turning in desperation to allegedly new and dangerously simplified schemes of "world order." They call for "revolutionary political thinking" in a new technological era. "Experts" with panaceas appear every day; they usually are not characterized by great training in political science. The passionate amateur has taken the center of the stage in national discussions of international affairs.

The political scientist is urgently aware of the enormous complexity of the problems in international relationships which the bomb, probably revolutionizing warfare, has caused. He will, however, be the last to produce the easy, clear, and simple answer. This slim volume is a brilliant example of the careful, preliminary probing of the nature of the problem which is fundamental to later attempts to work out possible solutions. It will probably not command the audience which it deserves; the majority of readers are not patient enough to read it. Many will doubtless be baffled by the fact that the authors readily admit their uncertainties. More will throw down the book in anger because it accepts the international facts of life as they are, assumes that they will not change quickly, and explores the problem of the atomic bomb in our present world of national sovereign powers.

If there be a thesis in the book, it may be paraphrased as follows: in a world of nation-states pursuing objectives of foreign policy which frequently conflict, violence must still be assumed in inter-state relations. Will this new "absolute weapon" eliminate war by its very existence, can it be controlled, or will it be used in one possibly final conflict between Great Powers? It is improbable that any Government of any nation (if in "possession of its senses," says Professor Wolfers), will begin a war which it cannot expect to win, or in which it is certain not to gain even limited objectives. It is possible that in the future, especially after nations other than the United States have the bomb, knowledge that aggression by atomic bombs or any other means will be followed by instant retaliation with atomic bombs, will deter any nation from waging aggressive war. Fear of retaliation may well be the key to future absence of war.

This does not obviate the desirability of control schemes, such as the United States Government has already proposed to the United Nations Atomic Energy Commission. "Control," however, presents tremendous difficulties, quite apart from the basic question as to whether *all* states will actually desire it. The complexities of the problem are analyzed by Mr. Fox in the concluding chapter. His close reasoning demands the most careful reading; few readers will be satisfied with his treatment. After pointing out many seemingly insuperable difficulties he endorses the much-discussed Lilienthal Report as a "long step forward." He goes further than that Report and advocates a "general agreement" providing for automatic obligatory retaliation against an atomic aggressor. He varies between implicit acceptance of failure of possible control measures, probably leaving most readers in despair, and a hortatory conclusion which is strange reading after the pages which have preceded.

Inevitably a book which is the work of several authors will vary in quality. To this reviewer the chapters by Mr. Brodie on "War in the Atomic Age" and "Implications for Military Policy" and the one by Mr. Wolfers on "The Atomic Bomb in Soviet-American Relations" would alone make this book worthwhile and recommended reading. The scholar, no matter what his special field, should welcome the volume as a whole and these selections in particular. It is a distinguished survey of a frightening problem by scholars of high standing. Atomic scientists and other tyros in the study of politics take note.

WILLIAM G. FLETCHER

AFPAC, Tokyo

*Unwritten Treaty.* By James P. Warburg. New York: Harcourt, Brace; Pp. 186. \$2.00. The author spent the war years as Deputy Director of

Propaganda Policy in the Office of War Information; he organized the London Office of OWI and had major responsibility for developing our propaganda effort in Europe. In this book he somewhat needlessly retells the story of Axis psychological warfare at home and abroad, surveys briefly the British effort from 1939 to 1941, and tells something of the confused history of American propaganda and information agencies. There is a good analysis of the decline of Allied propaganda effectiveness after the climax of the African invasion, together with a brief reference to Soviet psychological warfare. It is unfortunate that less than one third of the book is devoted to the presentation of what Mr. Warburg has to contribute in the way of original thinking in regard to his main concern, which is psychological disarmament and the promotion of mutual understanding and trust among the peoples of the world. Briefly, he advocates international agreements to favor the free flow of information and to define and outlaw psychological warfare and aggression; he wants an agreement to define "harmless" propaganda, and he advocates that the United States create a major agency with the right to be heard in the Cabinet to work with private agencies in telling our story abroad. These are challenging ideas which deserve considerably better development than they get in this volume.

ALEXANDER F. KIEFER

Alexandria

*Political Reconstruction.* By Karl Loewenstein. New York: Macmillan; 1946. Pp. xii, 498. Index. \$4.00. The author assures us in the preface of his volume that whoever buys his book will make a good bargain, for he will acquire for his library two or rather three books between the covers of one. The reviewer, having matched one against the other, is unable to decide which is the absolute best buy, since much depends upon the particular interest of the reader. But he has chosen Part I dealing with "The Dogma of Internal Self-Determination" for himself, and it is worth the price, even though it only runs to some 83 pages.

The book, as the author informs us, "has one central thesis; namely, that the right of every nation to choose the form of government it pleases, now enshrined in the Atlantic Charter, is the safest way to World War III." Stated in that absolute form the thesis is, of course, highly challenging; and it embarrasses the reviewer considerably in his efforts to make the necessary practical distinctions in the application of the doctrine of "non-intervention" in Latin America. Equally absolute is the author's statement that "Internal sovereignty must be destroyed if we are to have a breathing spell of one or two generations, let alone a stable and peaceful order." Does he really mean "destroyed," or merely qualified and limited?

The opening analysis of the dogma of self-determination is the best presentation of the background and development of the principle of non-intervention that the reviewer has yet found, particularly in its presentation of the different phases through which the principle has passed. It is followed by an equally careful analysis of what is meant by "the form of government" when we speak of the right of each state to form its own. The author then examines, under the title *De Monarchia, Model 1945*, what monarchy practically means and whether it is to be considered as one of the permissible forms of government, the conclusion being reached that "Even though permissible as a choice, monarchy is not to be recommended as a form of government. . . . The monarchical principle fits badly into the shape of things to come."

Part IV is a study in political science, describing how, as a practical mat-



ter, nations actually "choose" their form of government through the agencies of provisional governments, national assemblies, and constitutions; and Part V is directed specifically to a constructive solution of the problem of political reconstruction in Europe. In this last part the author explains in detail what he believes to be the method and objectives of the "political tutelage" to be imposed upon the defeated nations, and he sets forth boldly and without reserves the "democratic imperative," by which the author means the necessity of a democratic government and respect for human rights as a condition of a stable world order.

It is difficult to explain how the author, otherwise so keen an analyst, fails to apply his "democratic imperative" to the Soviet Union. He does not appear to be greatly disturbed by the violation of his principles in the case of the border states which he describes as, to all intents and purposes, "under the political tutelage of Russia." Nor is he much troubled by the attitude of the Soviet Union towards fundamental human rights, or by the present inability of the peoples of the western world to make direct contact with the Russian people as distinct from their government. But this is perhaps explainable in part by his assumption that his whole plan depends upon "the stability of the alliance between the Anglo-Saxon nations and Soviet Russia," and in part by the conditions prevailing in 1944 when the main body of the text was written.

But doubtless the very crusading spirit that leads an author to write a challenging book leads him to overstress a point here and overlook another there. The reader, duly warned, can always make the necessary corrections.

C. G. FENWICK

#### *Of the Board of Editors*

*The Future in Perspective.* By Sigmund Neumann. New York: Putnam; 1946. Pp. x, 406. Illustrations. Index. \$4.00. This "synthesis of contemporary history" contains in place of an introduction, a long reply by the author to a friend in need of an answer as to whether wars can be ended and whether history after all has meaning. The author warns against over simplification and asserts that "one guide, if not the most essential one, in plotting the future course is to gain a historical perspective, . . . a full vista of the past in order to avoid the dangers of peacemaking in a vacuum." He consequently conceives the history of the recent decades as a true unit—a second Thirty Years' War.

He pictures this era as a great classic drama opening with World War I as described in the Prologue and then followed by the presentation, based upon painstaking research, of five acts: 1) The war after the war period (1919–1924); 2) The years of stabilization and reconstruction (1924–1929); 3) The mounting crisis (1929–1934); 4) The dictators' march on the world (1934–1939); and 5) The Second World War. An epilogue (33 pp.) attempts to point at the goal—Peace, the challenge of our time.

The author describes comprehensively yet concisely the many points involved in this complex subject matter. Most of the facts are widely known, but he restores many of them in a chronological presentation of the numerous international, national, and personal problems, interweaving vivid portraits of the men who made history in the 20th century, ably supported by impressive drawings by the world-famous caricaturist, Aloys Derso.

"World War I brought into bold relief and open clash the problems which had increasingly taken hold of the new century," and in a Prologue, subdivided into three chapters (Sarajevo and Its Causes, A War and Two Revolutions, and Versailles A Generation After) the author analyzes the

results of the World War I and the treaty terminating it. This great struggle did not consist of military campaigns only—"it was a great political revolution at the same time. War and revolutions became the twins of upheaval, which they remained in the following decades."

The experiments of peacemaking at Versailles (the first act) and its weaknesses are carefully analyzed. It looked to the peacemakers and their generation like the final settlement, "yet it turned out to be merely the prelude of a bigger drama, . . . a long armistice." This great drama, forming the major portion of this breezily written book, is then developed in five acts describing the past in retrospect. "The years following the Paris settlement were a continuation of the war by other means." Whether Versailles would bring enduring peace depended upon a number of factors and "the clash of these divergent forces decided the first five years of the great truce (1919-24)."

The realization that the occupation of the Ruhr (1923) and the ensuing German "passive resistance" were a failure opened a "new era in world politics." The second act, reconstruction and stabilization, internally and internationally, mainly due to the ideal efforts of three outstanding statesmen (Briand, Chamberlain, and Stresemann). Following the strict rules of the classic drama, the third act brought into the open all the elements of unrest, the great crisis of 1929, with economic depression, political revolution, and world-wide disturbances.

The fourth period covers the bold marches of the dictators on the world. To surprise the world with *faits accomplis* "became the standard strategy of modern dictatorships." The very day that Greater Germany had been fully established after the occupation of Austria and the cession of the Sudetenland, the Nazis . . . seized upon new concepts that promised further expansion (*Lebensraum*). "This was the hour of General Haushofer and his school of *Geopolitik*." Czechoslovakia was gone by the spring of 1939 and this act opened the Nazi war against the world. The overwhelming onslaught of German mechanized troops on Poland in September, 1939, opened formally the fifth act: World War II.

The distressing period of "missed opportunities, of indecision and fatalism, of appeasement and retreat on the part of the democratic nations in face of the unscrupulous, overconfident, and militant aggressor powers" had ended. World War II "was turned by the superhuman efforts of the United Nations from a tragedy into a drama with a hopeful ending." The author asserts in his epilogue that growing out of the ruins and sacrifices of this Second Thirty Years' War, the foundations for a new world order are laid and he adds that "international law, like any law, can be effectively enforced only by reaching down to the individual himself. Only by cutting across national sovereignties and by insuring juridical action in order that, in the words of Justice Jackson, 'those who start war will pay for it personally'—only in such a direct recourse to man can an international bill of rights and a peaceful order be initiated." The goal is a people's peace.

CHARLES KRUSZEWSKI

Chicago

*Central-Eastern Europe, Crucible of World Wars.* By Joseph S. Roucek and Associates. New York: Prentice Hall, 1946. Pp. xii, 679. Maps. Index. \$5.00. Professor Roucek deserves much praise for attempting to prepare in collaboration with ten associates this badly needed survey of Central-Eastern Europe. As indicated in the subtitle this area is the crucible of world wars; both World War I and World War II originated in the

region that can roughly be defined as Central-Eastern Europe. "Although the sparks of the conflagrations in that area eventually menaced the very existence of the British Empire and even set the United States ablaze, the region is *terra incognita* to Anglo-Saxons." More definite knowledge of the backgrounds, conditions, and current problems of that region is therefore of paramount importance and of great timeliness.

Evil propaganda often succeeded in misrepresenting conditions prevailing in the various countries of the area under consideration and it is the aim of this book to dispel many such disillusioning statements and "to synthesize, summarize, and reinterpret available knowledge about the region." "The aphorism that all reasonable hopes of the future depend upon a sound understanding of the past applies with particular force to Central-Eastern Europe," says the editor, and Part I covers the subject of Central-Eastern Europe in World History. This vivid account attempts to find "the key to an understanding of titanic modern struggles in the forces of history which have perpetuated a disequilibrium in the no man's land of Central-Eastern Europe, where western and eastern influences in European and Asiatic history have remained locked in a stalemate."

The territory under discussion, "predestined to endless conflicts by the very geography of the area," comprises the borderlands of the great national states of Western Europe and the Slavic power of Russia. In twelve chapters, forming Part II of this harvest of studies, various collaborators bring into sharp focus the main trends involved in the national development of each country, beginning with Austria-Hungary and Czechoslovakia and followed by other countries up to 1918 namely Russia, the Baltic States (Finland, Latvia, Lithuania, Estonia) Poland and the Balkans (Rumania, Yugoslavia, Bulgaria, and Albania) and, up to 1920, Greece and Turkey.

Probably of greater interest and running more closely along the main line of interest of students of international law and relations is Part III covering "Central-Eastern Europe in International Relations (1914-1945)," a detailed chronological factual account with added interpretations, comparisons, and conclusions, some of which may be disputed. Some parts could be fuller in presentation but as an overall understanding of this cavalcade of fateful years in the tangled relationships of this region the account is scholarly and is impressively stated. "The attempts of various powers to dominate the region, in the past as well as in the present, and the counter-action resulting from opposition to such imperialistic ambitions, have been the essence of the international problems there."

Thirteen additional chapters, constituting Part IV, take up the various threads and here Dr. Rucick's associates describe graphically the developments in the countries listed above from 1918 (or 1920) down to 1944-45 (Austria 1918-1938), or, in the case of the Baltic States, between World War I and II. Part V deals with the military occupations by Germany and by Russia, followed by two chapters on Governments in Exile and Post-War Plans for and Economic Problems of Central-Eastern Europe. The last and concluding chapter treats of Russian influence over Central-Eastern Europe and develops the new pattern of power exercised by Soviet Russia in most of that region behind the so-called "iron curtain."

This symposium is a decided contribution to the essential knowledge of this dynamic area in which the issue is still open: "Who is to dominate Central Eastern Europe?"

CHARLES KRUSZEWSKI

Chicago

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UNITED STATES, FRANCE, UNITED KINGDOM, NETHERLANDS,  
BELGIUM, YUGOSLAVIA, LUXEMBOURG

FINAL ACT AND ANNEX OF THE PARIS CONFERENCE ON REPARATION\*

*January 14, 1946*

CONFERENCE RECOMMENDATION

The Paris Conference on Reparation, which has met from 9 November 1945 to 21 December 1945, recommends that the Governments represented at the Conference should sign in Paris as soon as possible an Agreement on Reparation from Germany, on the Establishment of an Inter-Allied Reparation Agency and on the Restitution of Monetary Gold in the terms set forth below.

DRAFT AGREEMENT ON REPARATION FROM GERMANY, ON THE ESTABLISHMENT OF AN INTER-ALLIED REPARATION AGENCY AND ON THE RESTITUTION OF MONETARY GOLD

The Governments of ALBANIA, The UNITED STATES OF AMERICA, AUSTRALIA, BELGIUM, CANADA, DENMARK, EGYPT, FRANCE, The UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND, GREECE, INDIA, LUXEMBOURG, NORWAY, NEW ZEALAND, The NETHERLANDS, CZECHOSLOVAKIA, The UNION OF SOUTH AFRICA and YUGOSLAVIA, in order to obtain an equitable distribution among themselves of the total assets which, in accordance with the provisions of this Agreement and the Provisions agreed upon at Potsdam on 1 August 1945 between the Governments of the United States of America, the United Kingdom of Great Britain and Northern Ireland and the Union of Soviet Socialist Republics, are or may be declared to be available as reparation from Germany (hereinafter referred to as German reparation), in order to establish an Inter-Allied Reparation Agency, and to settle an equitable procedure for the restitution of monetary gold,

HAVE AGREED as follows:

Part I

German Reparation

Article 1. Shares in Reparation.

A. German reparation (exclusive of the funds to be allocated under Article 8 of Part I of this Agreement), shall be divided into the following categories:

Category A, which shall include all forms of German reparation except those included in Category B,

\* Texts as issued by Department of State.



*Category B*, which shall include industrial and other capital equipment removed from Germany, and merchant ships and inland water transport.

B. Each Signatory Government shall be entitled to the percentage share of the total value of Category A and the percentage share of the total value of Category B set out for that Government in the Table of Shares set forth below:

TABLE OF SHARES

Country	Category A	Category B
Albania.....	.05	.35
United States of America.....	28.00	11.80
Australia.....	.70	.95
Belgium.....	2.70	4.50
Canada.....	3.50	1.50
Denmark.....	.25	.35
Egypt.....	.05	.20
France.....	16.00	22.80
United Kingdom.....	28.00	27.80
Greece.....	2.70	4.35
India.....	2.00	2.90
Luxembourg.....	.15	.40
Norway.....	1.30	1.90
New Zealand.....	.40	.60
Netherlands.....	3.90	5.60
Czechoslovakia.....	3.00	4.30
Union of South Africa (1).....	.70	.10
Yugoslavia.....	6.60	9.60
Total.....	100.00	100.00

(1) The government of the Union of South Africa has undertaken to waive its claims to the extent necessary to reduce its percentage share of Category B to the figure of 0.1 per cent but is entitled, in disposing of German enemy assets within its jurisdiction, to charge the net value of such assets against its percentage share of Category A and a percentage share under Category B of 0.1 per cent.

C. Subject to the provisions of paragraph D below, each Signatory Government shall be entitled to receive its share of merchant ships determined in accordance with Article 5 of Part I of this Agreement, provided that its receipts of merchant ships do not exceed in value its share in Category B as a whole.

Subject to the provisions of paragraph D below, each Signatory Government shall also be entitled to its Category A percentage share in German assets in countries which remained neutral in the war against Germany.

The distribution among the Signatory Governments of forms of German reparation other than merchant ships, inland water transport and German assets in countries which remained neutral in the war against Germany

shall be guided by the principles set forth in Article 4 of Part I of this Agreement.

D. If a Signatory Government receives more than its percentage share of certain types of assets in either Category A or Category B, its receipts of other types of assets in that Category shall be reduced so as to ensure that it shall not receive more than its share in that Category as a whole.

E. No Signatory Government shall receive more than its percentage share of either Category A or Category B as a whole by surrendering any part of its percentage share of the other Category, except that with respect to German enemy assets within its own jurisdiction, any Signatory Government shall be permitted to charge any excess of such assets over its Category A percentage share of total German enemy assets within the jurisdiction of the Signatory Governments either to its receipts in Category A or to its receipts in Category B or in part to each Category.

F. The Inter-Allied Reparation Agency, to be established in accordance with Part II of this Agreement, shall charge the reparation account of each Signatory Government for the German assets within that Government's jurisdiction over a period of five years. The charges at the date of the entry into force of this Agreement shall be not less than 20 per cent of the net value of such assets (as defined in Article 6 of Part I of this Agreement) as then estimated, at the beginning of the second year thereafter not less than 25 per cent of the balance as then estimated, at the beginning of the third year not less than  $33\frac{1}{3}$  per cent of the balance as then estimated, at the beginning of the fourth year not less than 50 per cent of the balance as then estimated, at the beginning of the fifth year not less than 90 per cent of the balance as then estimated, and at the end of the fifth year the entire remainder of the total amount actually realized.

G. The following exceptions to paragraphs D and E above shall apply in the case of a Signatory Government whose share in Category B is less than its share in Category A:

(i) Receipts of merchant ships by any such Government shall not reduce its percentage share in other types of assets in Category B, except to the extent that such receipts exceed the value obtained when that Government's Category A percentage is applied to the total value of merchant ships.

(ii) Any excess of German assets within the jurisdiction of such Government over its Category A percentage share of the total of German assets within the jurisdiction of Signatory Governments as a whole shall be charged first to the additional share in Category B to which that Government would be entitled if its share in Category B were determined by applying its Category A percentage to the forms of German reparation in Category B.

H. If any Signatory Government renounces its shares or part of its shares in German reparation as set out in the above Table of Shares, or if it withdraws from the Inter-Allied Reparation Agency at a time when all or part of its shares in German reparation remain unsatisfied, the shares or part

thereof thus renounced or remaining shall be distributed rateably among the other Signatory Governments.

Article 2. Settlement of Claims against Germany.

A. The Signatory Governments agree among themselves that their respective shares of reparation, as determined by the present Agreement, shall be regarded by each of them as covering all its claims and those of its nationals against the former German Government and its Agencies, of a governmental or private nature, arising out of the war (which are not otherwise provided for), including costs of German occupation, credits acquired during occupation on clearing accounts and claims against the Reichskreditkassen.

B. The provisions of paragraph A above are without prejudice to:

- (i) The determination at the proper time of the forms, duration or total amount of reparation to be made by Germany;
- (ii) The right which each Signatory Government may have with respect to the final settlement of German reparation; and
- (iii) Any political, territorial or other demands which any Signatory Government may put forward with respect to the peace settlement with Germany.

C. Notwithstanding anything in the provisions of paragraph A above, the present Agreement shall not be considered as affecting:

(i) The obligation of the appropriate authorities in Germany to secure at a future date the discharge of claims against Germany and German nationals arising out of contracts and other obligations entered into, and rights acquired, before the existence of a state of war between Germany and the Signatory Government concerned or before the occupation of its territory by Germany, whichever was earlier;

(ii) The claims of Social Insurance Agencies of the Signatory Governments or the claims of their nationals against the Social Insurance Agencies of the former German Government; and

(iii) Banknotes of the Reichsbank and the Rentenbank, it being understood that their realization shall not have the result of reducing improperly the amount of reparation and shall not be effected without the approval of the Control Council for Germany.

D. Notwithstanding the provisions of paragraph A of this Article, the Signatory Governments agree that, so far as they are concerned, the Czechoslovak Government will be entitled to draw upon the Giro Account of the National Bank of Czechoslovakia at the Reichsbank, should such action be decided upon by the Czechoslovak Government and be approved by the Control Council for Germany, in connection with the movement from Czechoslovakia to Germany of former Czechoslovak nationals.

Article 3. Waiver of Claims Regarding Property Allocated as Reparation.

Each of the Signatory Governments agrees that it will not assert, initiate

actions in international tribunals in respect of, or give diplomatic support to claims on behalf of itself or those persons entitled to its protection against any other Signatory Government or its nationals in respect of property received by that Government as reparation with the approval of the Control Council for Germany.

Article 4. General Principles for the Allocation of Industrial and other Capital Equipment.

A. No Signatory Government shall request the allocation to it as reparation of any industrial or other capital equipment removed from Germany except for use in its own territory or for use by its own nationals outside its own territory.

B. In submitting requests to the Inter-Allied Reparation Agency, the Signatory Governments should endeavor to submit comprehensive programs of requests for related groups of items, rather than requests for isolated items or small groups of items. It is recognized that the work of the Secretariat of the Agency will be more effective, the more comprehensive the programs which Signatory Governments submit to it.

C. In the allocation by the Inter-Allied Reparation Agency of items declared available for reparation (other than merchant ships, inland water transport and German assets in countries which remained neutral in the war against Germany), the following general principles shall serve as guides:

(i) Any item or related group of items in which a claimant country has a substantial prewar financial interest shall be allocated to that country if it so desires. Where two or more claimants have such substantial interests in a particular item or group of items, the criteria stated below shall guide the allocation.

(ii) If the allocation between competing claimants is not determined by paragraph (i), attention shall be given, among other relevant factors, to the following considerations:

(a) The urgency of each claimant country's needs for the item or items to rehabilitate, reconstruct or restore to full activity the claimant country's economy;

(b) The extent to which the item or items would replace property which was destroyed, damaged or looted in the war, or requires replacement because of excessive wear in war production, and which is important to the claimant country's economy;

(c) The relation of the item or items to the general pattern of the claimant country's prewar economic life and to programs for its post-war economic adjustment or development;

(d) The requirements of countries whose reparation shares are small but which are in need of certain specific items or categories of items.

(iii) In making allocations a reasonable balance shall be maintained among the rates at which the reparation shares of the several claimant Governments are satisfied, subject to such temporary exceptions as are justified by the considerations under paragraph (ii) (a) above.

Article 5. General Principles for the Allocation of Merchant Ships and Inland Water Transport.

A. (i) German merchant ships available for distribution as reparation among the Signatory Governments shall be distributed among them in proportion to the respective over-all losses of merchant shipping, on a gross tonnage basis, of the Signatory Governments and their nationals through acts of war. It is recognized that transfers of merchant ships by the United Kingdom and United States Governments to other Governments are subject to such final approvals by the legislatures of the United Kingdom and United States of America as may be required.

(ii) A special committee, composed of representatives of the Signatory Governments, shall be appointed by the Assembly of the Inter-Allied Reparation Agency to make recommendations concerning the determination of such losses and the allocation of German merchant ships available for distribution.

(iii) The value of German merchant ships for reparation accounting purposes shall be the value determined by the Tripartite Merchant Marine Commission in terms of 1938 prices in Germany plus 15 per cent, with an allowance for depreciation.

B. Recognizing that some countries have special need for inland water transport, the distribution of inland water transport shall be dealt with by a special committee appointed by the Assembly of the Inter-Allied Reparation Agency in the event that inland water transport becomes available at a future time as reparation for the Signatory Governments. The valuation of inland water transport will be made on the basis adopted for the valuation of merchant ships or on an equitable basis in relation to that adopted for merchant ships.

Article 6. German External Assets.

A. Each Signatory Government shall, under such procedures as it may choose, hold or dispose of German enemy assets within its jurisdiction in manners designed to preclude their return to German ownership or control and shall charge against its reparation share such assets (net of accrued taxes, liens, expenses of administration, other *in rem* charges against specific items and legitimate contract claims against the German former owners of such assets).

B. The Signatory Governments shall give to the Inter-Allied Reparation Agency all information for which it asks as to the value of such assets and the amounts realized from time to time by their liquidation.

C. German assets in those countries which remained neutral in the war against Germany shall be removed from German ownership or control and liquidated or disposed of in accordance with the authority of France, the United Kingdom and the United States of America, pursuant to arrange-

ments to be negotiated with the neutrals by these countries. The net proceeds of liquidation or disposition shall be made available to the Inter-Allied Reparation Agency for distribution on reparation account.

D. In applying the provisions of paragraph A above, assets which were the property of a country which is a member of the United Nations or its nationals who were not nationals of Germany at the time of the occupation or annexation of this country by Germany, or of its entry into war, shall not be charged to its reparation account. It is understood that this provision in no way prejudices any questions which may arise as regards assets which were not the property of a national of the country concerned at the time of the latter's occupation or annexation by Germany or of its entry into war.

E. The German enemy assets to be charged against reparation shares shall include assets which are in reality German enemy assets, despite the fact that the nominal owner of such assets is not a German enemy.

Each Signatory Government shall enact legislation or take other appropriate steps, if it has not already done so, to render null and void all transfers made, after the occupation of its territory or its entry into war, for the fraudulent purpose of cloaking German enemy interests, and thus saving them harmless from the effect of control measures regarding German enemy interests.

F. The Assembly of the Inter-Allied Reparation Agency shall set up a Committee of Experts in matters of enemy property custodianship in order to overcome practical difficulties of law and interpretation which may arise. The Committee should in particular guard against schemes which might result in effecting fictitious or other transactions designed to favour enemy interests, or to reduce improperly the amount of assets which might be allocated to reparation.

#### Article 7. Captured Supplies.

The value of supplies and other materials susceptible of civilian use captured from the German Armed Forces in areas outside Germany and delivered to Signatory Governments shall be charged against their reparation shares in so far as such supplies and materials have not been or are not in the future either paid for or delivered under arrangements precluding any charge. It is recognised that transfers of such supplies and material by the United Kingdom and United States Governments to other Governments are subject to such final approval by the legislature of the United Kingdom or the United States of America as may be required.

#### Article 8. Allocation of a Reparation Share to Non-repatriable Victims of German Action.

In recognition of the fact that large numbers of persons have suffered heavily at the hands of the Nazis and now stand in dire need of aid to pro-

mote their rehabilitation but will be unable to claim the assistance of any Government receiving reparation from Germany, the Governments of the United States of America, France, the United Kingdom, Czechoslovakia and Yugoslavia, in consultation with the Inter-Governmental Committee on Refugees, shall as soon as possible work out in common agreement a plan on the following general lines:

A. A share of reparation consisting of all the non-monetary gold found by the Allied Armed Forces in Germany and in addition a sum not exceeding 25 million dollars shall be allocated for the rehabilitation and resettlement of non-repatriable victims of German action.

B. The sum of 25 million dollars shall be met from a portion of the proceeds of German assets in neutral countries which are available for reparation.

C. Governments of neutral countries shall be requested to make available for this purpose (in addition to the sum of 25 million dollars) assets in such countries of victims of Nazi action who have since died and left no heirs.

D. The persons eligible for aid under the plan in question shall be restricted to true victims of Nazi persecution and to their immediate families and dependents, in the following classes:

(i) Refugees from Nazi Germany or Austria who require aid and cannot be returned to their countries within a reasonable time because of prevailing conditions;

(ii) German and Austrian nationals now resident in Germany or Austria in exceptional cases in which it is reasonable on grounds of humanity to assist such persons to emigrate and providing they emigrate to other countries within a reasonable period;

(iii) Nationals of countries formerly occupied by the Germans who cannot be repatriated or are not in a position to be repatriated within a reasonable time. In order to concentrate aid on the most needy and deserving refugees and to exclude persons whose loyalty to the United Nations is or was doubtful, aid shall be restricted to nationals or former nationals of previously occupied countries who were victims of Nazi concentration camps or of concentration camps established by regimes under Nazi influence but not including persons who have been confined only in prisoners of war camps.

E. The sums made available under paragraphs A and B above shall be administered by the Inter-Governmental Committee on Refugees or by a United Nations Agency to which appropriate functions of the Inter-Governmental Committee may in the future be transferred. The sums made available under paragraph C above shall be administered for the general purposes referred to in this Article under a program of administration to be formulated by the five Governments named above.

F. The non-monetary gold found in Germany shall be placed at the disposal of the Inter-Governmental Committee on Refugees as soon as a plan has been worked out as provided above.

G. The Inter-Governmental Committee on Refugees shall have power to carry out the purposes of the fund through appropriate public and private field organisations.

H. The fund shall be used, not for the compensation of individual victims, but to further the rehabilitation or resettlement of persons in the eligible classes.

I. Nothing in this Article shall be considered to prejudice the claims which individual refugees may have against a future German Government, except to the amount of the benefits that such refugees may have received from the sources referred to in paragraphs A and C above.

## Part II

### Inter-Allied Reparation Agency

#### Article 1. Establishment of the Agency.

The Governments signatory to the present Agreement hereby establish an Inter-Allied Reparation Agency (hereinafter referred to as the "Agency"). Each Government shall appoint a Delegate to the Agency and shall also be entitled to appoint an Alternate who, in the absence of the Delegate, shall be entitled to exercise all the functions and rights of the Delegate.

#### Article 2. Functions of the Agency.

A. The Agency shall allocate German reparation among the Signatory Governments in accordance with the provisions of this Agreement and of any other agreements from time to time in force among the Signatory Governments. For this purpose, the Agency shall be the medium through which the Signatory Governments receive information concerning, and express their wishes in regard to, items available as reparation.

B. The Agency shall deal with all questions relating to the restitution to a Signatory Government of property situated in one of the Western Zones of Germany which may be referred to it by the Commander of that Zone (acting on behalf of his Government), in agreement with the claimant Signatory Government or Governments, without prejudice, however, to the settlement of such questions by the Signatory Governments concerned either by agreement or arbitration.

#### Article 3. Internal Organization of the Agency.

A. The organs of the Agency shall be the Assembly and the Secretariat.

B. The Assembly shall consist of the Delegates and shall be presided over by the President of the Agency. The President of the Agency shall be the Delegate of the Government of France.

C. The Secretariat shall be under the direction of a Secretary General, assisted by two Deputy Secretaries General. The Secretary General and the two Deputy Secretaries General shall be appointed by the Governments



of France, the United States of America and the United Kingdom. The Secretariat shall be international in character. It shall act for the Agency and not for the individual Signatory Governments.

#### Article 4. Functions of the Secretariat.

The Secretariat shall have the following functions:

A. To prepare and submit to the Assembly programs for the allocation of German reparations;

B. To maintain detailed accounts of assets available for, and of assets distributed as, German reparation;

C. To prepare and submit to the Assembly the budget of the Agency;

D. To perform such other administrative functions as may be required.

#### Article 5. Functions of the Assembly.

Subject to the provisions of Articles 4 and 7 of Part II of this Agreement, the Assembly shall allocate German reparation among the Signatory Governments in conformity with the provisions of this Agreement and of any other agreements from time to time in force among the Signatory Governments. It shall also approve the budget of the Agency and shall perform such other functions as are consistent with the provisions of this Agreement.

#### Article 6. Voting in the Assembly.

Except as otherwise provided in this Agreement, each Delegate shall have one vote. Decisions in the Assembly shall be taken by a majority of the votes cast.

#### Article 7. Appeal from Decisions of the Assembly.

A. When the Assembly has not agreed to a claim presented by a Delegate that an item should be allocated to his Government, the Assembly shall, at the request of that Delegate and within the time limit prescribed by the Assembly, refer the question to arbitration. Such reference shall suspend the effect of the decision of the Assembly on that item.

B. The Delegates of the Governments claiming an item referred to arbitration under paragraph A above shall select an Arbitrator from among the other Delegates. If agreement cannot be reached upon the selection of an Arbitrator, the United States Delegate shall either act as Arbitrator or appoint as Arbitrator another Delegate from among the Delegates whose Governments are not claiming the item. If the United States Government is one of the claimant Governments, the President of the Agency shall appoint as Arbitrator a Delegate whose Government is not a claimant Government.

#### Article 8. Powers of the Arbitrator.

When the question of the allocation of any item is referred to arbitration

under Article 7 of Part II of this Agreement, the Arbitrator shall have authority to make final allocation of the item among the claimant Governments. The Arbitrator may, at his discretion, refer the item to the Secretariat for further study. He may also, at his discretion, require the Secretariat to resubmit the item to the Assembly.

#### Article 9. Expenses.

A. The salaries and expenses of the Delegates and of their staffs shall be paid by their own Governments.

B. The common expenses of the Agency shall be met from the funds of the Agency. For the first two years from the date of the establishment of the Agency, these funds shall be contributed in proportion to the percentage shares of the Signatory Governments in Category B and thereafter in proportion to their percentage shares in Category A.

C. Each Signatory Government shall contribute its share in the budget of the Agency for each budgetary period (as determined by the Assembly) at the beginning of that period; provided that each Government shall, when this Agreement is signed on its behalf, contribute a sum equivalent to not less than its Category B percentage share of £50 000 and shall, within three months thereafter, contribute the balance of its share in the budget of the Agency for the budgetary period in which this Agreement is signed on its behalf.

D. All contributions by the Signatory Governments shall be made in Belgian francs or such other currency or currencies as the Agency may require.

#### Article 10. Voting on the Budget.

In considering the budget of the Agency for any budgetary period, the vote of each Delegate in the Assembly shall be proportional to the share of the budget for that period payable by his Government.

#### Article 11. Official Languages.

The official languages of the Agency shall be English and French.

#### Article 12. Offices of the Agency.

The seat of the Agency shall be in Brussels. The Agency shall maintain liaison offices in such other places as the Assembly, after obtaining the necessary consents, may decide.

#### Article 13. Withdrawal.

Any Signatory Government, other than a Government which is responsible for the control of a part of German territory, may withdraw from the Agency after written notice to the Secretariat.

#### Article 14. Amendments and Termination.

This Part II of the Agreement can be amended or the Agency terminated by a decision in the Assembly of the majority of the Delegates voting, provided that the Delegates forming the majority represent Governments whose shares constitute collectively not less than 80 per cent of the aggregate of the percentage shares in Category A.

#### Article 15. Legal Capacity, Immunities and Privileges.

The Agency shall enjoy in the territory of each Signatory Government such legal capacity and such privileges, immunities and facilities, as may be necessary for the exercise of its functions and the fulfilment of its purposes. The representatives of the Signatory Governments and the officials of the Agency shall enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connection with the Agency.

### Part III

#### Restitution of Monetary Gold.

##### Single Article.

A. All the monetary gold found in Germany by the Allied Forces and that referred to in paragraph G below (including gold coins, except those of numismatic or historical value, which shall be restored directly if identifiable) shall be pooled for distribution as restitution among the countries participating in the pool in proportion to their respective losses of gold through looting or by wrongful removal to Germany.

B. Without prejudice to claims by way of reparation for unrestored gold, the portion of monetary gold thus accruing to each country participating in the pool shall be accepted by that country in full satisfaction of all claims against Germany for restitution of monetary gold.

C. A proportional share of the gold shall be allocated to each country concerned which adheres to this arrangement for the restitution of monetary gold and which can establish that a definite amount of monetary gold belonging to it was looted by Germany or, at any time after March 12th, 1938, was wrongfully removed into German territory.

D. The question of the eventual participation of countries not represented at the Conference (other than Germany but including Austria and Italy) in the above-mentioned distribution shall be reserved, and the equivalent of the total shares which these countries would receive, if they were eventually admitted to participate, shall be set aside to be disposed of at a later date in such manner as may be decided by the Allied Governments concerned.

E. The various countries participating in the pool shall supply to the Governments of the United States of America, France and the United King-

dom, as the occupying Powers concerned, detailed and verifiable data regarding the gold losses suffered through looting by, or removal to, Germany.

F. The Governments of the United States of America, France and the United Kingdom shall take appropriate steps within the Zones of Germany occupied by them respectively to implement distribution in accordance with the foregoing provisions.

G. Any monetary gold which may be recovered from a third country to which it was transferred from Germany shall be distributed in accordance with this arrangement for the restitution of monetary gold.

#### Part IV

#### Entry into Force and Signature.

##### 1. Entry into Force.

This Agreement shall be open for signature on behalf of any Government represented at the Paris Conference on Reparation. As soon as it has been signed on behalf of Governments collectively entitled to not less than 80 per cent of the aggregate of shares in Category A of German reparation, it shall come into force among such Signatory Governments. The Agreement shall thereafter be in force among such Governments and those Governments on whose behalf it is subsequently signed.

##### Article 2. Signature.

The signature of each contracting Government shall be deemed to mean that the effect of the present Agreement extends to the colonies and overseas territories of such Government, and to territories under its protection of suzerainty or over which it at present exercises a mandate.

In witness whereof, the undersigned, duly authorized by their respective Governments, have signed in Paris the present Agreement, in the English and French languages, the two texts being equally authentic, in a single original, which shall be deposited in the Archives of the Government of The French Republic, a certified copy thereof being furnished by that Government to each Signatory Government.

..... for the Government of ..... 194 .  
 ..... for the Government of ..... 194 .

#### UNANIMOUS RESOLUTIONS BY THE CONFERENCE

The Conference has also unanimously agreed to include the following Resolutions in the Final Act:

##### 1. German Assets in the Neutral Countries.

The Conference unanimously resolves that the countries which remained

neutral in the war against Germany should be prevailed upon by all suitable means to recognize the reasons of justice and of international security policy which motivate the Powers exercising supreme authority in Germany and the other Powers participating in this Conference in their efforts to extirpate the German holdings in the neutral countries.

### 2. Gold transferred to the Neutral Countries.

The Conference unanimously resolves that, in conformity with the policy expressed by the United Nations Declaration Against Axis Acts of Dispossession of January 5th, 1943 and the United Nations Declaration on Gold of February 22nd, 1944, the countries which remained neutral in the war against Germany be prevailed upon to make available for distribution in accordance with Part III of the foregoing Agreement all looted gold transferred into their territories from Germany.

### 3. Equality of Treatment regarding Compensation for War Damage.

The Conference unanimously resolves that, in the administration of reconstruction or compensation benefits for war damage to property, the treatment accorded by each Signatory Government to physical persons who are nationals and to legal persons who are nationals of or are owned by nationals of any other Signatory Government, so far as they have not been compensated after the war for the same property under any other form or on any other occasion, shall be in principle not less favourable than that which the Signatory Government accords to its own nationals. In view of the fact that there are many special problems of reciprocity related to this principle, it is recognized that in certain cases the actual implementation of the principle cannot be achieved except through special agreements between Signatory Governments.

### *Reference to the Annex to the Final Act.*

During the course of the Conference, statements were made by certain Delegates, in the terms set out in the attached Annex, concerning matters not within the competence of the Conference but having a close relation with its work. The Delegates whose Governments are represented on the Control Council for Germany undertook to bring those statements to the notice of their respective Governments.

In witness whereof, the undersigned have signed the present Final Act of the Paris Conference on Reparation.

Done in Paris on December 21, 1945, in the English and French languages, the two texts being equally authentic, in a single original, which shall be deposited in the Archives of the Government of the French Republic, certified copies thereof, being furnished by that Government to all the Governments represented at that Conference.

..... Delegate of the  
    Government of .....  
 ..... Delegate of the  
    Government of .....

## ANNEX

## 1. Resolution on the subject of Restitution.

The Albanian, Belgian, Czechoslovak, Danish, French, Greek, Indian, Luxembourg, Netherlands and Yugoslav Delegates agree to accept as the basis of a restitution policy the following principles:

(a) The question of the restitution of property removed by the Germans from the Allied countries must be examined in all cases in the light of the United Nations Declaration of January 5th, 1943.

(b) In general, restitution should be confined to identifiable goods which (i) existed at the time of occupation of the country concerned, and were removed with or without payment; (ii) were produced during the occupation and obtained by an act of force.

(c) In cases where articles removed by the enemy cannot be identified, the claim for replacement should be part of the general reparation claim of the country concerned.

(d) As an exception to the above principles, objects (including books, manuscripts and documents) of an artistic, historical, scientific (excluding equipment of an industrial character), educational or religious character which have been looted by the enemy occupying Power shall, so far as possible, be replaced by equivalent objects if they are not restored.

(e) With respect to the restitution of looted goods which were produced during the occupation and which are still in the hands of German concerns or residents of Germany, the burden of proof of the original ownership of the goods shall rest on the claimants and the burden of proof that the goods were acquired by a regular contract shall rest on the holders.

(f) All necessary facilities under the auspices of the Commanders-in-Chief of the occupied Zones shall be given to the Allied States to send expert missions into Germany to search for looted property and to identify, store and remove it to its country of origin.

(g) German holders of looted property shall be compelled to declare it to the control authorities; stringent penalties shall be attached to infractions of this obligation.

## 2. Resolution on Reparation from Existing Stocks and Current Production.

The Delegates of Albania, Belgium, Czechoslovakia, Denmark, Egypt, France, Greece, India, Luxembourg, the Netherlands, Norway and Yugoslavia,

In view of the decision of the Crimea Conference that Germany shall make

compensation to the greatest possible extent for the losses and suffering which she has inflicted on the United Nations,

Considering that it will not be possible to satisfy the diverse needs of the Governments entitled to reparation unless the assets to be allocated are sufficiently varied in nature and the methods of allocation are sufficiently flexible,

Express the hope that no category of economic resources in excess of Germany's requirements as defined in Part III, article 15 of the Potsdam Declaration, due account being taken of article 19 of the same Part, shall in principle be excluded from the assets, the sum total of which should serve to meet the reparation claims of the Signatory Governments.

It thus follows that certain special needs of different countries will not be met without recourse, in particular, to German existing stocks, current production and services, as well as Soviet reciprocal deliveries under Part IV of the Potsdam Declaration.

It goes without saying that the foregoing shall be without prejudice to the necessity of achieving the economic disarmament of Germany.

The above-named Delegates would therefore deem it of advantage were the Control Council to furnish the Inter-Allied Reparation Agency with lists of existing stocks, goods from current production and services, as such stocks, goods or services become available as reparation. The Agency should, at all times, be in a position to advise the Control Council of the special needs of the different Signatory Governments.

3. Resolution regarding Property in Germany belonging to United Nations or their nationals.

The Delegates of Albania, Belgium, Czechoslovakia, France, Greece, Luxembourg, the Netherlands, Norway and Yugoslavia, taking into account the fact that the burden of reparation should fall on the German people, recommend that the following rules be observed regarding the allocation as reparation of property (other than ships) situated in Germany:

(a) To determine the proportion of German property available as reparation, account shall be taken of the sum total of property actually constituting the German economy, including assets belonging to a United Nation or to its nationals, but excluding looted property, which is to be restored.

(b) In general, property belonging legitimately to a United Nation or to its nationals, whether wholly owned or in the form of a shareholding of more than 48 percent, shall so far as possible be excluded from the part of German property considered to be available as reparation.

(c) The Control Council shall determine the cases in which minority shareholdings of a United Nation or its nationals shall be treated as forming part of the property of a German juridical person and therefore having the same status as that juridical person.

(d) The foregoing provisions do not in any way prejudice the removal

or destruction of concerns controlled by interests of a United Nation or of its nationals when this is necessary for security reasons.

(e) In cases where an asset which is the legitimate property of one of the United Nations or its nationals has been allocated as reparation, or destroyed, particularly in the cases referred to in paragraphs *b*, *c*, and *d* above, equitable compensation to the extent of the full value of this asset shall be granted by the Control Council to the United Nation concerned as a charge on the German economy. This compensation shall, when possible, take the form of a shareholding of equal value in German assets of a similar character which have not been allocated as reparation.

(f) In order to ensure that the property in Germany of persons declared by one of the United Nations to be collaborators or traitors shall be taken from them, the Control Council shall give effect in Germany to legislative measures and juridical decisions by courts of the United Nation concerned in regard to collaborators or traitors who are nationals of that United Nation or were nationals of that United Nation at the date of its occupation or annexation by Germany or entry into the war. The Control Council shall give to the Government of such United Nation facilities to take title to and possession of such assets and to dispose of them.

#### 4. Resolution on captured War Materiel.

The Delegates of Albania, Belgium, Denmark, Luxembourg, the Netherlands, Norway, Czechoslovakia and Yugoslavia, taking account of the fact that part of the war materiel seized by the Allied Armies in Germany is of no use to these Armies but would, on the other hand, be of use to other Allied countries recommend:

(a) That, subject to Resolution 1 of this Annex on the subject of restitution, war materiel which was taken in the Western Zones of Germany and which has neither been put to any use nor destroyed as being of no value, and which is not needed by the Armies of Occupation or is in excess of their requirements, shall be put at the disposal of countries which have a right to receive reparation from the Western Zones of Germany, and;

(b) That the competent authorities shall determine the available types and quantities of this materiel and shall submit lists to the Inter-Allied Reparation Agency, which shall proceed in accordance with the provisions of Part II of the above Agreement.

#### 5. Resolution on German Assets in the Julian March and the Dodecanese.

The Delegates of Greece, the United Kingdom and Yugoslavia (being the Delegates of the countries primarily concerned), agree that

(a) The German assets in Venezia Giulia (Julian March) and in the Dodecanese shall be taken into custody by the military authorities in occupation of those parts of the territory which they now occupy, until the territorial questions have been decided; and



(b) As soon as a decision on the territorial questions has been reached, the liquidation of the assets shall be undertaken in conformity with the provisions of Paragraph A of Article 6 of Part I of the foregoing Agreement by the countries whose sovereignty over the disputed territories has been recognized.

6. Resolution on Costs relating to Goods Delivered from Germany as Reparation.

The Delegates of Albania, Australia, Belgium, Canada, Denmark, Egypt, France, Greece, India, Luxembourg, Norway, New Zealand, the Netherlands, Czechoslovakia and Yugoslavia, recommend that the costs of dismantling, packing, transporting, handling, loading and all other costs of a general nature relating to goods to be delivered from Germany as reparation, until the goods in question have passed the German frontier, and expenditure incurred in Germany for the account of the Inter-Allied Reparation Agency or of the Delegates of the Agency should, in so far as they are payable in a currency which is legal tender in Germany, be paid as a charge on the Germany economy.

7. Resolution on the Property of War Criminals.

The Delegates of Albania, Belgium, France, Luxembourg, Czechoslovakia and Yugoslavia express the view that:

(a) The legislation in force in Germany against German war criminals should provide for the confiscation of the property in Germany of these criminals, if it does not do so already;

(b) The property so confiscated, except such as is already available as restitution, should be liquidated by the Control Council and the net proceeds of the liquidation paid to the Inter-Allied Reparation Agency for division according to the principles set out in the foregoing Agreement.

8. Resolution on Recourse to the International Court of Justice.

The Delegates of Albania, Australia, Belgium, Denmark, France, Luxembourg, the Netherlands, Norway, Czechoslovakia and Yugoslavia recommend that:

Subject to the provisions of Article 3 of Part I of the foregoing Agreement, the Signatory Governments agree to have recourse to the International Court of Justice for the solution of every conflict of law or of competence arising out of the provisions of the foregoing Agreement which has not been submitted by the parties concerned to amicable solution or arbitration.

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